THE SCOTTISH LAW REPORTER

CONTAINING REPORTS BY

JOHN BOYD, M.A. (EDITOR), H. KERMACK, M.A., T. J. MARTIN, M.A., SCOTT MONCRIEFF PENNEY, M.A., A. O. M. MACKENZIE, B.A., AND R. T. YOUNGER, M.A., LL.B., ADVOCATES,

OF

CASES DECIDED IN THE COURT OF SESSION, COURT OF JUSTICIARY, COURT OF TEINDS, AND HOUSE OF LORDS.

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SESSION 1888-89.

COURT OF SESSION.

First Division.

LORD PRESIDENT—The Right Hon. JOHN INGLIS.
LORD MURE.
LORD SHAND.
LORD ADAM.

Second Division.

LORD JUSTICE-CLERK—The Right Hon. J. H. A. MACDONALD (LORD KINGSBURGH).
LORD YOUNG.
LORD RUTHERFURD CLARK.
LORD LEE.

Lords Ordinary—
LORD FRASER*, LORD M'LAREN, LORD KINNEAR, LORD TRAYNER, LORD WELLWOOD, LORD KYLLACHY.

HIGH COURT OF JUSTICIARY.

Lord Justice-General—
The Right Hon. JOHN INGLIS.

Lord Justice-Clerk—
The Right Hon. J. H. A. MACDONALD (LORD KINGSBURGH).

Lords Commissioners of Justiciary—
THE SENATORS OF THE COLLEGE OF JUSTICE,
Under the Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), sec. 44.

Lord Advocate—Right Hon. J. H. A. MACDONALD, Q.C.,
succeeded by
Right Hon. J. P. B. ROBERTSON, Q.C.

Solicitor-General—J. P. B. ROBERTSON, Q.C.,
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Lands Valuation Court.

LORD FRASER*, LORD TRAYNER, LORD WELLWOOD.

Registration Appeal Court.

LORD MURE, LORD FRASER*, LORD KINNEAR.

HOUSE OF LORDS.

Judges deciding in Scottish Appeals—

LORD CHANCELLOR HALSBURY.
LORD HERSCHELL.
EARL OF SELBORNE.
LORD WATSON.
LORD FITZGERALD.
LORD MACNAGHTEN.

* LORD FRASER died on 27th March 1889.

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Bankruptcy—Sequestration—Recal—Affidavit—Right in Security—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 22. Where the oath of a petitioning creditor in a sequestration was *ex facie* conform to statute, but omitted to specify as security of the debt certain valueless inhibitions, a petition for recal of sequestration *refused*. The directors of a public company became jointly and severally liable under a bond for £4300 to one of their number, who, under a charge upon the bond, obtained sequestration of the estates of one of his co-obligants. The creditor deponed that the debtor owed him £3583, 6s. 8d., being the balance of £4300, less the sixth part due by himself in his character of co-obligant, and that he held the other co-obligants—naming them, but making no mention of himself—liable for the debt. He omitted to state among the securities held by him for the debt certain inhibitions over the creditor's estate which had attached nothing. In a petition for recal of the sequestration—*held* (1) that the oath of the creditor specified all those who were, besides the bankrupt, liable for the debt, and (2) that it was within the discretion of the Court to consider that no prejudice had arisen from the omission to specify the inhibitions over the creditor's estate, and the petition *refused*. Laurie *v.* Motherwell, p. 98.

——— *Cessio—Trust-deed—Discretion of Sheriff—Debtors Act* 1860 (43 *and* 44 *Vict. c.* 34), *sec.* 9, *sub-sec.* 3. When a petition for *cessio* is presented at the instance of a creditor, the above sub-section gives the Sheriff a discretion to grant or refuse decree "as the justice of the case requires." A tradesman executed a trust-deed for behoof of his creditors, and about a year thereafter became unable to fulfil his obligations to certain fresh creditors who desired him to grant a second trust-deed, but to a different trustee. He declined, and one of them gave notice that he would present a petition for *cessio*. The day after receiving this notice the debtor signed a trust-deed in favour of the former trustee, who at once proceeded to realise and distribute his estate. In the petition for *cessio* at the instance of the creditor, *held* that the petitioner was entitled to obtain decree in respect of the circumstances under which the trust-deed had been granted. Robertson & Sons *v.* Falconer, p. 158.

——— *Liquidation—Limited Company—Articles of Association—Purchase by Company of its own Shares—Reduction of Transfer—Rectification of Register—Companies Act* 1862, *sec.* 5. It is *ultra vires* of a limited company, incorporated under the Companies Acts, to purchase its own shares, and any such transaction is void. The 35th section of the Companies Act 1862 authorises the Court in an application for rectification of the register of a company, either to refuse the application, or, "if satisfied of the justice of the case," to make an order for rectification thereof. By the 4th article of association of a company incorporated under the Companies Acts with limited liability, shareholders wishing to sell their shares were bound to offer them to the company. A shareholder transferred his shares to the company in 1876, and his name was removed from the register, the company's name being placed thereon instead, and he was thereafter in no way treated as a shareholder. This and similar transactions were known to a number of the shareholders. There was some evidence that the shareholder might have disposed of his shares to a third party had the company refused them. In 1886 the company went into liquidation. Part of the debt due by the company had been incurred while the name of the shareholder in question was still on the register. At the instance of the liquidator, the Court, in respect that it was *ultra vires* of the company to purchase its own shares, reduced the transfer, and *ordained* the names of the trustees and executors of the shareholder to be placed on the list of contributories. General Property Investment Company *v.* Matheson, p. 185.

Bankruptcy—Sequestration—Recal—Affidavit—Extrinsic Objection—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 22. The affidavit of a petitioning creditor in a sequestration was *ex facie* conform to statute, but it appeared on a proof that he had never been put upon oath. The Court, holding that this irregularity was a ground for recal of the sequestration, pronounced an interlocutor recalling it, on being satisfied that no rights or preferences of creditors would be affected by the recal. Blair *v.* North British and Mercantile Insurance Company, p. 213.

——— *Master and Servant—Implied Agreement—Claim for Wages for which there had been no Agreement—Presumption—Proof.* A long period of service raises a presumption that remuneration therefor was intended even although there was no agreement for wages. A father lodged a claim in his son's sequestration, averring that he had served his son as vanman for seven years without receiving wages. It was admitted that there had been no agreement for wages. The trustee rejected the claim as collusive. On appeal, the Court *recalled* the trustee's deliverance, and allowed the claimant a proof of his averments as to the circumstances connected with the constitution of the alleged debt. Thomson *v.* M'Bain (Thomson's Trustee), p. 217.

——— *Cessio—Creditor—Title to Sue.* When decree of *cessio* has been granted, a creditor can only sue an alleged debtor of the estate by obtaining the use of the trustee's name (which he can compel by finding security for expenses), or an assignation to the claim. Henderson v. Robb and Others, p. 222.

——— *Act* 1696, *c.* 5—*Illegal Preference—Assignation in Security—Sale of Bankrupt Estate under Deed of Arrangement—Right of Purchaser to Challenge Preferences.* A firm assigned their book debts to the amount of £887, 15s. in security of an advance of £330 and a bill for £57, 15s. previously granted by them to the lender. A further assignation of their book debts was made in respect of other advances, and in security of any possible deficit on the first assignation. Three weeks after the date of the first assignation the firm was sequestrated, but by deed of arrangement the sequestration was wound up, and the whole property of the estate was sold. In an action by the purchaser against the assignee in security for transference of the book debts, the purchaser objected to the assignee crediting him-

self with the sum of £57, 15s., the amount of the bill, on the ground that it had been granted within sixty days of bankruptcy. *Held* that as the deed of arrangement did not convey to the purchaser a right to challenge preferences by the bankrupt, he had no title to challenge the assignation in respect of the said bill. *Opinion* (*per* Lord Young) that the said assignation would not have been challengeable even at the instance of prior creditors or a trustee in a sequestration. George Smith & Company and Millar *v.* Smyth and Another, p. 301.

Bankruptcy—Catholic Security—Assignation of Security by Prior to Postponed Creditor—Titles to Land Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 123. A heritable subject was burdened with a first bond, and also with a second bond. The first bondholder executed a poinding of the ground, and thereafter the debtor became bankrupt. The first bondholder by his poinding of the ground obtained a preference to the extent of one year's unpaid interest. He sold the subjects under his bond, and took payment of his debt, both principal and all unpaid interest, out of the price. The second bondholder then obtained from him an assignation of the preference he had obtained by poinding the ground, and claimed for that sum in the sequestration. *Held* that the first bondholder having been bound in equity to communicate to the second the preference he had obtained to the second, the claim of the latter in the sequestration was good. M'Laren *v.* Hill, p. 327.

——— *Sale of Furniture left in Bankrupt's House—Reputed Ownership—Mercantile Law Amendment Act* 1856, *sec.* 1. In 1885 a bankrupt entered into a composition arrangement with several of his creditors, including his mother-in-law, who in reduction of her claim bought his furniture as valued by an appraiser. She thereafter lent it to her daughter, the wife of the bankrupt, and it remained in his house until 1888, when his estates were sequestrated. *Held* that the trustee in bankruptcy was not entitled to sell the furniture in a question with the bankrupt's wife and sister, to whom their mother had bequeathed the furniture. Scott and Others *v.* Horsbrugh (Scott's Trustee), p. 362.

———*Cessio—Notour Bankruptcy—Insolvency—Debtors* (*Scotland*) *Act* 1880 (43 *and* 44 *Vict. cap.* 34), *secs.* 6 *and* 8. By the 8th section of this Act it is provided that "any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 . . . or of this Act," may present a petition to the Sheriff of the county in which is his debtor's domicile, praying for decree of *cessio* against the debtor; and "with the petition shall be produced evidence that the debtor is notour bankrupt." By the 6th section it is provided that where imprisonment is rendered incompetent by the Act, "notour bankrupcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by expiry of the days of charge without payment." In a petition for his debtor's *cessio* a creditor produced a charge expired without payment as evidence of the debtor's notour bankruptcy. A suspension of the charge had been raised, and the note had been refused. It appeared from the circumstances that the creditor might reasonably hope for the ultimate payment of his debt, although the debtor was unable to make present payment thereof. *Held* that there was *prima facie* evidence of the debtor's notour bankruptcy. M'Nab and Others *v.* Clarke, p. 472

Bankruptcy—Illegal Preference—Act 1621, *c.* 18 *—Act* 1696, *cap.* 5*—Reduction.* A trader being indebted to a creditor arranged with a friend to join him in giving a promissory-note to the creditor. This friend was not at the time his creditor in any sum, and in security of his obligation on the note he obtained from the trader a disposition to certain heritages, and gave him a back-letter bearing that the disposition was intended to secure him if he should become liable on the promissory-note. Within sixty days of the transaction the trader was sequestrated. His trustee raised an action to reduce the disposition as having been indirectly a further security for the creditor. He did not, however, seek to reduce the promissory-note itself or make the creditor a party to the conclusion for reducing the disposition. *Held* (Lord Lee *diss.*) that in the absence of the creditor, whom it was alleged that the transaction was intended to benefit, the disposition was not reducible. Fraser (M'Dougall's Trustee) *v.* Gibbon, p. 554.

———*Cessio—Citation—Wilful Absence—Bankruptcy and Cessio* (*Scotland*) *Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 9. The Bankruptcy and Cessio (Scotland) Act 1881, sec. 9, provides—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum.*" In a petition for *cessio* a diet was fixed, but before the date thereof it was agreed in view of certain concessions of the debtor that the diet should be continued *sine die.* In disregard of this agreement the agents for the petitioning creditor moved the Sheriff-Substitute to fix an adjourned diet, which was not intimated to the debtor, and to which he was not cited. At the adjourned diet decree of *cessio* was granted "in respect of no appearance by or for the defender." *Held* that the defender had not wilfully absented himself from the diet, and the decree *reduced. Opinion* that an interlocutor granting *cessio* under section 9 of the Bankruptcy and Cessio (Scotland) Act 1881 should contain a finding that the debtor had wilfully absented himself from the diet. Reid *v.* Somerville & Company and Others, p. 574.

———*Sale—Personal Bond for Price of Property Unconveyed—Rights of Seller.* The purchasers of a plot of ground arranged with the sellers in September 1887 to pay a portion of the price then, the sellers agreeing to postpone the date of payment of the balance till Whitsunday 1889 upon receiving from the purchasers a personal bond for the amount, with interest. The purchasers' estates were sequestrated in 1888. The subjects had not been conveyed to the bankrupts, and the bond remained unpaid. The sellers claimed in the sequestration upon their bond. The trustee called upon them to deduct from their claim, as a security held by them over the estate of the bankrupt, the value

Burgh. Warrant for the erection within burgh of a byre for the accommodation of thirty cows was opposed on the ground that it would create nuisance, and the Dean of Guild sisted process to allow the objectors to bring an interdict. This not having been done, the Dean of Guild recalled the sist, and granted warrant in terms of the prayer of the petition. On appeal, the Court (following the case of *Manson* v. *Forrest*, June 14, 1887, 14 R. 802) of new sisted process to allow the objectors to apply for interdict. *Opinion* (*per* Lord President) that while the Dean of Guild may refuse a lining where a proposed structure is only adapted to the purposes of a trade which has been specified by law as a nuisance, it was expedient that a question of nuisance should not be tried in the Dean of Guild Court. Leith and Bremner *v.* W. & J. Kirkwood, p. 176.

Burgh Court. See *Jurisdiction.*

Burgh Franchise. See *Election Law.*

Bursary. See *Testament.*

Byre in Burgh. See *Burgh.*

Capital and Income. See *Succession.*

Carrier — Railway — Agreement — Construction. A railway company entered into an agreement with an iron company to carry upon their railway system the whole mineral and other traffic (under a certain exception) which the iron company might send, of the description and at rates and charges specified in the third article of the agreement. In that article the traffic was divided into two classes, of which Class A included "pig iron, coke, hewing stone, bricks, and tiles," and Class B included "rubble stone, iron ore, coal," &c. The railway company further undertook not to carry traffic for any other party at lower proportionate rates than those charged to the iron company, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line. *Held*, on a sound construction of this agreement, (1) that it imposed an obligation on the railway company not to carry traffic, inwards or outwards, for any other traders at lower proportionate rates per ton per mile than those charged to the iron company, irrespective of the terminus to which the traffic was carried; (2) that in the case of lower rates being charged to other traders, the iron company was entitled to a reduction only on the same kind of traffic comprised in the class to which the particular traffic belonged. Murray and Others *v.* The Glasgow and South-Western Railway Company, p. 373.

Casualty. See *Revenue—Superior and Vassal.*

Casus Improvisus. See *Police.*

Catholic Security. See *Bankruptcy.*

Caution. See *Arrestment—Process.*

Caution for Expenses. See *Process.*

Cautionary Obligation — Guarantee — Signature upon Blank Sheet of Paper—Proof—New Firm. A received a blank sheet of paper with a sixpenny stamp upon it from his son, with the request to sign across the stamp. He did so on the understanding that his son was to fill in simply a guarantee for £500. The son filled in the guarantee for £500 and added an obligation to pay certain premiums of insurance upon his life of which his father knew nothing. *Held* that A having given his son no authority to fill in this obligation was not bound to pay the premiums. *Observations* upon sec. 7 of Mercantile Law Amendment Act. Wylie & Lochhead *v.* Hornsby, p. 618.

Cautioner — Relief — Security given by Principal Debtor to Particular Cautioner—Proof of Consent by Co-Cautioner. A cautioner who has obtained from the principal debtor a special security for the liability he has undertaken is not bound to communicate to his co-cautioners the benefit of that security if he agreed to be cautioner only on the condition of having the security, and if the co-cautioners, when they entered into the cautionary obligation, knew of and consented to that arrangement. A shipbuilding firm, and the two individual partners thereof, became cautioners in a cash credit bond along with another co-cautioner. In security of the liability which they had undertaken the partners received a disposition of certain heritable property from the principal debtor. His estate having been sequestrated, the firm and the individual partners, on the demand of the bank, paid the debt due under the bond, and took an assignation thereto. In an action of relief at their instance against the co-cautioner under the bond—*held* (Lord Lee *diss.*) that the defender was liable to relieve the pursuers of one-fourth of the sum paid by them, and that the pursuers were not bound to communicate to the defender the benefit of the security they had received from the principal debtor, in respect it was proved that the security had been granted to the partners with the knowledge and consent of the defender for their benefit only, and to cover any liabilities incurred by them, either through the firm or as individuals, which it was just sufficient to do. *Opinion* (*per* Lord Lee) that where one of the several co-cautioners, equally bound by the same deed, avers that he has received from the principal debtor a special security for his own benefit with the consent of his co-cautioners, such consent cannot be proved by parole evidence. Hamiltons *v.* Freeth and Others, p. 693.

Cemetery. See *Valuation Roll.*

Certificate "in that behalf." See *Justiciary Cases.*

Certified Copy of Proceedings in Scottish Courts. See *Process.*

Cessio. See *Bankruptcy.*

Change in Firm. See *Guarantee.*

Charter-Party. See *Ship.*

Charter-Party, Black Sea, 1878. See *Shipping Law.*

Child Placed Voluntarily in Charitable Institution. See *Parent and Child.*

Children Drowned in a Pond. See *Reparation.*

Church—Church Patronage Act 1874 (37 *and* 38 *Vict. cap.* 82), *sec.* 7, *sub-sec.* 1—*Appointment of Minister—Right of Congregation where Delay caused by Presbytery.* The Church Patronage (Scotland) Act 1874 provides by section 7 (1)—"If on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam*

Competency of Action in Sheriff Court. See *Process.*

Competency of Motion to Proceed with Cause Pending Appeal. See *Process.*

Competency of Panel as Witness. See *Justiciary Cases.*

Complaint. See *Justiciary Cases.*

Completion of Title. See *Lease.*

Composition. See *Revenue—Superior and Vassal.*

Compromise of Claim. See *Sequestration.*

Condictio indebiti—Error in Payment—Repetition—Knowledge. Where a person makes a payment in the knowledge that the sum paid is not due, he is presumed to have waived all inquiry and to have admitted the debt. In order, however, to bar his right to repetition of the payment it must be established that the knowledge that the sum was not due was, or should have been, present to his mind at the time of payment. An iron company and a railway company entered into an agreement by which the railway company, *inter alia*, undertook "not to carry traffic for any other party at lower proportionate rates than those charged to the iron company, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line. Troon traffic . . . alone excepted from this condition." The iron company regularly paid for fifteen years the rates charged by the railway company on their traffic. In an action by the iron company against the railway company, founded on this clause, for repetition of certain sums which they averred they had paid in excess of sums charged and paid by two other traders, the railway company pleaded that the pursuers were barred from repetition in respect they had paid the alleged overcharges in the knowledge (possessed by their manager and secretary) that the two traders were being charged less for their traffic. Evidence on which the Court *held* that the pursuers were entitled to repetition in respect that (1) they neither knew nor ought to have known of the overcharges; (2) in respect that the defenders must be held to have known they were violating their own agreement. Murray and Others (The Dalmellington Iron Company) *v.* The Glasgow and South-Western Railway Company, p. 373.

Condition. See *Agreement.*

Condition Appended to Letter of Application. See *Company.*

Condition in Landlord's Favour. See *Landlord and Tenant.*

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Constructive Delivery. See *Sale.*

Constructive Residence. See *Election Law.*

Continuity of Residence. See *Poor.*

Continuous Account. See *Prescription.*

Contract—Foreign—Assignation—Locus contractus. A domiciled Scotsman borrowed money from a money-lender in England. In security he delivered a promissory-note and a policy of insurance on his life effected with a Scottish insurance company. At his death in June 1887 the loan was only partially repaid, and in August the lender notified to the insurance company that the policy of insurance had been assigned to him. In December the estate of the deceased was sequestrated, and a trustee appointed thereon. In a multiplepoinding the Court ranked the lender preferably to the trustee for the debt still due, in respect that the loan was negotiated in England, by the law of which, as the parties admitted, deposit of the policy operated as an equitable mortgage in favour of the lender, and notification thereof by the lender to the insurance company, before the bankruptcy of the borrower, conferred on him such a preferable right. The Scottish Provident Institution *v.* Walker and Others, p. 73.

Contract—Executory Sale—Delay—Disconformity to Contract. Under a contract for the supply of machinery which specified no time for completion of the work, the price was payable, one-half upon delivery, one-fourth upon the machinery being started, and the remaining fourth three months thereafter. The first instalment and part of the second were paid at the time stipulated. In an action against the purchaser for the balance of the second instalment he sought to set off alleged loss from undue delay in delivery, and from disconformity to contract, and pleaded that the pursuers, being themselves in breach of the contract, were not entitled to sue under it. *Held* that the allegations of disconformity were relevant, but did not form a sufficient defence, seeing that the third instalment, which exceeded the abatement claimed, had become due. Woodside Steel and Iron Company *v.* Dick & Stevenson, p. 165.

———*Stock Exchange—Joint Agreement to Sell Stock not in Seller's Hands—Speculation as to Rise and Fall of Stock.* On the joint employment of two persons a broker sold a certain amount of railway stock. Neither of the parties possessed the stock at the time. The stock was continued for some months, when it was closed at a loss, and the sum due to the broker for commission and differences was paid by one of the principals. In an action at his instance against the other adventurer for repayment of one-half of this sum, the defender pleaded that the action should be dismissed in respect that the transaction was of a gambling nature. *Held* that as the stocks had been sold to a real purchaser, and the transaction between the principals was a joint-adventure in stocks, and not a joint-adventure in gaming, the pursuer was entitled to recover from the defender the amount sued for. Mollison *v.* Noltie, p. 240.

———*Construction—Words of Estimate or Expectancy.* A company contracted to supply "the whole of the steel required" by the contractor for the Forth Bridge, less 12,000 tons of plates, at certain prices. The general conditions appended to the contract contained the following clause—"The estimated quantity of the steel we understand to be 30,000 tons, more or less." From the specification attached to the contract for the construction of the bridge, to which the above contract referred, it appeared that the part of the bridge for which in the contemplation of the parties the steel was required was the superstructure of the four

—*Service Qualification—Farm Manager.* A farm manager had the exclusive use and occupation of a bedroom in the farm-house by virtue of his employment. His mother, who was tenant of the farm, and his sisters, also resided in the farm-house, and he took his meals along with them in another room in the house. *Held* that the dwelling-house was inhabited by the person under whom he served, and that therefore he was not entitled to be placed upon the roll of voters as an inhabitant-occupier of a dwelling-house. Philip *v.* Roxburgh, p. 181.

Election Law—County Franchise—Representation of the People Act 1884 (48 *and* 49 *Vict. c.* 3), *secs.* 2 *and* 7 (4)—*Representation of the People* (*Scotland*) *Act* 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 3—"*Inhabitant-Occupier*"—*Constructive Residence—Imprisonment of Occupier during Part of the Necessary Period of Occupation.* A man occupied as tenant a house in a county for the necessary period, with the exception of three months during which he had been confined in jail under sentence for assault. While he was in jail his wife and son resided in the house. *Held* that he was entitled to be enrolled as an "inhabitant-occupier." Watt *v.* M'Guire, p. 182.

Employment. See *Implied Contract.*

Entail—Disentail—Lands directed to be Entailed—Rutherfurd Act (11 *and* 12 *Vict. cap.* 36), *secs.* 27 *and* 28. A testator by his trust-disposition and settlement, after providing for the payment of his debts, certain small annuities, and a family provision of £6125 in favour of his son and his children, directed his trustees upon the death of his son to execute a disposition and deed of striot entail of his estates in favour of the eldest son of his (the testator's) son and substitute heir of entail. He further directed that in the event of his son dying before the child entitled to succeed as institute should have attained twenty-six years of age, the trustees should retain the management of the estates, pay a portion of the income in maintenance of the heir-apparent, and accumulate the remainder into a sinking fund until that event. In the event of the sinking fund not being strong enough when that event arrived to wipe off the family provision of £6125, and the annuities and legacies left by the testator, the trust was to remain in force until those and all the testator's other engagements were fully discharged. He further directed that after the whole purposes of the trust were accomplished, but not till then, his trustees should denude of the trust and deliver over to the heir of entail in possession of the heritages for the time the title-deeds of the same. The testator was predeceased by his son but survived by his grandson (his only son's eldest son), who at the date of the testator's death was more than twenty-six years of age. The testator's personal estate was insufficient to meet his personal debts. There was a balance of about £1600 to be met by the heritable estate. In addition the heritable estate was burdened with heritable debt to the extent of £7900 and was primarily liable for certain small annuities. The value of the estates was about £17,500. The testator's grandson presented a petition under the Entail Acts, with the necessary consents, to have the trustees ordained to convey the estate to him in fee-simple. The reporter appointed to inquire into the procedure reported, that while in his opinion the petitioner—strictly under the trust-deed, and apart from the Rutherfurd Act—could not have compelled the trustees to denude in his favour until the sinking fund had become strong enough to pay off the family provision of £6125, he considered that the provisions of sections 27 and 28 of the Rutherfurd Act had the effect of entitling him to obtain possession at once, all parties interested being satisfied or secured. The Lord Ordinary *approved* of the report and ordained the trustees to denude accordingly. Clark, Petitioner, p. 172.

Entail—Authority to Charge Estate—Appointment of Curator ad litem to Pupil Respondent—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 31—*Disentail—Provisions for Younger Children—Entail* (*Scotland*) *Act* 1882 (45 *and* 46 *Vict. c.* 53), *sec.* 24. In 1883 an heir of entail in possession by petition obtained authority to charge the entailed estates with a sum of £150,000. The three persons called as next heirs were his eldest daughter, her child—a pupil—and his second daughter, also in pupillarity. One curator *ad litem* was appointed to the two pupil respondents, and he on their behalf granted a deed of consent to the charge. By his marriage-contract the heir of entail made certain provisions for his younger children, the amount of which depended on the amount of the free rental of the entailed estates. He became bankrupt, and in 1885 conveyed his estate to trustees, *inter alia*, for payment of his creditors, and it appeared in the settlement of his affairs that the interests of his second daughter as "younger child" had been prejudiced by the estates being charged with the above sum. She raised an action concluding, *inter alia*, for declarator that this charge, and the interest thereon, must not be taken into account in calculating the amount of her provisions, or of her security therefor, and for reduction to that extent of the decree authorising the charge. *Held* that the deed of consent granted on behalf of the second and third consenting heirs in the application of 1883 was disconform to the requirements of section 31 of the Act 11 and 12 Vict. cap. 36, in respect a separate curator *ad litem* had not been appointed to each of the pupil respondents, and decree *granted* in terms of the above conclusions. Cases of *Hamilton, Petitioner*, February 3, 1853, 15 D. 371, and *Dalrymple, Petitioner*, July 10, 1857, 19 D. 964, commented on. Lady Muriel Boyle *v.* The Earl of Glasgow and Others, p. 204.

———*Disentail—Provision for Younger Children—Entail Amendment Act* 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 6. An heir of entail in possession bound himself by his marriage-contract to secure certain provisions in favour of his younger children by bond and disposition in security over his estates. In a petition for disentail he proposed (following the case of the *Earl of Fife*, unreported) to make these provisions a burden on the estate postponed to a limited power of borrowing over the estate. *Opinion* (*per* Lord Shand) that they

ought not to be so postponed, and in accordance therewith a bond and disposition in security of the younger children's provisions was executed in favour of trustees. Baron Polwarth, Petitioner, p. 212.

Entail—Entailed Estate—Contract to Sell—Ratification of Court—Specific Implement—Entail Acts 16 *and* 17 *Vict. c.* 94, *sec.* 5; 38 *and* 39 *Vict. c.* 61, *secs.* 5 *and* 6; 45 *and* 46 *Vict. c.* 53, *secs.* 13, 19, 21, *and* 22. An heir of entail in possession by holograph letter offered to sell an entailed estate at a certain price, under the condition that the sale was made "subject to the ratification of the Court." The offer having been accepted the heir of entail presented a petition to the Court under the 19th and following sections of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), craving the Court to ratify and confirm the contract of sale, and to grant an order of sale of the estate. To this application the next heir lodged answers, objecting to a sale by private bargain. In an action by the purchaser against the heir of entail for implement of the contract, the Court *held* that the latter was under a legal obligation to apply to the Court for authority to sell and dispone the estate, under 16 and 17 Vict. cap. 94, sec. 5; 38 and 39 Vict. cap. 61, secs. 5 and 6; 45 and 46 Vict. cap. 53, sec. 13; and the Court appointed the pursuer to lodge in process the draft of a disposition by the defender of the estate in favour of the pursuer in fulment of the contract of sale. Kennedy *v.* Stewart, p. 338.

———*Disentail—Expectancy—Surplus — Agreement—Payment in Error.* In a petition for disentail of an estate the heir of entail in possession and the three next heirs agreed that the interests of the latter parties should be valued. In terms of the actuary's report the parties agreed by minute that the surplus funds remaining after valuation should be distributed proportionately to the several interests as already valued, and the surplus was distributed accordingly. The Court, after a remit to a man of business, approved of the proceedings, and disentailed the estate. Four years thereafter the former heir in possession sued the three next heirs for repayment of the surplus funds, on the ground that the payment had been made in error, and that he had not been properly represented, as the same agent acted for all the parties. *Held* that as the payments had been made under an agreement approved of by the Court, and that as the pursuer at the time of the transaction was *sui juris*, and had enjoyed independent advice, the action was incompetent, and the defenders *assoilzied*. Mackintosh *v.* Rose and Others, p. 450.

———*Mansion-house—Insurance—Fire Insurance—Obligation to Re-build.* The mansion-house on an entailed estate was partly destroyed by fire, and the heir in possession, who had insured it against the risk, received a sum of money in respect of the damage done. He died without having rebuilt. The next heir having done so, presented a petition under the Entail Acts of 1875 and 1882 for authority to charge the entailed estate with the amount expended. It was objected on behalf of subsequent heirs that the sum recovered by the late heir, in so far as it exceeded his life interest in the subjects destroyed, was received by him as trustee for the subsequent heirs, and ought to be recovered by the petitioner from his executor, and applied *pro tanto* to repay the expense of rebuilding, and that the amount with which the petitioner was entitled to charge the estate was the amount expended under deduction of that sum. *Held* that the sum received by the late heir was his own absolute property, that he was not bound to rebuild, and that his executor was not liable to the next heir for any part of the sum recovered from the insurance company. Pollok, Petitioner, p. 515.

Entail. See *Process.*

Entailed Estate. See *Entail.*

Entry. See *Sale.*

Error in Payment. See *Condictio indebiti.*

Errors or Negligence of Navigation. See *Ship.*

Essential Error. See *Contract.*

Essentials of Sale. See *Contract.*

"*Estate . . . heritable, and Income thereof.*" See *Marriage.*

Evidence. See *Justiciary Cases.*

Evidence in Aggravation of Damages. See *Reparation.*

Evidence in Mitigation of Damages without Issue in Justification. See *Reparation.*

Exceptions. See *Ship.*

Excessive Penalty. See *Justiciary Cases.*

Exclusion of Jus mariti. See *Husband and Wife.*

Exclusion of Review except by Circuit Court. See *Justiciary Cases.*

Execution Pending Appeal. See *Process.*

Executor—Confirmation — Domicile — Confirmation of Executors Act 1858 (21 *and* 22 *Vict. c.* 56), *sec.* 9—*Sheriff Courts* (*Scotland*) *Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 41. The Sheriff Courts Act 1876, section 41, *inter alia*, provides that where it is desired to include in the personal estate of anyone dying domiciled in Scotland personal estate situated in England, the fact that a deceased person died domiciled in Scotland "shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff-clerk to insert in the confirmation, or to note thereon, and to sign a statement, that the deceased died domiciled in Scotland, and such a statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland." A testator died in England possessed of personal property both in England and Scotland. The executors nominated by his settlement, which was in Scottish form and *ex facie* valid, declared that he died domiciled in Scotland, and obtained confirmation from the commissary. Confirmation was opposed by a person who claimed to be one of the next-of-kin, and who averred that the deceased died domiciled in England; that the settlement had been procured from him under constraint, and made no provision for her, although for eighteen years years before his death he had allowed her an annuity of £500; and that confirmation in England would facilitate the action which she intended to take to have the settlement set aside. No allegation of impecuniosity was made against the trustees, and it was not suggested that the estate would suffer by their

administration. In an appeal, *held* that in view of the provisions of the statute warrant to issue confirmation had been properly granted, and that no sufficient reasons had been alleged for staying confirmation. Hamilton *v.* Hardie and Others (Gavin Hardie's Executors), p. 140.

Executry Sale. See *Contract.*

Exemption. See *Revenue.*

Exoneration and Discharge. See *Judicial Factor.*

Expectancy. See *Entail.*

Expenditure on Improvements. See *Revenue.*

Expenses—Husband and Wife—Divorce—Wife's Expenses of Reclaiming-Note. Held (*dis.* Lord Young) that a wife who had unsuccessfully reclaimed against a decree of divorce on the ground of adultery, and who had by her own earnings acquired separate estate to the extent of £500, was bound to pay her own expenses in both the Outer and the Inner House. Henderson *v.* Henderson, p. 46.

———*Reserved Expenses.* Where in the course of a litigation expenses have been reserved, and there is in the final interlocutor a general finding of expenses in favour of the successful party, the reserved expenses are carried by that finding. Caledonian Railway Company *v.* Chisholm, p. 489.

———*Process—Revenue—Trust.*

Expulsion from Ring at Race Meeting. See *Reparation.*

Extract. See *Sheriff.*

Extrinsic Objection. See *Bankruptcy.*

Failure to Lodge Defences. See *Process.*

Farm Manager. See *Election Law.*

Fault. See *Reparation.*

Fee. See *Succession.*

Fee and Liferent. See *Succession.*

Fees to Counsel when not Sent along with Instructions. See *Process.*

Feu-Charter. See *Property.*

Finalty. See *Crofter.*

Fire Insurance. See *Entail.*

Firm's Name, Right to Use. See *Partnership.*

Footpath. See *Reparation.*

Footway. See *Police.*

Foreign—Domicile—Proof—Onus. A lady whose domicile of origin was Scottish married in 1855 a domiciled Scotsman, with whom she resided, partly in Scotland and partly in England, down to the date of his death in 1883. Her husband left her considerable property, consisting of a house in London, which after occupying for a few months, she sold along with most of the furniture which it contained, two farms in Scotland, which were in her possession at the time of her death, and about £15,000, which was invested by her Scottish agents on heritable security in Scotland. During the five years which she survived her husband she only revisited Scotland twice, residing for the most part in London in furnished houses, or in lodgings. She frequently went abroad, and she also visited occasionally various watering places in England. She died in London in 1888. After her death a question arose as to whether her domicile was Scottish or English. *Held* that the *onus* of proving that the deceased had abandoned her domicile of origin fell upon the party alleging that she had *animo et facto* acquired an English domicile; and, on the proof, that this *onus* had *not* been discharged. Vincent and Guardian *v.* The Earl of Buchan, p. 481.

Foreign. See *Contract—Husband and Wife—Jurisdiction—Arrestment.*

Foreign Mission. See *Church.*

Forfeiture. See *Succession.*

Forum conveniens. See *Jurisdiction.*

Fraud. See *Justiciary Cases—Public Company.*

Fraudulent Bankruptcy. See *Justiciary Cases.*

Freight. See *Ship.*

General Conviction. See *Justiciary Cases.*

Glebe. See *Right in Security.*

Goodwill. See *Partnership.*

Grass Crop. See *Lease.*

Guarantee—Jus quæsitum tertio—Action on Guarantee by One not being Person to whom Guarantee Originally Given. A firm gave certain guarantees addressed to an underwriters' association, for the transactions of certain underwriters, who thereafter entered into policies with certain other underwriters and brokers belonging to the association. There was no reference to the guarantees in the policies. The firm and the underwriters who underwrote the policies having been sequestrated — *held* (by Lord Kyllachy and *acquiesced in*) that the insured had a title of the nature of a *jus quæsitum* to enforce the guarantees by being ranked as creditors under them against the firm's estate. Rose, Murison, & Thomson *v.* Gourlay (Wingate, Birrell, & Company's Trustee), p. 774.

———*Partnership—Change in Firm.* In 1871 a firm of insurance brokers granted a guarantee in the ordinary course of business for the transaction of an underwriting. At that time the firm consisted of two partners. One partner died, and thereafter the other conducted the business under the same name, and took over the assets and liabilities. After a time he assumed his son into partnership, and the business thereafter continued to be carried on under the same name. There was no agreement excluding liability for the underwriters' transactions. The underwriters having failed—*held* (by Lord Kyllachy and *acquiesced in*), in a question between the firm and the holders of policies underwritten by them, that the guarantee of 1871 was available against the firm. Rose, Murison, & Thomson *v.* Gourlay (Wingate, Birrell, & Company's Trustee), p. 774.

———See *Cautionary Obligation.*

Guarantee as to Ship's Capacity. See *Ship.*

Guardian and Pupil. See *Nobile Officium.*

Heir and Executor. See *Succession.*

Heritable and Moveable. See *Succession—Lease.*

Heritable Right. See *Jurisdiction.*

Hire. See *Ship.*

Hiring Agreement. See *Possession.*

Horse—Loan—Injury while in Borrower's Custody—Reparation—Onus—Discharge of Onus. When an article is lent in good condition and returned damaged, the *onus* is on the borrower to show (1) that all due care was taken of the article, and (2) that it was not used for any other purpose than that for which it was lent. While the borrower of a horse was driving it along the road the horse fell, and sustained severe injuries. In an action by the owner against the borrower it was proved that the

road where the accident occurred was level and free from stones; that at the time of the accident the defender had been driving at a moderate pace and with tight reins; that the horse had general weakness of the fore parts, and that he had also at various times suffered from the effects of bad shoeing. *Held* that the defender had observed reasonable care in using the horse, and that the accident was not caused by his fault, and the defender therefore *assoilzied*. Strang *v.* Bain, 137.

Hotel. See *Justiciary Cases.*

Husband and Wife—Decree of Divorce—Reduction — Relevancy. A wife who had been divorced for adultery raised an action for reduction of the decree, on the grounds (1) that the material evidence against her was perjured, and (2) that it had been obtained by subornation of perjury committed by an agent of the husband. The Court, *reserving* opinions on the first ground, *allowed* proof before answer of the averments with regard to the subornation of certain witnesses. Begg *v.* Begg, p. 81.

——*Antenuptial Contract—Reduction—Agent of One Party Signing as Notary for the Other—Marriage — Rei interventus.* In an action by a widow to reduce an antenuptial contract as invalid, inasmuch as the agent for her husband had signed as notary for her, the Court, without deciding the question whether the contract had or had not been validly executed, *held* that if any informality in execution had existed, it had been cured *rei interventu* by the marriage having followed upon it. Lang *v.* Latta and Others (Lang's Trustees) and Others, p. 466.

——*Foreign — Wife's Heritable Estate — Effect of Sale—Surrogatum—Donation.* The wife of a domiciled Scotsman after her marriage, with concurrence of her husband, sold a heritable estate belonging to her in England. She duly acknowledged the conveyance thereof before two of the commissioners appointed under the Act for the Abolition of Fines and Recoveries (3 and 4 Will. IV. c. 74), and "declared that she did intend to give up her interest in the said estate without having any provision made for her in lieu thereof." Part of the price was received and retained by the husband, and part was vested in certain trustees to indemnify the purchasers against an annuity charged on the estate. The result of this conveyance by the law of England was that the husband "became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by the said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti*." The husband and wife having subsequently separated by mutual consent, the latter executed a deed of revocation by which she revoked and cancelled all donations and provisions made by her in favour of her husband. In an action by the wife against the executor of her husband—*held* that the pursuer was entitled to repayment of the sum received by her husband, and to payment of the rest of the price on the annuity ceasing to be chargeable, in respect that (1) the rights of the spouses in the price of the estate were to be decided by Scots law, and (2) that by Scots law the price was *surrogatum* for the estate. Tennent *v.* Welch, p. 600.

Husband and Wife—Donation. Opinion that if there had been a presumption that the wife intended to give her husband the price of the estate it would have been a revocable donation. Tennent *v.* Welch, p. 601.

——*Separate Estate of Wife — Liferent of Husband — Actuarial Value.* A married woman having, with the concurrence of her husband, sold a heritable estate belonging to her in England, in which by the law of England her husband had a freehold or liferent interest, subsequently brought an action against the executor of her husband to recover the purchase money which her husband had received and retained in his own hands, but without claiming interest thereon. The Court *decerned* against the defender for the sum sued for, and refused to have the life interest of the husband calculated as at the date of the sale, and deducted from the said sum, in respect that it had been fully satisfied by his having had possession of the purchase money till his death, and having appropriated the interest to his own uses. Tennent *v.* Welch, p. 601.

——*Antenuptial Contract — Exclusion of Jus mariti—Succession — Married Women's Property (Scotland) Act* 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 6. The Married Women's Property (Scotland) Act, by its 6th section, gives to the husband of any woman who may die domiciled in Scotland the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland. By antenuptial contract a woman conveyed her whole estate to trustees for behoof of herself, whom failing for behoof of her own representatives, or other parties that might be thereafter named by her, excluding her husband's *jus mariti* and right of administration, which were also expressly renounced by the husband in the deed. Some years after the marriage she died domiciled in Scotland, survived by her husband and certain issue of the marriage, and possessed of certain moveable estate. *Held* (following *Poë* v. *Paterson*, 10 R. (H. of L.) 73) that the husband was entitled to one-third of the said moveable estate. Hogarth and Another (Fotheringham's Trustees) *v.* Fotheringham, p. 609.

——See *Succession—Expenses.*

Husband's Right of Administration. See *Marriage.*

Illegal Preference. See *Bankruptcy.*

Illegitimate Child. See *Reparation.*

Implement. See *Contract.*

Implied Agreement. See *Bankruptcy.*

Implied Contract—Employment—Recompense. A trader having fallen into difficulties laid before his creditors a state of his affairs prepared by his agent. An accountant employed by two of the creditors attended the meeting, and was requested by the meeting of creditors to examine into the affairs. He did so, and thereafter, having ceased to act for the two individual creditors, he negotiated and carried through a composition arrangement, which the

first cousins of the wards who were in destitute circumstances, *refused*. Balfour, Petitioner, p. 268.

Judicial Factor—Curator Bonis—Inventory—Statement of Accounts—Exoneration and Discharge. In June 1880 an executor *qua* factor for three pupil children was appointed and confirmed by the Sheriff of Inverness. In August 1882 he was appointed their *curator bonis* by the Sheriff of Dumfries, the children having meanwhile succeeded to certain legacies. The inventory and accounts lodged with the Accountant of Court included both estates. In administering the executry estate, which consisted chiefly of the stock of a farm, large losses were incurred, and the last account lodged with the Accountant of Court closed with a balance due to the *curator bonis*. In a petition for discharge of the curatory, on the ground that the whole estate was exhausted, and for decree against the wards for the balance, *held* that the wards were entitled to an account of the curatory estate apart from the executry estate, and that the petitioner was only entitled to discharge on payment of any balance due to them on that account. Matheson *v.* Matheson and Others, p. 552

———*Title to Sue. Held* (following *M'Gregor* v. *Beith*, 6 S. 853) that a judicial factor appointed on heritable subjects "with the usual powers" has no title to sue parties who have intromitted with the rents prior to his appointment. Gordon *v.* Williams' Trustees, p. 750.

Jurisdiction—Arrestments ad fundandam jurisdictionem—Question of Status—Amendment of Summons—Forum conveniens. The child of a deceased person raised an action against his trustee, his widow, and his sister, concluding (1) for declarator of legitimacy on the ground of a putative marriage between the pursuer's parents; (2) for payment of legitim; (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The defenders were not resident within the jurisdiction of the Court, but it was averred that by arrestments *ad fundandam jurisdictionem* jurisdiction had been constituted as regarded the trustee. By leave of the Lord Ordinary the pursuer amended her summons, and sued for decree under the summons, as the offspring of a legal marriage. *Held* that the principal question in the action being one of status, jurisdiction could not be founded by arrestments, and the action *dismissed*. Morley *v.* Jackson and Others, p. 52.

———*Burgh Court—Summary Ejection—Heritable Right.* By a mutual disposition and settlement a husband disponed certain premises to his wife "in liferent, for her liferent alimentary use allenarly." After the husband's death his heir-at-law disponed the premises to the widow in fee. She married again, and, as liferentrix of the premises under her former husband's will, she presented a petition in a Burgh Court for ejection against her present husband. He lodged defences, on the ground that the disposition to the fee in favour of his wife did not exclude his *jus mariti* and right of administration. The Burgh Court granted decree of ejection. A suspension thereof at the instance of the husband *sustained*, on the ground that the question involved in the case was one of heritable right, and so beyond the jurisdiction of the Burgh Court. Wales *v.* Wales, p. 115.

Jurisdiction—Arrestment jurisdictionis fundandæ causa—Foreign—Transference of Right to Fund Arrested. An arrestment valid to found jurisdiction at its date is not rendered ineffectual, though, after the raising of the action but before the defences are lodged, the right to the fund arrested is transferred from the party against whom it is sought to found jurisdiction to someone else. Stewart *v.* North—Stewart *v.* Eldred & Bignold, p. 650.

———See *Burgh*.

Jurisdiction of Court of Session. See *Church*.

Jury Trial. See *Reparation—Process*.

Jus quæsitum tertio. See *Guarantee*.

Jus relictæ. See *Succession*.

Justiciary Cases—Fraud—Indictment—Relevancy—Specification—Fraudulent Bankruptcy—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 13, *sub-sec. B* (3). An indictment charging panels with having, in pursuance of a scheme to that effect, obtained on credit and appropriated goods on false pretences, after setting forth the false representations alleged to have been made, and averring that the panels did by said false representations "deceive and impose upon" persons specified, continued "and did thus induce" them "to supply you on credit with yarn and hosiery goods" of values specified, "towards the settlement of which you did not pay more than" certain specified sums. Objections to the relevancy on the grounds (1) that the obtaining of the goods was not connected with the representations as effect and cause; (2) that non-payment being of the essence of the crime, the statement that part of the goods had been paid for effectually destroyed the charge so far as these goods were concerned, and as regarded the balance remaining unpaid, negatived the intention to defraud—*repelled*. A charge under 43 and 44 Vict. cap. 34, section 13, sub-section B (3), of obtaining property on credit by false representations within four months prior to sequestration, and not having paid for the same, which did not specify the property obtained but only its value, *held irrelevant*. *Opinion* (*per* Lord M'Laren) that it is not sufficient to constitute this crime that the property be obtained within the four months, it being also necessary that the false representations be made within that period. H. M. Advocate *v.* Macleods, p. 1.

———*Culpable Homicide—Indictment—Accumulation of Panels—Relevancy—Specification—Separation of Trials.* James Parker and James Barrie were indicted on a charge that, time and place specified, "you James Parker, when pilot in charge of the steamship 'Balmoral Castle,' there being risk of a collision between the said vessel and the steamship 'Princess of Wales,' did fail to slacken speed by stopping and reversing, contrary to article 18 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Act Amendment Act 1862, and you James Barrie, while pilot in charge of the said steamship 'Princess of Wales,' there being risk of a collision as aforesaid, did fail to slacken speed

by stopping and reversing, and did put to starboard the helm of the said steamship 'Princess of Wales,' contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill A. F." Objections to the relevancy on the ground (1) that it was not competent to charge the panels together in one indictment, the acts of negligence being separate, and (2) that the indictment was wanting in specification in respect that the Regulations founded on were insufficiently set forth, that facts were not alleged sufficient to infer breach of the Regulations, that the charge of failure to navigate with proper and seamanlike care was too vague, and that *culpa* being of the essence of crime ought to be specifically set forth—*repelled*. *Dingwall* v. *H. M, Advocate*, May 26, 1888, 25 S.L.R. 494, *commented* upon and *distinguished*. Motion to separate the trials on the ground that panels might mutually prejudiced each other by their defence, *refused*. H. M. Advocate *v.* Parker and Barrie, p. 39.

Justiciary Cases—Public-House—Selling or Giving Out Liquor—Complaint—Relevancy—Locus—Summary Procedure Act 1864 (27 *and* 28 *Vict. c.* 53), *sec.* 5—*Public-Houses Acts Amendment (Scotland) Act* 1862 (25 *and* 26 *Vict. c.* 35). A complaint charging the offence of selling or giving out liquors in breach of certificate ought to specify the name of the person to whom the liquors were sold or given out, or to set forth that they were sold or given out to some person to the prosecutor unknown. Circumstances in which a conviction obtained upon a complaint which failed so to specify *sustained*, the accused having suffered no prejudice from the omission. The words "*at* his licensed premises at," &c., is a sufficient specification of the *locus* in such a complaint. Muir *v.* Campbell (P.-F. of J.P. Court of Renfrew), p. 63.

———*Public-House — Contravention of Hotel Certificate—Alternative Complaint and General Conviction—Public-Houses Acts Amendment (Scotland) Act* 1862 (25 *and* 26 *Vict. c.* 35). George Duncan, hotel-keeper, Crown Hotel, Alloa, was charged in the Police Court at Alloa with a contravention of the terms of his certificate, which was in form of Schedule A of the Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. cap. 35), in so far as he "did keep open house or sell or give out" liquors after ten o'clock at night, and was convicted by the magistrate "of the offence charged." *Held* (following the case of *Murray* v. *M'Dougall*, February 7, 1883, 5 Coup. 215) that the charge was alternative, and conviction *suspended*. Duncan *v.* Lang, p. 65.

———*Police—Affixing Bills to Building without Authority—Glasgow Police Act* 1866 (29 *and* 30 *Vict. c.* 273), *secs.* 149, 131, *and* 132—*Exclusion of Review except by Circuit Court—Suspension—Competency*. The Glasgow Police Act 1866, by section 149, imposes a penalty on "every person who is guilty of any of the following disorderly acts or omissions . . . in any street, . . . namely," *inter alia* (subsection 28), "who affixes, without the consent of the proprietor and occupier, to any building any bill or notice." The occupier of a building was charged under this section with affixing, "without the consent of the proprietor," certain bills to the wall of the building occupied by him, and was convicted. In a suspension the Court *held* that the section did not apply to the case of the occupier or owner of a building placing bills upon it, but only to third parties, and that the complaint and whole proceedings were outwith the statute and illegal, and *quashed* the conviction. The procedure and conviction being *ex facie* illegal, an objection to the competency of the suspension, founded on sections 131 and 132 of the Act, which provide for the exclusion of review except by the next Circuit Court, *repelled*. Kidger *v.* M'Phee, p. 65.

Justiciary Cases—Contagious Diseases (Animals) Act 1878 (41 *and* 42 *Vict. c.* 74), *sec.* 61, *sub-sec.* (1)—*Permitting Animals to be Moved without Declaration under Local Authority Regulations—Summary Prosecutions Appeals (Scotland) Act* 1875 (38 *and* 39 *Vict. c.* 62), *sec.* 3, *sub-sec.* (9)—*Amendment of Case*. The Contagious Diseases (Animals) Act 1878, by section 61, provides that if any person without lawful authority or excuse, proof whereof shall lie on him, does any of the following things he shall be guilty of an offence against this Act—(1) If he does anything in contravention of this Act or of a regulation of a local authority. The Animals Order 1886, passed by the Privy Council, provides—"If an animal is moved in contravention of a regulation made by a local authority, . . . the owner of the animal, and the person for the time being in charge thereof, and the person causing, directing, or permitting the movement of the animal . . . shall be deemed guilty of an offence." A cattle-dealer was convicted of an offence within the view of these provisions, on the ground that he had permitted the removal of certain cattle from his farm into Lanarkshire unaccompanied by a declaration under the regulations of the local authority of Lanarkshire. In a case on appeal obtained by him it was stated that the appellant sold the cattle at his farm in Ayrshire, where they were delivered to the purchaser; that the person who drove them into Lanarkshire had not a declaration properly filled up under the regulations of the local authority of that county; that the Justices were "of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be removed into the county of Lanarkshire, was guilty of the offence charged." *Held* that the grounds stated were not sufficient to justify the conviction, which must be set aside, and a motion to remit the case to the Justices to be amended *refused*. *Observations* (*per* Lord Justice-Clerk) upon the practice of remitting for amendment. Dunlop *v.* Weir, p. 93.

———*Truck Act* (1 *and* 2 *Will. IV. c.* 37), *secs.* 2 *and* 23—*Deduction from Wages for House Rent*. Section 2 of the Truck Act (1 and 2 Will. IV. cap. 37) prohibits any contract between an employer and an artificer, by which provision is made for the expenditure of wages due to the latter. Section 23 provides "that nothing herein contained shall extend, or be

construed to extend, to prevent any employer . . . from demising to any artificer, &c., the whole or any part of any tenement at any rent to be thereon reserved . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent: . . . Provided always, that such stoppage or deduction . . . shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer." A workman was employed by a coal company, and occupied a house belonging to them upon the conditions specified in certain regulations issued by the company, which provided, *inter alia*, that "all houses, gardens, &c., leased or granted to workmen by the said company are to be held as leased or granted only during the period of the workman's engagement under article 1. Immediately on the expiration of said engagement, the workman must remove from the subjects let to him, and leave the the same in good order. Failing removal, he will thereby become bound to pay as rent, for the subject occupied by him, the sum of one shilling for each day or part of a day he shall occupy the same after the expiration of his said engagement, without prejudice nevertheless to the said company ejecting the said workman from the said subjects. The said company shall be entitled to retain the wages due to the workman until the terms of this article are fulfilled, and shall also be entitled to deduct from said wages such sums as shall become payable by the said workman under under this article." Throughout his employment the workman signed pay-tickets, which, after acknowledging receipt of wages, contained the following words, namely, "and I hereby authorise you to deduct from my wages in future, so long as I am in your employment, the amount of my house rent." At the termination of his employment the workman did not remove from his house. His wages were retained until he removed, and ultimately a portion was deducted in part satisfaction of the debt which he had incurred by occupying the house after the term of removal. A complaint was brought against the manager of the company under the Truck Act, and the Sheriff-Substitute assoilzied. In an appeal upon a case stated—*held* that the written agreement contained in the pay-ticket did not authorise the deduction of rent from wages after the employment had ceased, and further, that the payment stipulated for by the regulations after the termination of the employment was of the nature of liquidate damages for breach of the contract of lease, and was not rent within the meaning of section 23 of the Truck Act. M'Farlane (P.-F. of Sheriff Court at Dunfermline) *v.* Birrell, p. 133.

Justiciary Cases—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. c.* 35), *secs.* 2, 5, *and* 8, *and Schedule A—Indictment—Relevancy—Omission of "Falsely and Fraudulently" from Indictment—Specification.* The Criminal Procedure (Scotland) Act 1887, sec. 5, enacts that "it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime." Sec. 8 enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' . . . or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant." J. S. was charged before the High Court of Justiciary on an indictment which bore, "the charge against you is that," time and place specified, "you did pretend to J. H. that you were the son of a farmer in Aberdeenshire, and possessed of a sum of money amounting to £1900 in the Grand Trunk Railway, and that you were about to receive payment of said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay, and had no intention of paying." Objection was taken to the relevancy, on the ground (1) that the acts charged were not alleged to have been done falsely and fraudulently, and (2) that the libel did not specify the advantage or benefit which the panel obtained by the use of the false and fraudulent pretences. The Court (Lord Young expressing no opinion) *held* that the qualifying allegations enumerated in section 8 of the Criminal Procedure Act are to be implied in all cases where without them the indictment would fail to set forth facts relevant and sufficient to constitute an indictable crime, and that the words "falsely and fraudulently" must be implied to qualify the word "pretend" in the indictment, and accordingly *repelled* the first objection, but *sustained* the second objection. Case of *Dingwall* v. *H. M. Advocate*, May 26, 1888, 15 R. (J.C.) 69, *overruled. Question* (*per* Lord Adam and Lord Kinnear)—Whether an indictment would be relevant which might be read to charge one or other of a variety of crimes according as one or other of the qualifying allegations set forth in section 8 of the statute were read into it? H. M. Advocate *v.* Swan, p. 192.

Justiciary Cases—Criminal Law Amendment Act 1885 (48 *and* 49 *Vict. c.* 69), *secs.* 9 *and* 20—*Rape—Evidence—Competency of Panel as Witness.* Section 9 of the Criminal Law Amendment Act provides that "if upon the trial of any indictment for rape . . . the jury shall be satisfied that the defendant is guilty of an offence under sections 3, 4, or 5 of this Act, but are not satisfied that the defendant is guilty of the felony charged in such indictment, . . . the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid." Section 20 provides that "every person charged with an offence under this Act, . . . and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing, at every stage of such charge, except an inquiry before a grand jury." A person charged with rape tendered himself as a witness at the trial. *Held* that section 9 does not entitle a jury to convict a person charged with rape of

any of the statutory offences enumerated therein unless the statutory offence is charged in the indictment, and that there being no such charge, the accused was not within the provisions of section 20. H. M. Advocate *v.* Henderson, p. 198.

Justiciary Cases—Hotel—Breach of Certificate—Sunday Traveller. A man who had arrived by steamer in the town where he lived between 12·30 a.m. and 2 a.m. on Sunday, and had gone home and slept at home, was supplied with liquor at a hotel in the town between 11 a.m. and 12 noon on the same day. He was unknown to the servant who supplied him, and stated that he had come by steamer, and was a *bona fide* traveller. The hour of the steamer's arrival was known to the servant, who made no further inquiry. The innkeeper was charged with breach of his certificate, and was acquitted by the magistrates. *Held*, on appeal, that the person served was not a *bona fide* traveller, that the servant was not justified in serving him, as he had failed to make due inquiry, and that the innkeeper was improperly acquitted. Galloway *v.* Weber, p. 218.

———*Act* 2 *and* 3 *Will. IV. c.* 68—*Day Trespass Act—Poaching by Person having Permission to Kill Rabbits—General Conviction. Held* that a person who had permission from his father, the tenant of a farm, to shoot rabbits, and who while upon the farm shot two grouse, was guilty of a trespass under the Day Trespass Act. *Held* that a charge under the Day Trespass Act of entering upon lands in "pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies," is not an alternative charge, and that a general conviction following upon it is good, even though the person convicted has a right to kill conies. Maxwell *v.* Marsland, p. 270.

———*Police—Glasgow Police Act* 1866 (29 *and* 30 *Vict. c.* 273), *secs.* 131 *and* 132—*Exclusion of Review except by Circuit Court—Suspension—Competency—Industrial Schools Act* 1866 (29 *and* 30 *Vict. c.* 118), *sec.* 15—*Order Pronounced without Intimation to Father of Child.* Sections 131 and 132 of the Glasgow Police Act 1866 provide for the exclusion of review of proceedings under the Act except by the next Circuit Court. A girl of ten years of age while with her mother in the City Clothes Market in Glasgow, was found to be in possession of articles missing from the stalls. The mother and child were taken to the police office. No charge was made against them. They were requested to appear at the police office on the following morning and allowed to go home. Two police officers called at the woman's house the same afternoon, and again told the woman and her daughter to be at the police office on the following morning. On obeying this order they were placed at the bar, and a charge of theft of the articles found on the daughter having been read over to them they were asked to plead. They pleaded not guilty, and evidence having been led, the mother was convicted and sentenced to imprisonment, and the daughter was ordered to be sent to an industrial school. No intimation was given to the husband that his wife and daughter were to be charged with theft, or that the latter was to be sent to an industrial school, and he was not present when the sentence and order were pronounced. In a suspension objection was taken to the competency on the ground that the jurisdiction of the High Court was excluded by sections 131 and 132 of the Glasgow Police Act 1866. *Held* (*diss.* Lord Adam) that the proceedings on which the conviction of the mother followed, being contrary to the recognised principles of criminal procedure, were *funditus* null, and that the High Court accordingly had jurisdiction to entertain the suspension. *Held* that the order complained of having been pronounced under the Industrial Schools Act 1866, the review clauses of the Glasgow Police Act did not apply; that the High Court had jurisdiction to entertain the suspension; and that the order having been pronounced without intimation to the father, and in his absence, could not be sustained. M'Kenzies *v.* M'Phee and Another, p. 272.

Justiciary Cases—Salmon Fisheries (*Scotland*) *Act* 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 22—"*Place for Exportation.*" *Held* that an inland railway station is not a "wharf, quay, or other place for exportation" within the meaning of section 22 of the Salmon Fisheries (Scotland) Act 1868. Adams *v.* Cadenhead, p. 281.

———*Act* 19 *Geo. IV. cap.* 29, *sec.* 1—*Criminal Procedure* (*Scotland*) *Act* 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 46 *and* 48—*Appeal to Glasgow Winter Circuit Court—Competency.* The Act 9 Geo. IV. cap. 29, sec. 1, provides for the holding of a Winter Circuit Court at Glasgow, to "be continued from day to day until the whole criminal business to be brought before the Court at that time is concluded, and no longer." The Criminal Procedure (Scotland) Act 1887, sec. 46, empowers the Lords Commissioners of Justiciary to "hold such sittings for the trial of criminal causes as may be necessary, . . . and every sitting of the Lords Commissioners . . . shall be a sitting of the High Court of Justiciary." *Held* that the Act 9 Geo. IV. cap. 29, has not been abrogated or superseded by the provisions of the Criminal Procedure (Scotland) Act 1887 with reference to the holding of Circuit Courts, and that the Glasgow Winter Circuit Court is held by virtue of it and subject to its provisions; and (following *Davidson* v. *Gray*, 2 Brown 13) that it is incompetent to appeal any case, even though criminal, to that Court. M'Kenzies *v.* M'Phee, p. 283.

———*Ship—Destroying a Ship with Intent to Defraud Insurers—Indictment—Relevancy—Criminal Procedure* (*Scotland*) *Act* 1887 (50 *and* 51 *Vict. c.* 35), *secs.* 8 *and* 60. The master and mate of a vessel were charged on an indictment which set forth that certain insurances having been effected on the vessel, and being then in force, they did bore one or more holes in the vessel, and did attempt to force out her bow-ports in order that she might sink, and did spread oil over her in order that she might be set on fire, and "did thus attempt to sink and destroy the said barque with intent to defraud the insurers liable under said insurances." Objection was taken to the relevancy on the ground that the indictment failed to set forth in the *modus* any facts relevant to infer fraudulent intent.

Held that the words "you well knowing that the ship had been so insured," were to be implied by virtue of section 8 of the Criminal Procedure (Scotland) Act 1887, and that the indictment was relevant. *Opinion* that in the event of fraudulent intent not being proved it would be competent for the jury to convict the accused of an attempt to sink the ship maliciously, the word "maliciously" being in that event read in to qualify the acts charged, and a conviction of a part of what is charged in an indictment, if in itself an indictable crime, being competent by sec. 60 of the Criminal Procedure (Scotland) Act 1887. H. M. Advocate *v.* Le Bourdais, p. 285.

Justiciary Cases — Proof — Witnesses — Particeps Criminis — Incest. J. A. was indicted and charged with having committed the crime of incest with his daughter. She having been called as a witness for the Crown, her evidence was objected to on the ground that being of age she was liable to be charged with the crime, and on the authority of *H. M. Advocate* v. *A. E.*, Dec. 5, 1887, 15 R. (J.C.) 32, could not be examined except as Queen's evidence. The objection was *repelled*. H. M. Advocate *v.* J. A., p. 370.

———*The Vaccination (Scotland) Act* 1863 (25 *and* 26 *Vict. cap.* 108), *sec.* 18—*Refusal to allow Vaccination—Previous Conviction—Competency.* In a prosecution by a Parochial Board for failure to vaccinate a child in compliance with an order issued under the Vaccination Act 1863, sec. 18—*held* that it was no defence that the accused had been previously convicted of a similar offence with regard to the same child. Skene *v.* Falconer, p. 408.

———*Sentence—Alteration in Executorial Part—Ambiguity—Sea Fisheries Act* 1883 (46 *and* 47 *Vict. cap.* 22), *sec.* 20, *sub-sec.* 2—*Sea Fisheries (Scotland) Amendment Act* 1885 (48 *and* 49 *Vict. cap.* 70), *sec.* 4. A sentence convicting an accused person of a contravention of the bye-laws passed by the Fishery Board for Scotland, in respect he had used a beam-trawl for sea fish within prohibited limits, and adjudging him to pay a fine of £20, and in default of payment to suffer thirty days' imprisonment, was pronounced verbally by a Sheriff, and thereafter read out by the Sheriff-clerk from a draft prepared by him during the trial, the written form ending with these words, "without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction." Subsequently on the same day the form of the sentence was altered by the Sheriff to the effect (1) that eight days were allowed to the accused in which to pay his fine, and (2) that warrant was granted for recovery of the fine by poinding and sale of the boat, &c., to which the accused belonged in terms of the Sea Fisheries Act 1883, sec. 20, sub-sec. 2, the return or execution of the poinding to be lodged within twenty days "from the expiration of the period herein allowed for payment under certification of imprisonment for the period of thirty days as before written in default of payment or recovery of the said sum of £20 of fine before the time allowed for such report." The sentence in its final form was read over in Court in presence of the prosecutor and the accused, and signed by the Sheriff. In a suspension it was objected (1) that the sentence was ambiguous, in respect it contained two different dates on which imprisonment was authorised to follow default of payment of the fine; and (2) that the sentence was void, in respect it was not the sentence pronounced by the Court in the presence of parties. *Held* (1) that the sentence was in conformity with the statutory provisions under which it was pronounced, and (2) that the sentence had not been altered after it was pronounced, but only completed as regards executorial matter, and suspension *refused*. Mackenzie *v.* Allan, p. 413.

Justiciary Cases—Salmon Fisheries Act 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 21—*Annual Close-Time.* The Salmon Fisheries (Scotland) Act 1868, sec. 21, provides—"Any person who shall . . . have in his possession any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close-time which is in force at the time for any district shall be liable to a penalty." . . . *Held* that the words "annual close-time" mean the time during which net fishing is illegal. Therefore, that a complaint was relevant which charged the accused with having salmon in his possession during close-time although at the date libelled rod-and-line fishing was open in another district. Chalmers *v.* Bain and Irvine, p. 415.

———*Edinburgh Municipal and Police Act* 1879 (42 *and* 43 *Vict. cap.* 132), *secs.* 261 *and* 333—*Citation out of Jurisdiction—Unsound Meat—"Possession as or for Human Food."* *Held* that by virtue of section 333 of the Edinburgh Municipal and Police Act 1879, the warrant of the Judge of Police is sufficient within Scotland for citing or apprehending any person charged with committing an offence which may be tried by him, or for citing witnesses for the trial of such an offence, if such warrant be endorsed by the Sheriff of the county of Edinburgh or Midlothian, or any of his Substitutes. A farmer in Perthshire despatched a carcase for sale in the ordinary course of business on 29th March 1888, addressed to the Dead Meat Company, Fountainbridge, Edinburgh. The carcase had been dressed in his presence "as or for human food" by the butcher who slaughtered it. It arrived in the market on the following day. In consequence of its appearance the manager of the market had it examined, and it was condemned as unfit for human food. The farmer was charged before the Police Court of Edinburgh under sec. 261 of the Edinburgh Municipal and Police Act 1879, with having the carcase in his possession in Edinburgh as or for human food, the same being unsound, and was convicted. *Held*, upon an appeal, that facts had not been proved sufficient to infer that the accused had the carcase in his possession in Edinburgh as or for human food, and conviction *quashed*. Cairns *v.* Linton, p. 417.

———*Sentence—Suspension—Sentence Proceeding upon Bad Previous Conviction.* A boy of nine years of age was charged with the crime of theft aggravated by two previous convictions. He pleaded guilty, and was convicted and sen-

tenced. One of the previous convictions charged against him had been obtained when he was five years of age. In a suspension, *held* that this previous conviction was bad, and ought not to have been under the consideration of the Judge in giving sentence, and the sentence *quashed* accordingly. Grant *v.* Allan, p. 543.

Justiciary Cases—Rape—Bail. In an appeal by a procurator-fiscal against the decision of a Sheriff-Substitute admitting to bail a person accused of rape, it was stated on behalf of the Lord Advocate that the case was an ordinary case of rape, and that his investigations disclosed no facts tending to show that it ought to be dealt with as exceptional. *Held* that persons accused of rape ought not to be admitted to bail unless under very exceptional circumstances, and that the Court ought to refuse bail upon the objection of the Lord Advocate, supported by his statement, upon his responsibility, that the case was not exceptional. Wilson *v.* M'Guire, p. 622.

———*Public-Houses (Scotland) Acts Amendment Act* 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 17—*Complaint—Deviation from Statutory Form—Certificate "in that behalf."* Section 17 of the Public-Houses (Scotland) Acts Amendment Act 1862 provides that "Every person trafficking in any spirits or other excisable liquors in any place or premises without having obtained a certificate in that behalf in terms of this Act, shall be guilty of an offence." A person was charged with trafficking in liquors "without having a certificate authorising and empowering him to keep premises for the sale of excisable liquors therein," and was convicted. In a suspension it appeared that the accused held no certificate for the premises, but that there was a subsisting certificate in the hands of a person who prior to the date of the conviction had granted a trust-deed for behoof of his creditors. It was alleged by the complainer that he had been entrusted by this person with the management of the premises, and was so managing for him when convicted. *Held* that as the charge contained in the complaint was in effect that of trafficking without having obtained a personal certificate, and that it had not been open to the accused to plead his employer's certificate, there had been a deviation from the statutory forms which had prevented substantial justice from being done, and the conviction *suspended*. Wylie *v.* Thom, p. 622.

———*Breach of the Peace—"To the Alarm of the Lieges."* Under a complaint for breach of the peace it was proved that the accused, in his house, which was situated in a street, had, about three a.m., used loud language, accompanied by oaths and imprecations, which could be heard in the street at a considerable distance, and he was convicted. In an appeal against the conviction, *held* that the acts proved were such as were calculated to cause alarm to the lieges, and conviction *sustained*. Ferguson *v.* Carnochan (P.-F. of the Burgh Court of Stranraer), p. 624.

———*Public-house—Public-Houses Acts Amendment (Scotland) Act* 1862 (25 *and* 26 *Vict. c.* 35), *Schedule A, No.* 2—*Breach of Certificate—"Unlawful Games"—Dominoes Played for a Stake.* The "form of certificate for public-houses" in Schedule A, No. 2, of the Public-Houses Acts Amendment (Scotland) Act 1862 contains the proviso that the person to whom the certificate is granted "do not suffer or permit any unlawful games" within his premises. A publican was charged with having permitted a number of persons "to play at dominoes for a stake—an unlawful game"—within his premises, and was convicted. In an appeal—*held* that dominoes is not an unlawful game, and that the expression "unlawful games" does not apply to a lawful game played for a stake, and conviction *quashed*. Hoggan *v.* Wood, p. 684.

Justiciary Cases—Summary Jurisdiction (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 33), *secs.* 3 *and* 6, *sub-sec.* (*b*)—*Prosecution in Forms Prescribed by Local Police Act—Application of Summary Jurisdiction Acts—Excessive Penalty.* The Summary Jurisdiction Act 1881 provides, section 3—"The provisions of the Summary Jurisdiction (Scotland) Acts 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3rd section of the Summary Procedure Act 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily . . . provided that where there is a general or local police Act in force, it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms provided by the Summary Jurisdiction Acts." By sec. 6, sub-sec. (*b*) of the same Act it is enacted that in proceedings under the Summary Jurisdiction Acts where the fine does not exceed £20, the alternative imprisonment shall not exceed two months. A prosecution for shebeening was brought in Dundee in the form prescribed by the Dundee Police and Improvement Consolidation Act 1882 (45 and 46 Vict. cap. 185), and the accused was convicted and sentenced by the Magistrates to pay a fine of £15, or suffer three months' imprisonment, the punishment enacted for the offence by the Public-Houses Acts Amendment (Scotland) Act 1862, sec. 17. In a suspension—*held* that the provisions of the Summary Jurisdiction Act applied to the prosecution, and that the period of imprisonment in the sentence was therefore illegal, and sentence *suspended*. Gray *v.* Dewar, p. 685.

Knowledge. See *Condictio indebiti.*
Known Danger. See *Reparation.*
Known Risk. See *Reparation.*

Land forming Part of Undertaking. See *Valuation Roll.*

Landlord and Tenant—Lease—Tacit Relocation—Rei interventus—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. c.* 62), *sec.* 28. Previous to the term of Martinmas 1884 the tenant of certain farms under a lease which expired at Whitsunday following, arranged verbally with his landlord the terms of a new lease at a reduced rent. The landlord handed to the tenant a letter to his factor of 1st December 1884, directing the latter to prepare a formal lease embodying the terms of the new arrangement. The landlord executed a trust-deed for behoof of his creditors, and no

formal lease was executed. The tenant continued in possession of the farms, but paid no rent after Whitsunday 1885. *Held* that an action at the instance of the trustee for the rent payable under the old lease as having been continued by tacit relocation fell to be dismissed, in respect that since Whitsunday 1885 the tenant had not possessed by tacit relocation, but under the new arrangement. *Observations* on the question whether a tenant abstaining from giving a notice to leave his holding required by the Agricultural Holdings (Scotland) Act 1883, and continuing to possess, could be held to validate *rei interventu* an uncompleted arrangement for a new lease at a different rent. Tod (Sutherland's Trustee) *v.* Geddes (Miller's Trustee), p. 6.

Landlord and Tenant—Condition in Landlord's Favour—Tenant not to Sell or Retail Spirits upon the Premises without Consent—Revocation of Consent. A building lease contained a clause prohibiting the tenant, *inter alia*, from selling or retailing "spirits upon the premises without the express consent of the proprietor, or his factor for the time being," the proprietor, "or the factor for the time, being the sole judges of all such matters." The tenant erected buildings and carried on business as a general merchant. Thereafter, with the factor's consent, he obtained a grocer's licence to sell malt liquors on the premises. For the purposes of his whisky trade he erected at the end of his house a store-shed of the value of about £50, and he was allowed, without opposition on the part of the landlord, to obtain for seven years a renewal of his licence. In consequence of irregularities in the conduct of the spirit business the landlord sought to put in force the prohibition in the lease. *Held* that the consent which had been given was limited in its nature; that nothing had followed thereon which gave to that consent a permanent character; that it was revocable on cause shown; and that the evidence showed sufficient justification of its withdrawal. *Opinion* (*per* the Lord President and Lord Lee) that the consent could not have been withdrawn capriciously, or from enmity, or within the year in which it was granted. *Opinion* (*per* Lord Adam) that as, by the terms of his lease, the landlord, or his factor, was the sole judge, it was not essential, in withdrawing a consent, to assign a reason therefor. Lord Macdonald *v.* Campbell, p. 397.

Landlord's Discretion as to Place. See *Crofter.*

Landlord's Liability for Defective Drainage. See *Reparation.*

Lands Directed to be Entailed. See *Entail.*

Law-Agent. See *Trust.*

Lead Poisoning. See *Reparation.*

Lease—Defective Possession—Retention of Rent—Abatement—Liquid and Illiquid. In an action for payment of rent it is a relevant answer to support a claim for abatement that the tenant has never got entire possession of the subjects let. In an action by a landlord to recover arrears of rent from two of his tenants, the latter answered that they were entitled to an abatement, averring, *inter alia*, that certain farm buildings had not been handed over to them in a tenantable condition as required by the lease. *Held* (following the case of *Muir* v. *M'Intyres*, February 4, 1887, 14 R. 470) that the averments of the tenant were relevant to support a claim for abatement. Munro *v.* M'Geoghs, p. 60.

Lease—The Registration of Long Leases (Scotland) Act 1857 (20 *and* 21 *Vict. c.* 26), *secs.* 4, 5, *and* 16—*Assignation in Security—Completion of Title.* The Registration of Long Leases (Scotland) Act 1857, which provides for the registration of leases of thiry-one years and upwards in the Register of Sasines, provides by section 4 that "it shall be lawful for the party in right of any such lease recorded as aforesaid, and whose right thereto is recorded in terms of this Act," to assign it in security for debt, and that the recording of such assignation should complete the right. Section 5 provides that "where the party in right of any such lease or assignation in security as aforesaid is not the original lessee in such lease, or the orginal assignee in such assignation in security, he shall, before presenting such lease or assignation in security for registration, expede" a notarial instrument, which shall be recorded along with the lease or assignation. Section 16 provides that the registration of leases, assignations, assignations in security, and notarial instruments shall complete the right under the same respectively, to the effect of establishing a preference in virtue thereof as effectually as if the granter or party in his right had entered into actual possession of the subjects. A person in right of a long lease, but not the original lessee, assigned the same in security. Thereafter the assignee in security expede a notarial instrument in the form provided by section 5, proceeding upon the documents by which the granter of the assignation had obtained right to the lease, and upon the assignation in security, and recorded the notarial instrument and the lease. The granter of the assignation in security thereafter assigned the lease to another person. In a suspension brought by the assignee, who alleged a properly recorded right and possession, against a threatened sale of the lease by the assignee in security, *held* that the latter not being a person "in right" of a lease could not avail himself of section 5, and that his title was not validly completed under the statute. Russell *v.* Campbell, p. 209.

———*Abatement—Liquid and Illiquid.* A farm was let from year to year under a lease terminable by written notice six months before the term of Whitsunday, and the proprietrix undertook to put the existing buildings into complete repair. She spent a considerable sum on repairs on the entry of the tenants, who continued in occupation for five years, when the lease was terminated. In the third year they asked the proprietrix to put up certain new buildings, but their request was refused. They paid the rent for four and a-half years without reservation of any claim against the proprietrix. In an action by the proprietrix to recover the last half-year's rent it was pleaded that the tenants were entitled to an abatement, in respect of loss sustained by them during their occupancy from the pursuer's failure to put the buildings into complete repair. *Held* that the demand of the defenders was not justified by terms of the lease; and that, in any view, a claim of damages for the whole period of occu-

(when not expressly included) "mines of coal, ironstone, slate, or other minerals under any land purchased," did not apply to a seam of clay forming the sub-soil of the lands conveyed. The Lord Chancellor holding that the word "minerals" fell to be construed in accordance with the ordinary use of the word in dealing with proprietary rights in Scotland, and did not include clay. Lord Watson holding that the "land purchased" included the soil and sub-soil, and that the exceptional depth of the sub-soil (even if mineral) was no reason for bringing it within the category of expected minerals. Lord Macnaghten holding that the exception was limited to mines in the proper and usual sense of underground workings, and to minerals in such mines. Lord Herschell was of opinion that the word "mines" was not limited to underground workings or to minerals that could be won only by such operations, and that the word "minerals," as used in the exception, must be taken to mean all such non-vegetable substances lying together in seams or strata as are commonly worked for profit, and to include clay. Magistrates of Glasgow *v.* Farie, p. 229.

Minister of Parish. See *Reparation.*
Minister's Stipend. See *Bankruptcy.*
Misrepresentation. See *Company.*
Mortgage. See *Succession.*
Mortgagees' Rights. See *Ship.*
Motion to Vary Issue. See *Process.*
Multipleponding. See *Process.*
Munus Publicum. See *Church.*
Mutual Wall. See *Property.*

Nearest of Kin. See *Succession.*
Negative Prescription. See *Superior and Vassal.*
Negligence. See *Reparation.*
Negligence during Navigation. See *Ship.*
New Certificate. See *Public-House.*
New Firm. See *Cautionary Obligation.*
Newspaper Report of Judicial Proceedings. See *Slander.*
New Tenant. See *Right in Security.*
New Trial. See *Reparation.*
New Trustee, Appointment of. See *Bankruptcy.*
Nobile Officium—Guardian and Pupil—Authority to Grant Bonds and Dispositions in Security over Ward's Estate. A pupil proprietor of a fee-simple estate succeeded thereto under burden of certain provisions for the younger children of the disponer, payable one year after the death of the latter, and bearing interest at 5 per cent. The interest amounted to £689, 10s. 11d. per annum. The tutors and curators of the pupil presented a petition to the Court for authority to raise by bonds and dispositions in security over his estate a sum sufficient to pay off these provisions. It appeared that the interest on such a loan would amount to £482, 13s. 8d. per annum, and the annual saving to the ward would therefore be £206, 17s. 3d. for the period of eight years. The Court *granted* the prayer of the petition. Grant and Others, Petitioners, p. 269.
———See *Bankruptcy—Judicial Factor—Process.*
Nomination of Guardian by the Mother. See *Parent and Child.*
Non-Entry. See *Superior and Vassal.*
Notour Bankruptcy. See *Process—Bankruptcy.*
Nuisance. See *Burgh.*

Oath of Verity. See *Bankruptcy.*
Obligation ad factum præstandum. See *Succession.*
Obligation on Vassal, his Heirs, Executors, and Successors whomsoever. See *Superior and Vassal.*
Obligation to Re-build. See *Entail.*
Obligation to Relieve from Public Burdens. See *Superior and Vassal.*
Occupation by Tolerance. See *Election Law.*
Offer and Acceptance. See *Sale.*
Omission of "Falsely and Fraudulently" from Indictment. See *Justiciary Cases.*
Omission to Lodge Prints in Time. See *Process.*
Onus. See *Horse—Foreign—Bill.*
Order of Commissioners. See *Crofter.*
Order Pronounced without Intimation to Father of Child. See *Justiciary Cases.*
Out and Home Voyage. See *Ship.*

Parent and Child — Bastard — Nomination of Guardian by the Mother—Competency—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. c.* 27), *secs.* 2 *and* 3. Although the mother of a pupil bastard has no power to appoint by will a guardian to him, the Court gave effect to her wishes where she had by will made such an appointment, being satisfied that the nominee was in a position to attend to the child's welfare. The mother of a bastard who had been placed by her under the care of charitable persons of the Protestant faith, having become a Roman Catholic, made a will appointing a person of the latter faith her executor and the tutor of the bastard, and expressing a desire that the latter should be brought up a Roman Catholic. The Court being satisfied with the scheme proposed by the executor for the custody and education of the bastard, gave him the custody thereof, notwithstanding the opposition of those in whose care the child had been placed by the mother. Brand, Petitioner, p. 199.
———*Petition for Custody of Child—Competency—Guardianship of Infants Act* 1886 (49 *and* 50 *Vict. c.* 27), *secs.* 2 *and* 3. In an undefended action of separation and aliment by a wife the Lord Ordinary found that the defender had been guilty of grossly abusing and maltreating the pursuer, and decerned for the defender, finding her entitled to the custody of the youngest child of the marriage, who was about four years old. Two months and a-half after this decree had been pronounced the husband presented a petition to the First Division craving the custody of his youngest child. The Court *held* that the petition was competent, but in the circumstances *refused* to grant the prayer. Beedie *v.* Beedie, p. 443.
———*Custody — Child placed Voluntarily in Charitable Institution.* In 1882 a father voluntarily placed his three children, aged respectively four years, two years, and a few months, in the hands of the founder and superintendent of a charitable institution for children, who, after keeping them in one of the homes of the institution for a period of four years, removed them in 1886, without the consent of their father, to a property

belonging to her in Nova Scotia. In 1884 directors were appointed, but they did not assume the management of the institution until 1887, when the superintendent resigned. In consequence of threatened legal proceedings, the superintendent, on the advice of the directors, brought back the children in the end of 1886, but the directors allowed her to conceal them from their parents, and from the directors themselves. After her resignation in 1887 the superintendent again removed the children abroad. In a petition by the father for an order on the directors to deliver his children to him—*held* that though the superintendent was originally alone responsible for their custody, yet the respondents by becoming directors incurred the obligation of re-delivering the children to their father, and as through their negligence the children had been removed outwith the jurisdiction of the Court, the prayer of the petition was *granted*. Delaney *v.* Colston and Others, p. 576.

Parent and Child—Legitim—Time of Valuation to Ascertain Legitim—Discretion to Trustees. A truster directed his trustees immediately after his death, or as soon thereafter as they should deem it expedient, to realise his whole estate, which included certain ship shares, and to invest the proceeds for the purposes of the trust. Six months after the truster's death the trustees announced their resolution to retain the estate for the behoof of the beneficiaries. The son of the truster sued the trustees for legitim. *Held* (1) that the trustees were not bound to realise the estate in order to ascertain its value, and (2) (*rev.* Lord Fraser) that as legitim was a claim of debt against the estate as at the father's death, the pursuer was not entitled to a proof that the market value of the shares had risen since that date. Lord Shand *diss.* on the ground that in so far as the shares had risen in value between the date of the father's death and the resolution of the trustees to retain the property, the additional value should be taken into account in fixing the amount of the pursuer's claim. Gilchrist *v.* Young Pentland and Another (Gilchrist's Trustees), p. 639.

——See *Reparation.*

Parish Minister. See *Right in Security.*

Particeps Criminis. See *Justiciary Cases.*

Partnership—Goodwill—Right to Use Firm's Name. James Smith and Joseph M'Bride carried on business under the firm name of "Smith & M'Bride." The partnership was dissolved in 1884, James Smith buying the goodwill of the business, which he continued to carry on under his own name of James Smith, but without having renounced his sole right to the firm's name of "Smith & M'Bride." In 1885 Joseph M'Bride, along with William Smith, brother of James Smith, and D. M'Kelvie, set up a similar business in the same town under the firm of "M'Bride, Smith, & M'Kelvie." In 1887 M'Kelvie retired, and Joseph M'Bride and William Smith continued the business, but designated their firm as "Smith & M'Bride," which was the name of the original partnership between Joseph M'Bride and James Smith. *Held* that the latter was entitled to interdict Joseph M'Bride and William Smith from using the firm name of "Smith & M'Bride." Smith & M'Bride *v.* Smith, p. 22.

Partnership—Liability of New Firm for Debts of Old. A firm and the two individual partners thereof, in security of a loan, granted a bond and disposition over heritable property belonging to the firm. Three years later they assumed another partner under a new contract of copartnery, under which the old firm was to be wound up, and the new firm did not take over the heritable property or any liabilities of the old, and only took over the stock at a valuation. Five years thereafter the estates of the firm and of the three individual partners were sequestrated, and the disponee under the bond and disposition in security lodged a claim for the sum therein contained, alleging that the new firm was a mere continuation of the old. *Held*, on a proof, that the title and the right to the heritable property over which the bond had been granted remained with the old firm; that the stipulations of the contract had been observed in the actings of the parties; that the debt under the bond had not been adopted by the new firm; and that the claim accordingly fell to be *rejected*. Jenkins (Macdougall & Company's Trustee) *v.* Stephen (Stephen's Trustee), p. 594.

Payment. See *Agreement.*

Payment in Error. See *Entail.*

Period of Distribution. See *Succession.*

Period of Payment. See *Succession.*

Perjury. See *Proof.*

Permitting Animals to be Moved without Declaration under Local Authority Regulations. See *Justiciary Cases.*

Personal Bar. See *Right in Security.*

Personal Bond for Price of Property Unconveyed. See *Bankruptcy.*

Personal Injury. See *Reparation.*

Personal Obligation in Feu-Contract. See *Superior and Vassal.*

Personal Obligation of Granter. See *Bill of Exchange.*

Personal or Real. See *Right in Security.*

Persons Benefited. See *Testament.*

Petition for Custody of Child. See *Parent and Child.*

Petition for Investment of Sum Awarded to Heir of Entail. See *Process.*

Petition for Leave to Appeal in forma pauperis. See *Appeal to House of Lords.*

Petition for Leave to Appeal to the House of Lords. See *Process.*

Petition for Supervision Order and for Appointment of Additional Liquidator. See *Public Company.*

"Place for Expertation." See *Justiciary Cases.*

Plan. See *Property.*

Poaching by Person having Permission to Kill Rabbits. See *Justiciary Cases.*

Poinding. See *Bankruptcy.*

Police—Street—Footway—Maintenance—Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *sec.* 149—*Casus Improvisus.* Section 149 of the Police and Improvement (Scotland) Act 1862 enacts—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their property respectively on the sides

of such street to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct, and shall thereafter, from time to time, as occasion may require, repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground or pertinent of a house." *Held* (Lord Rutherfurd Clark *diss.*) that the owner of lands abutting on any street for the continuous length of more than 100 yards was liable for one-third of the cost of upholding the footways before such lands, and no further, so long as the lands remained unfeued and unbuilt upon. Sturrock *v.* Duke of Buccleuch, p. 435.

Police. See *Justiciary Cases.*

Policy. See *Insurance.*

Policy of Insurance—Construction—Liability Defined by Notice on Policy—Ambiguity to be Interpreted "contra preferentem." A man effected a policy of insurance with an accident company, which provided that "if the insured shall sustain any bodily injury . . . which shall occasion permanent partial disablement (as defined on the back hereof) then the company shall be liable to pay to him the sum of £200." On the back of the policy there was the following:—"Notice— . . . Permanent partial disablement implied the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight." *Held* that the notice was ambiguous in its terms, and must be read in the most favourable way for the insured, and that consequently he was entitled to recover the sum of £200 for permanent partial disablement from hernia if he had otherwise complied with the conditions of the policy. Scott *v.* Scottish Accident Insurance Company (Limited), p. 475.

Poor—Settlement—Residential Settlement—Continuity of Residence. A workman came to reside in the parish of South Leith at Whitsunday 1879. On 9th April 1884 he left his wife and family in a house which he had taken there, and entered on a business engagement in Cupar, where he lived in lodgings. His wife and family remained in the same house in South Leith until 26th May 1884, when he removed them to a house which he had taken for a year in Cupar, and in which he lived with them until the month of October following. Between 9th April and 26th May he had visited his wife and children nearly every Saturday, and had remained with them until the following Monday morning. *Held* that a residential settlement had not been acquired in the parish of South Leith by himself and his family. Greig (Inspector of Poor of City Parish, Edinburgh) *v.* Simpson (Inspector of Poor of South Leith), p. 19.

Poor—Poor's Roll—Appeal from Sheriff Court, and Reporters divided in Opinion. A pursuer in a Sheriff Court action for damages for personal injury appealed to the Court of Session against the judgment of a Sheriff, affirming the judgment of his Substitute, and assoilzieing the defenders. The pursuer applied for the benefit of the poor's roll, and the reporters on the *probabilis causa* were equally divided in opinion. The Court (following the case of *Carr, &c.* v. *North British Railway Company*, November 1, 1885, 13 R. 113) *refused* the application. Watson *v.* Callendar Coal Company, p. 61.

Poor Law—Classification—Poor Law Acts, 8 *and* 9 *Vict. cap.* 83, *secs.* 34 *and* 36; 24 *and* 25 *Vict. cap.* 37, *sec.* 1. By the 36th section of the Act 8 and 9 Vict. cap. 83, it is enacted that where a certain mode of assessment is adopted "it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rates of assessment upon the tenants or occupants of each class respectively as to such boards may seem just and equitable." A parochial board having adopted the mode of assessment referred to, directed, with the concurrence of the Board of Supervision, the lands and heritages in the parish to be distinguished into separate classes, for which they fixed different rates of assessment. Subsequently the parochial board resolved to discontinue the classification, and to rate all classes of property alike, and to this resolution they adhered notwithstanding the disapproval of the Board of Supervision. In a special case presented for the parochial board and certain ratepayers who objected to the new assessment, *held* that the assessment imposed in terms of the resolution of the parochial board was legal and could be enforced. Parochial Board of Fordoun *v.* Trefusis and Another, p. 431.

Poor's Roll. See *Poor.*

Possession—Sale—Suspensive Condition—Hiring Agreement—Reputed Ownership. A customer obtained a harmonium from a firm of music-sellers under a contract whereby she undertook "to pay to them a deposit of 30s. on delivery of the harmonium, and a further sum of £1 every four weeks thereafter as hire, until the full price shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever." It was further stipulated that until the full sum was paid "the hirer should have no property in the goods otherwise than as a hirer." The sum stipulated was deposited on delivery, and one instalment of 20s. was paid; thereafter the customer left the country, and on her instructions her furniture, including the harmonium, was sold by public roup. In an action by the music-sellers against the purchaser of the harmonium, *held* that the pursuers were entitled to delivery thereof, on the ground that the transaction between them and their customer was a sale

under a suspensive condition, and that as she had not paid the full price, no right of property had passed to her, and therefore she was not in a position to give a good title to the defender. Murdoch & Company (Limited) *v.* Greig, p. 323.

"*Possession as or for Human Food.*" See *Justiciary Cases.*

Power of Appointment. See *Succession.*

Power of Division, Exercise of. See *Succession.*

Power of Mission Committee to Dismiss Missionary. See *Church.*

Power of Sale. See *Succession.*

Powers of Trustee. See *Trust for behoof of Creditors.*

Powers of Trustees under Trust-Deed. See *Trust.*

Prescription—Triennial Prescription—Continuous Account. A joiner sued the executrix of a person deceased for payment of an account extending over many years, and which *ex facie* was capable of division into three parts—(1) a portion for jobbing work; (2) a portion said to have been incurred for work and materials supplied in a building contract; (3) a portion consisting of a few small items for jobbing during the last seven years of the deceased's life. The whole was charged as a continuous account. *Held*, in a question whether it or part of it was prescribed, that it must all be treated as a continuous account, and that the executrix was not entitled to treat the first and second portions as running a separate period of prescription. Ross *v.* Cowie, p. 131.

Presentment. See *Bill of Exchange.*

Presumption. See *Bankruptcy.*

Previous Conviction. See *Justiciary Cases.*

Principal and Agent—Trust for Creditors—Right in Security. A trader conveyed his whole estates, including his business, to a trustee for behoof of his creditors. In terms of the trust, the trader continued to conduct the business as manager for the trustee, and ordered the necessary supplies, which were paid for by the trustee. A merchant who in knowledge of the trust arrangement had supplied goods, raised an action against the trustee, as principal of the trader, for the price thereof. *Held* (*rev.* Lord Trayner) that the trustee was liable for payment of these goods because they had been ordered by his manager. Ford & Sons *v.* Stephenson, p. 13.

——See *Contract.*

Prior Debt. See *Bankruptcy.*

Private Railway. See *Reparation.*

Privilege. See *Reparation.*

Privileged Statement. See *Reparation,*

Probable Cause. See *Reparation.*

Pro Indiviso Property. See *Right in Security.*

Process—Multiplepoinding—Claims—Expenses. In a multiplepoinding raised by trustees to determine the right to a certain portion of a truster's estate the question in the competition was argued between the heir-at-law of the truster and one of four next-of-kin. As a result the latter secured a judgment that the fund was in great part moveable, but was found liable in certain expenses to the heir-at-law in respect of failure in certain contentions. The respective rights of the heir-at-law and the next-of-kin having been thus determined, the three other next-of-kin lodged claims. *Held* that they could only be allowed to participate in the fund on condition of bearing equally with the next-of-kin who had litigated the question all the expenses incurred by him, including those in which he had been found liable to the heir-at-law, as the contentions in which he had failed were not of a reckless character. Cowan's Trustees *v.* Cowan, p. 9.

Process—Reclaiming-Note—Competency—Boxing in Vacation after Expiry of Reclaiming Days—Personal Diligence (Scotland) Act 1838 (1 *and* 2 *Vict. c.* 114), *sec.* 20. By the 20th section of the Personal Diligence (Scotland) Act ten days are allowed for reclaiming against interlocutors of a Lord Ordinary loosing arrestments. An interlocutor loosing arrestments was pronounced on the last Wednesday of the summer session. The reclaiming days consequently expired on a Saturday in vacation, on which day the office was closed. The reclaiming-note was lodged on the following Tuesday, the first day after expiry of the reclaiming days on which the office was open. *Held* that the reclaiming-note was lodged in time. Henderson *v.* Henderson, p. 11.

——*Multiplepoinding—Competency.* A creditor of a deceased person raised an action against his executrix, for payment of an alleged debt exceeding in amount the apparent estate, which was otherwise sufficient to pay all claims of creditors in full. Another creditor thereupon brought an action of multiplepoinding with the assent of the executrix, and in her name, against the creditors as defenders. *Held* that the action of multiplepoinding was competent. Jamieson and Another *v.* Robertson and Another, p. 12.

——*Expenses—Caution — Insolvent Defender.* In an action of accounting by a beneficiary under a trust against a trustee, it transpired that the defender had executed a trust-deed for behoof of his creditors. Intimation of the action was made to the defender's trustee, who declined to sist himself. *Held* (*rev.* Lord Fraser) that the defender was entitled to litigate the question without finding caution for expenses. Lawrie *v.* Pearson, p. 37.

——*Sheriff—Failure to Lodge Defences—Prorogation—Discretion of Sheriff—Sheriff Court Act* 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 6—*Sheriff Court Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 48. The statute of 1853, sec. 6, provides—"When any condescendence or defences . . . or other paper shall not be given in within the periods prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just." . . . In an action in the Sheriff Court the Sheriff-Substitute deserted against the defender in respect his defences were not timeously lodged. On appeal the Sheriff, after hearing parties, recalled this interlocutor, and allowed the defences to be received on payment of ten shillings of expenses. In an appeal to the Court of Session, *held* that the Sheriff had exercised a discretion conferred upon him by

the Statute of 1853, sec. 6, of which he had not been deprived by the Statute of 1876, and that the Court would not inquire whether or not the Sheriff had exercised aright his statutory discretion. Nicol *v.* Johnston, p. 61.

Process—Appeal—Competency—Court of Session Act 1868, *sec.* 71—*A. S., March* 10, 1870—*Omission to Lodge Prints in Time.* In an appeal from the Sheriff Court the appellant failed to lodge prints within fourteen days after the Clerk of Court had received the process, in terms of A.S., March 10, 1870, sec. 3 (3), the appeal having been taken by mistake to the First Division instead of the Second Division. The Court, in the circumstances, and in view of the fact that no prejudice had been suffered by the respondents, *repelled* an objection to the competency. The Glasgow and South-Western Railway Company *v.* Boyd, Gilmour, & Company and Others, p. 84.

———*Decree of Summary Ejection from Agricultural Subject for Failure to Stock—Reduction on the ground of Irregularity in Proceedings—Competency of Action in Sheriff Court.* A Sheriff Court decree for sequestration of the effects of an agricultural tenant for past rent was granted of consent. Thereupon the landlord moved for a plenishing order upon the tenant, and for his summary ejection in case of failure. The tenant by minute stated that he was proceeding to stock. The Sheriff, in respect of that statement, pronounced no formal order, but remitted to a man of skill to see the stocking carried out, and to report within a month. Upon his reporting that there was no stock of any kind upon the place, the Sheriff pronounced decree of summary ejection. *Held* (*diss.* Lord Young) that as there had been no formal order upon the tenant there had been no default, and that the decree ought to be reduced. *Question*—Whether an action of ejection from an agricultural subject on account of failure to stock is competent in the Sheriff Court? Macdonald *v.* Mackessack, p. 124.

——— *Triennial Prescription — Proof before Answer.* In an action upon a joiner's account, the defender averred that two small items, at the interval of a year from each other, had been inserted merely to prevent the account from prescribing, and were not properly due by him for work done on his behalf. Proof before answer of this averment *allowed.* Ross *v.* Cowie. p. 131.

———*Multiplepoinding—Claim—Riding Claim.* In an action of multiplepoinding a person who is creditor of a creditor of the holder of the fund cannot claim to be ranked directly on the fund *in medio*, nor can a person who is creditor of a creditor of another claimant claim to be ranked as a rider upon the claim of that claimant. In his trust-disposition and settlement Maxwell directed his trustees, in certain events which happened, to realise the residue of his estate, and to pay one-half thereof to Gill. By indenture made between Gill and certain persons named as trustees therein it was declared that the trustees should hold Gill's prospective share in the residue of Maxwell's estate for behoof of Gill, his wife, and his daughter, and, *inter alia*, they were directed to pay to Gill three-fourths of the income which might arise therefrom. At the date of Gill's death the whole capital of his share in Maxwell's estate, and a portion of the income which had become due, was in the hands of Maxwell's trustees, who raised an action of multiplepoinding and exoneration to determine who had right thereto. The trustees under the indenture appeared, and claimed the whole fund, and certain persons who alleged themselves to be creditors of Gill claimed to be ranked and preferred to the amount of their alleged claims either directly on the fund *in medio*, or as riders on the claim of the trustees under the indenture, averring that the indenture had been granted without any consideration, and was invalid in competition with B's creditors; and further, that the fund *in medio* consisted of income due to B to an amount more than sufficient to pay the debts due to them. The Court *repelled* the claims of the alleged creditors of Gill, either as direct or riding claims, in respect that they were neither creditors of Maxwell's trustees nor of the trustees under the indenture. Maxwell's Trustees *v.* Gore and Others (Gill's Trustees), p. 292.

Process—Caution for Expenses—Pursuer Living in England—Notour Bankruptcy—Debtors Scotland Act 1880 (*43 and 44 Vict. c.* 34). *Held* that the pursuer of an action of damages for slander, who was living in England, and was notour bankrupt in the sense of the Debtors (Scotland) Act 1880, was not bound to find caution for expenses. Macrae *v.* Sutherland, p. 335.

———*Nobile Officium—Certified Copy of Proceedings in Scottish Courts—Clerk's Certificate.* The pursuer in an action of damages for libel depending in the Court of Session, raised an action in Ireland on the same grounds against the same parties who were defenders in the Scottish action. On the petition of the defenders the Court authorised and required the principal Clerk of Session to certify a copy of the proceedings in the Scottish action for production in the Irish Court. Walter and Another, Petitioners, p. 369.

———*Petition for Leave to Appeal to the House of Lords.* In an action against an heir of entail in possession, the pursuer sought to have it declared that the defender had entered into a valid contract for sale of the estate, and to have the defender ordained to implement that contract. The Court unanimously found that a valid contract of sale had been entered into between the pursuer and defender, and appointed the pursuer to lodge in process a draft disposition by the defender of the estate in favour of the pursuer. Petition for leave to appeal against these judgments to the House of Lords *refused* on the ground that further questions of importance might arise between the parties, and that the pursuer had an interest to have the case finally disposed of before appeal was taken. Stewart *v.* Kennedy, p. 890.

———*Action—Delivery of Stolen Goods.* The owner of stolen goods which have been lodged in the hands of the official custodier for the public interest, may present a petition in the Sheriff Court to have the custodier ordained to deliver them. James Eaglesham & Company *v.* Dickson and Others, p. 407.

Process—Amendment—Expenses. In an action of damages for slander, the Court, holding the pursuer's statements irrelevant, assoilzied the defender from the action as laid, and found him entitled to expenses. The pursuer, without having paid these expenses, raised a new action against the same defender in respect of the same alleged slander, making certain new averments which would have been capable of being added by amendment if he had so moved in the previous action. *Held* that he must pay the expenses in the previous action as a condition of insisting in the new one. M'Murchy *v.* Maclullich, p. 421.

———*Expenses—Fees to Counsel when not Sent along with Instructions—A. of S., 15th July* 1876, *sec.* 6. The defenders of an action were represented at the closing of the record and at the discussion in the procedure roll both by senior and junior counsel, but at the proof which followed no fee was sent to junior counsel along with his instructions. In the defenders' account of expenses this fee was entered and claimed before the Auditor. *Held* that this was not a "higher or additional" fee in the sense of section 6 of Act of Sederunt 1876, and the Auditor's report on the account, including this item, *approved.* Sim *v.* The National Heritable Property Company (Limited), p. 446.

———*Appeal to House of Lords—Execution pending Appeal—Caution.* In a petition for execution pending appeal to the House of Lords, the respondents argued that the appeal would shortly be heard; the amount decerned for was unusually large, and could only be raised and transferred at great expense, which would be lost if the judgment was reversed on appeal. *Held* that as the application was only granted on caution being found for repetition, in the event of the judgment appealed against being reversed, no sufficient reason had been assigned for departing from the ordinary rule. The Steel Company of Scotland (Limited) *v.* Tancred, Arrol, & Company, p. 465.

———*Amendment of Record—Court of Session Act* 1868, *sec.* 29. An action was raised to have a steamship forthwith delivered to the pursuers, "or alternatively, in the event of the defender . . . failing so to deliver to the pursuers the said steamship," to have the whole defenders found liable in damages. After evidence had been led, which dealt with damage sustained before the raising of the action, and judgment had been pronounced in the Outer House, the pursuers and reclaimers moved to be allowed to substitute for the words quoted above, the words "and in any event." *Held* that the amendment was incompetent, as thereby a "larger sum" and "another fund than that specified in the original summons" would be submitted to the adjudication of the Court. Laming & Company *v.* Seater and Others, p. 500.

———*Expenses—Lands Clauses Consolidation (Scotland) Act* 1845 (8 *Vict. cap.* 19), *sec.* 79 *— Entail — Petition for Investment of Sum Awarded to Heir of Entail.* The Lands Clauses Consolidation (Scotland) Act 1845 provides by section 79 that where money has been deposited in bank under the Act "it shall be lawful for the Court of Session to order the expenses of the following matters . . . to be paid by the promoters of the undertaking; (that is to say) . . . the expense of the investment of such monies in Government or real securities, . . . and also the expense of obtaining the proper orders for any of the purposes aforesaid." A sum of money awarded to an heiress of entail in possession, under the Lands Clauses Consolidation (Scotland) Act 1845, for land taken by a railway company, and deposited in bank under the Act, was, under the authority of the Court, in part applied in payment of permanent improvements, and the balance invested on heritable security. The railway company paid the expenses of the application. Some years thereafter the heiress of entail obtained authority from the Court to uplift part of the money so invested and apply it in payment of further improvement expenditure. The expense of this application was also paid by the railway company. Subsequently the debtor in the bond paid up the amount remaining so invested, and the then heir of entail in possession, having expended a like sum in improvement expenditure, presente a petition to have the money applied in repayment thereof, and prayed that the railway company should be found liable in the expense of the application. The date of this application was more than nineteen years after the date of the award. *Held* that the railway company were not liable. Logan, Petitioner, p. 521.

Process — Appeal—Competency—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 40—*Act of Sederunt, 11th July* 1828, *sec.* 5. *Held* (following the cases of *Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386, and *Duff* v. *Steuart*, October 20, 1881, 9 R. 17) that an appeal to the Court of Session for jury trial, which was not taken within fifteen days of the interlocutor allowing proof, was incompetent. *Question*—Whether to prevent hardship the Court could have admitted the appeal notwithstanding the terms of the Act of Sederunt. Case of *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, *commented upon* and *distinguished.* Williams *v.* Watt & Wilson, p. 536.

———*Issue—Interlocutor Approving and Fixing Day of Trial—Motion to Vary Issue—Court of Session Act* 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28. An interlocutor approved of issues as adjusted, and fixed a day for the trial of the cause. *Held* that the defender was not thereby precluded from moving the Court to vary the terms of the said issues, and an objection that the motion was made too late *repelled. Craig* v. *Jex Blake*, 9 Macph. 715, *distinguished.* Croucher *v.* Inglis, p. 541.

———*Jury Trial—Abandonment of Action—Judicature Act* 1825 (6 *Geo. IV. cap.* 120), *sec.* 10—*Act of Sederunt, 16th Feb.* 1841, *sec.* 46. The Judicature Act 1825, sec, 10, provides, *inter alia*—" . . . The pursuer has it in his power to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." The Act of Sederunt, 16th February 1841, sec. 46, provides—"If it shall be made to appear to the Court that a party has abandoned his suit, . . . the Court shall proceed therein as in cases in

which parties are held as confessed." . . . The pursuer of an action lodged a minute in process abandoning "the cause in terms of the statute," but he failed from poverty to pay the taxed amount of the defender's account of expenses. On the motion of the defender, and on the pursuer's consent, the Court *assoilzied* the defender from the conclusions of the action. Ross *v.* Mackenzie, p. 600.

Process—Jury Trial—Issues—Appeal to the House of Lords—Competency of Motion to proceed with Cause pending Appeal. In an action of reduction of missives of sale the Court (Lord Shand *diss.*) approved of an issue for the trial of the cause, but disallowed certain other issues. The defender thereafter moved to have a day fixed for the trial of the cause, but the Court, in respect that the pursuer had presented a petition to the House of Lords against the interlocutor approving of the issue, *refused* the motion. Stewart *v.* Kennedy, p. 625.

———*Reclaiming-Note—Competence—Court of Session Act* 1868, *secs.* 53 *and* 54. An interlocutor repelling an objection to the competency of a multiplepoinding on the ground that there has been no double distress, can only be reclaimed against within ten days, and with the leave of the Lord Ordinary. Stewart *v.* Guthrie and Others, p. 656.

———*Reclaiming-Note—Proof—Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 27 *and* 28—*A.S.*, 10*th March* 1870, *sec.* 1, *sub-sec.* 5, *and sec.* 2. An interlocutor by which the Lord Ordinary closes the record and assigns a day "for the adjustment of issues," is not an interlocutor deciding the manner in which proof is to be taken, and cannot therefore be reclaimed against without leave under the 28th section of the Court of Session Act 1868. J. S. Virtue & Company (Limited) *v.* Brown, p. 675.

———*Amendment of Record—Pursuer Suing in New Character—Sheriff Courts Act* 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 24. Section 24 of the Sheriff Courts Act 1876 enacts—"The sheriff may at any time amend any error or defect in the record in any action, . . . and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made." . . . A widow brought an action as an individual to recover certain sums which she alleged to be due to her. Thereafter, having served as executrix-dative to her deceased husband, she lodged a minute craving to be allowed to insist in the action in that character. *Held* that the proposed amendment exceeded the power conferred on the Sheriff by the Act, and the minute *refused*. Turnbull *v.* Veitch, p. 752.

———*Arbitration—Decree-Arbitral—Reduction.* In a reduction of a decree-arbitral on the ground that the arbiter had given decree for a larger sum in name of penalties than was claimed by the party in whose favour decree was granted, the latter offered to discharge the excess. The Court *held* that the proper remedy was to reduce the decree *quoad* the excess. Adams *v.* Great North of Scotland Railway Company, p. 765.

———See *Railway.*

Profits or Gains. See *Revenue.*

Promissory-Note. See *Bill of Exchange.*

Proof—Perjury—Subornation of Perjury. On 15th November 1888 the Court pronounced the following interlocutor—"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord Fraser's interlocutor of 30th June 1888, Recal the said interloctuor *in hoc statu:* Allow the pursuer to amend the record and the defender to answer the amendments, and in order thereto open up the record, and the amendments and answers having been made of new, close the record as amended: Before further answer, and reserving all questions of expenses, allow the pursuer a proof of her averments with regard to the subornation of Elizabeth Fairbairn and Christina Ramsay Fairbairn: Appoint the same to proceed before Lord Rutherfurd Clark at such time and place as his Lordship shall fix, and grant diligence at the instance of the pursuer against witnesses and havers." Proof before answer was led, and the Court after considering the proof and hearing arguments, pronounced this interlocutor—"The Lords having resumed consideration of the cause, with the proof adduced under the interlocutor of 15th November last, Find the averments of the pursuer irrelevant: Dismiss the action: Find the defender entitled to expenses." Begg *v.* Begg, p. 402.

———*Secondary Evidence—Skilled Witnesses—Value of Colliery.* In an action of reduction of a *mortis causa* trust-settlement and codicil, on the ground of facility and circumvention, the Court granted a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of certain collieries—a large share in which belonged to the trust-estate—the object being to obtain evidence of their value for the purposes of the pursuer's case. Hamilton *v.* Hamilton's Trustees, p. 679.

———See *Bankruptcy — Justiciary Cases — Foreign — Cautionary Obligation — Process — Company.*

Proof before Answer. See *Process.*

Proof before Lord Ordinary. See *Reparation.*

Proof of Consent by Co-Cautioner. See *Cautioner.*

Proof of Loss. See *Bill.*

Property—Feu-Charter—Description by Boundaries Inconsistent with Measurements—Plan. A feu-charter described the subject by boundaries. It also described it by measurements, and referred to a plan annexed. The measurements and plan agreed, but they were inconsistent with the boundaries specified. In a question as to the extent of the subject, *held* that the boundaries must prevail. Lord Young *dissented*, on the ground that the intention of parties was that shown by the measurements and plan. Currie *v.* Campbell's Trustees, p. 170.

———*Mutual Wall—Common Author.* The proprietor of two adjoining houses, by his settlement left one to one daughter and the other to another daughter. The conveyance of each house was in similar terms, and each was described as bounded by the other. The gable wall of one house formed part of the back wall of the other. In an action of declarator by one of the daughters against the other, *held* that, in the absence of any evidence to the contrary in the titles, this wall must be

an infant, . . . the mother, if surviving, shall be guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, . . . the Court may, if it shall think fit, from time to time, appoint a guardian or guardians to act jointly with the mother." By section 8 "guardian" means "tutor," and "infant" means "pupil." Where a father had died without making any nomination of tutors or curators to his pupil child, the Court, on the application of the next-of-kin of the pupil on the father's side, appointed the brother of the widow to act jointly with her as tutor to the pupil. Martin and Others *v.* Stewart, p. 128.

Purchase by Company of its own Shares. See *Bankruptcy.*

Pursuer Living in England. See *Process.*

Pursuer Suing in New Character. See *Process.*

Qualified Acceptance. See *Sale.*

Question of Status. See *Jurisdiction.*

Radical Right of Bankrupt in Estate after Discharge without Composition. See *Bankruptcy.*

Railway—Undue Preference—Difference of Rates over same Portion of the Line of Railway—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 83. The 83rd section of the Railways Consolidation (Scotland) Act 1845 provided for the alteration or variation of such tolls as a railway company might by special Act be entitled to charge, "provided that all such tolls be at all times charged equally to all persons, and after the same rate . . . in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances." . . . A railway company charged a certain rate per mile, and every part of a mile was accounted a whole mile. *Held* that each mile was to be considered as a unit in determining the "portion" of the railway over which the traffic of two different coalmasters passed, just as it was considered a unit in fixing the charges which the railway company were entitled to make in respect of such traffic, and that where the sidings of two collieries joined the main line at different distances from the terminus of their respective journeys, but were within the same mile from it, the traffic of both passed over "the same portion of the railway" within the meaning of the 83rd section of the statute. The Bellfield Colliery siding joined the down line of the railway to Troon. The Wellington Colliery siding joined the up line of the railway at a point 415 yards nearer Troon than the Bellfield siding. Wellington Colliery traffic for Troon was carried back by the railway company to cross-over points in the immediate vicinity of the Bellfiled siding. Wellington traffic was, however, invariably, and Bellfield traffic usually, carried to a siding beyond Hurlford station, and there marshalled for despatch to Troon. Both collieries were within the same mile from Troon. The railway company charged a certain rate per mile, and every part of a mile was accounted a whole mile. In an action at the instance of the Bellfield Colliery proprietors against the railway company on the ground of undue preference in the rates charged for the Wellington traffic, the defenders contended that their contract was to carry the traffic of each colliery to Troon from the respective points where it reached their railway, and that inasmuch as the pursuers' siding joined the railway 415 yards further from Troon than the Wellington siding, their traffic was not carried "over the same portion of the line of railway. *Held* that the traffic of the two collieries was carried "over the same portion" of the railway. *Opinion* that the traffic of both collieries must be viewed as carried to Troon from Hurlford station, and therefore that it passed "over the same portion" of railway. Yeats' Trustees (Bellfield Colliery Company) *v.* The Glasgow and South-Western Railway Company, p. 386.

Railway—Lands Clauses Consolidation (Scotland) Act 1845, *sec.* 120—"*Superfluous Lands.*" *Held* that a piece of ground, acquired by a railway company under compulsory powers, which had not been used or disposed of by the company more than ten years after the completion of their works, for which they had no immediate use, and which could only be utilised if additional ground were acquired under special Act of Parliament, had become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845. Sir Archibald D. Stewart *v.* Highland Railway Company, p. 438.

——*Undue Preference — Difference of Rates over Same Line of Railway—Railway Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 83—*Relevancy.* In an action at the instance of a railway company for rates charged for the carriage of goods, *held* that averments were relevant to entitle the defenders to a proof that the pursuers had charged other traders lower rates for goods of the same description conveyed or propelled by carriages, or engines passing only over the same portion of the lines of the pursuers' railway. The Caledonian Railway Company *v.* Alexander Cross & Sons, p. 447.

——*Undue Preference — The Railway and Canal Traffic Act* 1854 (17 *and* 18 *Vict. c.* 31), *sec.* 23—*Process—Railway Commissioners—The Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. c.* 25), *sec.* 58. The Railway and Canal Traffic Act 1854 provides that no railway company is to give an undue preference to any person, company, or description of traffic. *Held* (following the case of *Murray* v. *The Glasgow and South-Western Railway Company*, November 29, 1883, 11 R. 205) that interdict is the only remedy in a claim against a railway company for violation of the Statute of 1854; that the defenders' averments that the railway company had granted undue preferences to other traders in violation of the statute were irrelevant; and a motion by the defenders that the case be transferred to the Railway Commissioners *refused.* *Observed* that any proceeding before the Commissioners to interrupt the illegal practice of which the defenders complained must be in the form of a complaint to stop illegal proceedings, and not in the form of a claim for payment of money. The

alleged slander through the publication of the above article, *held* that the pursuer was entitled to an issue, but that an innuendo was necessary, to the effect that in so acting the manager had endeavoured to prevent the fire from being subdued, so as to cause the destruction of the works and stock therein. Gudgeon *v.* Outram, p. 130.

Reparation—Public School—Dismissal of Foundationer by Headmaster—Damnum sine injuria—Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 59), *sec.* 14. The rules of a public college, issued under the Educational Endowments (Scotland) Act 1882, provided, *inter alia*—"Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College. Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject." A foundationer of the College suffered from a disease, and the Headmaster, believing, on medical advice, that it was leprosy, and was contagious, dismissed him from the College, and forthwith laid a report before the Governors, who approved of the proceedings taken. In an action by the foundationer against the Governors of the College, *held* that the master had acted under the rules, and that there being no averment of *mala fides* the action could not be maintained. Piggott *v.* The Governors of the Fettes Trust, p. 143.

———*Slander—Issues—Evidence in Mitigation of Damages without Issue in Justification.* An action of damages for written slander was brought against the proprietor of a newspaper published in Scotland, in which it was represented that one of the pursuers had planned an outrage on himself in order to make it appear that his political opponents had been guilty of a crime; that he had made his sons parties to the fraud; and that they had become privy to their father's design. The article, which was contributed by a correspondent of the newspaper in Ireland, was admitted, and it was stated in defence that upon the occasion in question, and about the time when the aforesaid pursuer and a companion were expected to reach home, two police constables were attacked with stones near the pursuers' house; that the police captured the assailants, who proved to be the pursuer's sons, and who stated that they had mistaken the police for their father. No issue of *veritas* was taken. The defender proposed at the trial to prove the statements in defence as facts which affected the mind of the correspondent, but the evidence was disallowed by the presiding Judge. On a bill of exceptions the defender maintained the competency of the evidence for the purpose of mitigating damages. *Held* that as the action was laid against the publisher of the newspaper, and not against the correspondent, evidence as to the state of mind of the latter when he wrote the article was not relevant, and had been properly excluded. Browne and Others *v.* M'Farlane, p. 289.

Reparation—Slander—Issue—Diligence to Ascertain Authorship of Libel—Evidence in Aggravation of Damages. In an action of damages brought against the publishers of a newspaper for alleged libels contained in an editorial article and a series of letters purporting to come from a number of independent writers, which had been published in the defenders' newspaper, the pursuer averred that the defenders were themselves the authors of both article and letters, and he lodged a specification craving diligence to recover the manuscripts of the article and letters and any books or writings relating to their authorship and composition. The issue taken by the pursuer related only to the publication of the alleged libels. *Held* that the pursuer was entitled to the diligence craved, and to lead evidence in support of his averment as to the authorship of the letters in aggravation of damages without putting the question of authorship in issue. Cunningham *v.* Duncan & Jamieson, p. 316.

———*Written Slander—Issue—Innuendo.* The owner of a house wrote to the agent of his tenant—"Thanks for your attention. That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods." . . . In an action of damages for slander at the instance of the tenant, he averred that these statements meant that he was of fraudulent and dishonourable character, and that he had been guilty of falsehood. *Held* that the statements would bear this innuendo. Macrae *v.* Sutherland, p. 336.

———*Negligence—Injury by Falling into Unfenced Cutting near Footpath—Footpath.* The contractors for the construction of a new line of railway, in the course of their operations intercepted by a cutting the direct and usual access from a house on the south of the line to the neighbouring town on the north. The only other access was by a somewhat inconvenient and circuitous path. Near the house mentioned they afterwards built a hut for the accommodation of their employees, who generally in going to or coming from the town took a short cut along the edge of the cutting. A path was thus formed which became the usual access to the hut for others besides its inhabitants, and the use of this path was known to the contractors. A woman who had been to the hut to nurse a patient was returning to the town by this path when she fell into the cutting, and sustained injuries. In an action by her against the contractors, *held* that she was entitled to damages, on the ground that the defenders had failed to fence the new pathway, which by general use had become an established route. Gavin *v.* Arrol & Company and Another, p. 370.

———*Damages for Illegal Apprehension—Alimentary Debt—Civil Imprisonment Act* 1882

(45 *and* 46 *Vict. c.* 42), *sec.* 4. By section 4 of the Civil Imprisonment Act 1882 it is provided that the Sheriff on the application of the creditor may commit to prison "any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent Court . . . but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff . . . that the debtor has not since the commencement of the action in which the decree was pronounced possessed or been able to earn the means of paying the sum . . . in respect of which he has made default, or such instalment . . . as the Sheriff shall consider reasonable." The agents for a creditor holding a decree for a sum of aliment on which the days of charge had expired without payment, applied to the Sheriff for a warrant to commit the debtor to prison. The Sheriff granted a warrant to search for and apprehend the debtor, and bring him before the Sheriff for examination, and upon this warrant the creditor's agents caused the debtor to be apprehended. In an action of damages by the debtor against the creditor's agents—*held* that the debtor must fail to satisfy the Sheriff that he is unable to pay the debt as a condition of imprisonment or apprehension under the statute; that apprehension before the condition was fulfilled was illegal; and issues ordered for the trial of the cause. Cook *v.* Wallace & Wilson, p. 428.

Reparation—Railway—Custody—Secure Place. Certain cattle escaped from a yard at a railway station in which they were enclosed until the owner should obtain authority from the local authority to put them on trucks, strayed along the line, and were killed. In an action against the railway company by the owner for damages in respect of their loss, it was proved that the fence of the yard was defective, but that the cattle had been taken from the pens and placed there by the pursuer's own servant, who had left them there for a night notwithstanding that he was warned by the defenders' servants that the yard was not intended for such a purpose. It was further proved that the cattle were under the charge of the pursuer's servant, and not of the defenders. The Court *assoilzied* the defenders. Crawford *v.* The Portpatrick and Girvan Joint Committee, p. 440.

———*Master and Servant—Negligence—Unsafe State of Master's Plant.* A workman was fatally injured while engaged in putting coal in a furnace. The furnace was at the time, in the knowledge of the employer, liable to send up rushes of flame owing to the caking or "scaffolding" of the fuel and ironstone, and it had been in that condition for about nine months, during which attempts, known by the employers to have been ineffectual, had been made to remove the cause of accident. It would have been possible to remove it by a method which would have been somewhat expensive, and which, after the accident, was resorted to with success. *Held* that the employer was responsible for the accident. Henderson *v.* Carron Company—Barriscell *v.* Carron Company, p. 456.

———*Parent and Child—Title to Sue—Action of Damages for Loss of an Illegitimate Child. Held* that a woman has no title to sue an action of damages for the loss of her illegitimate child. Weir *v.* Coltness Iron Company (Limited), p. 470.

Reparation — Personal Injury—Master and Servant—Known Danger—Fault—Want of Reasonable Precautions. A surfaceman, while working in sidings where there was much noise and constant whistling, was knocked down and fatally injured by a railway engine entering the sidings, tender first, for the purpose of being turned. The engine-driver had great difficulty in looking ahead because of the position of the tender (which in the circumstances was justifiable), and was so occupied in watching the points that he did not see the surfaceman in time to prevent the accident. *Held* that the engine-driver was not to blame, but that the railway company were in fault for neglecting reasonable precautions to prevent the accident in a place where the ordinary warnings were insufficient, and that they were liable in damages to the widow of the injured man. Cairns *v.* Caledonian Railway Company, p. 485.

———*Negligence—Barrow left in Public Place—Injury to Infant—Relevancy.* A two-wheeled barrow, which on account of its size could not be received into its owner's workshop, was left by his servants in an adjoining lane, and secured to the wall by a chain. Some children who were playing in the lane, mounted the barrow, and were swinging on it, when they slid to the back of it, and brought it suddenly down on the head of a child aged three years, who died shortly after in consequence of the injuries which he then sustained. In an action of damages by the father—*held* that as a two-wheeled barrow was not a dangerous article no blame was to be attached to the owner for leaving it chained in the lane, and that no relevant averment of fault had been made by the pursuer to entitle him to an issue. Duff *v.* The National Telephone Company (Limited), p. 512.

———*Master and Servant—Fault—Known Risk—New Trial.* An employer who supplies his men with the usual appliances necessary for their work will not be liable in damages if in a place not belonging to the employer where these appliances are unsuitable the workmen adopt a recognised method of manual labour without making any complaint or requesting other appliances. A cellarman was injured while storing barrels along with three other skilled workmen in a cellar, which was too small for the use of "skeggs," and in which consequently the barrels were tiered by hand labour. The cellar did not belong to the employers. In an action of damages against his employers, on the ground that they had not provided the necessary appliances, it appeared that hand labour was a recognised method of tiering where skeggs could not be used, although a block-and-tackle was sometimes used, and that the pursuer had never complained or asked for further appliances. The pursuer obtained a verdict. On a motion for a new trial, the Court set aside the verdict, *holding* that there was no evidence of fault Ramsay *v.* Robin, M'Millan, & Company, p. 539.

Reparation — Culpa — Defective and Dangerous Machine — Threshing Mill without a Guard over the Drum. *Held* that a threshing mill without a guard over the drum is a defective and dangerous machine, and that a contractor who supplied such a machine was liable in damages for personal injuries caused thereby, especially as the occurrence took place in a neighbourhood where there had been previous similar accidents. Edwards *v.* Hutcheon, p. 550.

———*Slander — Privileged Statement — Minister of Parish — Probable Cause.* In an action of damages against the minister of a parish for alleged slanderous statements in two letters written by him to the inspector of poor of a neighbouring parish and the Board of Supervision respectively, and which challenged the pursuer's fitness as guardian of certain children boarded with him by the parochial board of the neighbouring parish, it was *held* that the defender was entitled to an issue of want of probable cause as well as of malice. *Opinion* (*per* Lord Shand) that a defender other than the minister of a parish would be entitled in similar circumstances to the protection of a similar issue. Croucher *v.* Inglis, p. 587.

———*Landlord's Liability for Defective Drainage — Relevancy.* In an action of damages against a landlord, a tenant averred that the drainage in a house let to him was defective, as the drains were old and not properly jointed; that he had complained to the defender, who had taken unsuitable or insufficient, or at any rate unsuccessful steps to remedy the nuisance; that his wife and child had suffered in health in consequence; and that he had incurred considerable expense in medical attendance, and by removal to other premises, and in loss of profit on the sale of goods in the premises for the unexpired period of the let. The landlord pleaded that the action was irrelevant. The Sheriff-Substitute allowed a proof before answer. *Held* that the Sheriff-Substitute had acted rightly in allowing such a proof. *Question* by Lord Young—Whether a landlord is liable to his tenant for loss arising from defective drainage apart from any special averment of fault on his part? M'Nee and Others *v.* Brownlie's Trustees, p. 590.

———*Personal Injury — Boy Injured by Fall of Gate — School Board — Fault — Contributory Negligence.* The entrance to the playground of a board school was closed by a heavy iron gate in two halves. The iron stop in the ground upon which the two halves of the gate should have shut was worn, and permitted the gate to open outwards as well as inwards. While some school children were swinging on one half of the gate, it swung violently outwards, was wrenched from its hinges, and fell upon and injured a schoolboy aged seven years. There was a conflict of evidence as to whether or not he was swinging on the gate at the time of the accident. In an action for damages by his father against the School Board —*held* that the accident was caused by the want of a proper stop for the gate, that the defenders were to blame for neglecting to renew the stop, and that even if the boy had been swinging upon the gate at the time of the accident, he was not guilty of contributory negligence. Cormack *v.* The School Board of the Burgh of Wick and Pulteneytown, p. 599.

Reparation — Slander — Wrongful Expulsion from Ring at Race Meeting — Jury Trial. A went to the meeting of a racing club, and was admitted to the ring on payment of the usual charge of 10s. B, a bookmaker, having pointed him out to the inspector of the ring as a man "who owes me money," A was expelled from the ring by the police. In an action of damages by A against the racing club and B the defenders submitted that the case was not appropriate for jury trial, in respect that it involved difficult questions (1) with regard to the construction of the Jockey Club rules, under which the meeting was held, and which conferred on the racing club and its members neither direction nor authority in controlling the proceedings; (2) with regard to the right conferred by payment for admission to the ring, which they averred was a mere licence liable to be withdrawn for certain reasons; and (3) as to whether it was actionable to charge a person with failure to pay his gambling debts, betting being illegal. *Held* that the case was appropriate for trial by jury, and issues ordered. Blasquez *v.* Lothians Racing Club and Another, p. 633.

———*Slander — Issue — Innuendo — Counter Issue.* In an action of damages for slander the pursuer obtained an issue whether the defender in the ring or paddock of the "Lothians Racing Club and Edinburgh Meeting" at Musselburgh, and in the presence of certain parties named, falsely and calumniously said of and concerning the pursuer, "This is the man who owes me money," or used words of similar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer? The defender proposed a counter issue. *Held* that the counter issue must fully meet the innuendo, and must include the words "and was a person who ought not to be allowed to remain in the said ring or paddock." Blasquez *v.* Lothians Racing Club and Another, p. 633.

———*Lead Poisoning — Factory and Workshop Act* 1883 (46 *and* 47 *Vict. c.* 53), *sec.* 3 — *White Lead.* *Held* (Lord Lee *diss.*) that the provisions of the Factory and Workshop Act 1883 (46 and 47 Vict. c. 53) with regard to the manufacture of white lead applied to carbonate of lead and did not apply to a salt of lead called white lead used as a substitute for that article, but which was in reality a sulphate of lead. A workman employed in a factory for the manufacture of Hannay's white lead became ill with lead poisoning, and brought an action of damages against his employers. *Held* (Lord Lee *diss.*) that he had failed to show that it was a white lead factory in the sense of the Factory and Workshop Act 1883, or to prove that the injuries sustained by him resulted from any neglect or failure on the part of the defenders to take proper precautions for the protection of their workmen. Creevy *v.* Hannay's Patents Company (Limited), p. 679.

———See *Horse — Insurance.*

Repetition. See *Condictio Indebiti.*

Reporters Divided in Opinion. See *Poor.*

that the nett profits and gains from the two branches of the business were to be massed as one undivided income, assessable according to the rules applicable to Case I., Schedule D; (2) that in estimating the profits and gains of the company, interest on investments which had not suffered deduction of income-tax at its source must be taken into account, as also fire insurance premiums for the year of assessment, or an average of three years (less losses by fire in that period, and ordinary expenses), and gains made on investments realised during either of these periods; (3) that the profits and gains of the company on its life business could only be ascertained by actuarial calculation, proceeding upon the result of the statutory quinquennial investigation, or of the usual periodical investigation in companies established before the statute, or of the triennial investigation prescribed by Schedule D of the Income-Tax Acts. The Scottish Union and National Insurance Company and Others, and the Northern Assurance Company and Others *v.* The Commissioners of Inland Revenue, p. 330.

Revenue—Property and Income-Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 60, *Schedule A, Rules* 9, 10, *and* 14 *of No* 4—*Taxes Management Act* 1880 (43 *and* 44 *Vict. c.* 19), *sec.* 60—*Assessment Doubly Charged—Superior and Vassal—Casualty—Composition.* A vassal paid a casualty of composition to his superior, who made a return thereof and was assessed upon the same. The vassal claimed exemption from an assessment of the annual rent of his lands, on the ground that it had already been charged with duty in the hands of the superior. *Held* that as the composition was paid to the superior not as rent, but as the price payable for entry, the vassal was the proprietor of the rent for the year, and was liable to assessment thereof. Macgregor *v.* The Commissioners of Inland Revenue, p. 334.

———*Case under the Taxes Management Act* 1880 (43 *and* 44 *Vict. c.* 19), *sec.* 59—*Expenses.* In this case, which was presented under the Taxes Management Act 1880, the Auditor in taxing the account of the Scottish Union and National Insurance Company and others disallowed all charges for the preparation and adjustment of the case before it appeared in the rolls of Court. An objection to the Auditor's report upon this ground *repelled.* The Scottish Union and National Insurance Company and Others *v.* Commissioners of Inland Revenue, p. 489.

———*Inhabited House-Duty—Different Tenements—Tenement Occupied for the Purpose of Trade—Exemption—Act* 41 *Vict. c.* 15, *sec.* 13, *sub-sec.* 1. This sub-section provides that "when any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business," the premises occupied for the purposes of trade or business shall be exempt. Where two separate tenements in one building were occupied from year to year by a tenant at a *cumulo* rent of £25—one tenement being occupied for the purposes of trade, and the other as a dwelling-house — neither tenement taken separately being of the annual value of £20, the Court *held* that the tenant was entitled to exemption from inhabited house-duty. Allan *v.* Miller, p. 491.

Revenue — Income-Tax — Railway—Expenditure on Improvements—Deductions from Profits. A railway company in making their return for assessment under the Income-Tax Act claimed as deductions from the revenue of the year of assessment (1) a sum expended upon the improvement of the permanent way of one section in order to bring it up to the standard of the rest of the line; and (2) a sum representing the cost of the extra weight in relaying another portion of the line with steel in place of iron rails, and with chairs of additional weight. In the books of the company these sums were charged against capital. In an appeal by the railway company, *held* that the sums so expended were properly charged against capital, and a determination of the Special Commissioners disallowing the said sums as deductions from revenue *affirmed.* Highland Railway Company *v.* Special Commissioners of Income-Tax, p. 657.

———*Indian or British Company—Contract of Copartnery—Death of Partner—Transfer of Shares—Inventory-Duty.* The firm of R. W. & Co. carried on an extensive business in indigo, silk, and other produce, which after being grown or manufactured in India was either sold there, and the proceeds remitted to this country, or was consigned to the London agents of the firm for realisation in Europe. The property of the concern was vested in three trustees, all of whom resided in the United Kingdom. The articles of copartnery also provided that upon the death of a partner his representatives should not become partners in his stead, but that they might, if they chose, within a specified time, sell his share to a person or persons approved of by a committee appointed to decide all matters affecting the interest of the partnership, and if a sale or transfer were not completed within that time, the value of the share was to be ascertained by the London agents of the company, and the price paid by the trustees to the representatives of the deceased partner upon their executing a transfer to the trustees of such share. A partner of the firm, domiciled in Scotland, died, and his executors transferred his shares to three of his sons, to each one share, at the price of £9000 per share. *Held* (*diss.* Lord Shand) that the £27,000 was liable to inventory-duty, as it was a debt recovered by the executors in this country, and both debtor and creditor were resident there. *Opinion* (*per* Lord Shand) that the articles of copartnery, and the manner in which the business of the firm was carried on, showed that this was an Indian company, and that the £27,000, being a payment in respect of a share thereof, was Indian estate, and was not liable to inventory-duty in this country Lord Advocate *v.* Laidlay's Trustees, p. 738.

Revocation of Consent. See *Landlord and Tenant.*

Right in Security—Pro indiviso Property—Maills and Duties—Competency—Personal Bar. A *pro indiviso* proprietrix borrowed a sum of money, and in security thereof granted a bond and disposition over her *pro indiviso* share of the property. The bond was in ordinary form, and contained a clause of assignation of rents. In an action of maills and duties by the creditor

of machinery . . . whereby the working of the vessel is stopped for more than forty-eight consecutive working hours the payment of hire shall cease until she be again in an efficient state to resume her service." The hire was to be paid monthly in advance. On the voyage her engines broke down so as to render her unseaworthy, and she had to put into a foreign port. There was no means of repairing her injuries in that port. A tug was sent out to bring her home under an agreement between the owners and the charterers, by which the cost of the tug was to be treated as general average. The ship arrived at the port of discharge with the aid of the tug. The charterer paid his proportion of the cost of the tug. In an action for the freight from the time she left the foreign port till her discharge was complete, *held* (*rev.* Lord Trayner) (1) that she was unseaworthy from the time of the breakdown till she arrived, the assistance of the tug not having rendered her seaworthy, and therefore that having in view the terms of the charter-party the owner was not entitled to freight for the voyage under tow; (2) (*dub.* Lord Young) that hire was due for a reasonable time for unloading at the port of discharge although the repairs necessary to make the ship seaworthy had not been completed. Millar & Company *v.* Hogarth and Others, p. 459.

Ship—Charter-Party—Demurrage—Undue Detention—Damages—Lien on Cargo. A charter-party provided, "charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage." *Held*, in the absence of anything in the charter-party showing that the parties intended otherwise, that "demurrage" fell to be interpreted in its strict legal sense; and that the owners' lien on cargo for demurrage did not free the charterers from an action of damages for the undue detention of the vessel at the port of loading. *Observed* (*per* Lord Adam) that "demurrage" ought always to be so construed, unless the charter-party made it clear that it was the intention of parties that the word should be used in another and a wider sense. Gardiner and Others *v.* Macfarlane, M'Crindell & Co. and Another, p. 492.

——— *Charter-Party — Rights of Mortgagees.* Mortgagees of a ship are entitled to prevent her sailing under a charter-party if their security would thereby be materially prejudiced. The owner of a steamship, who had obtained advances by mortgages upon the ship, sent her in October to have certain repairs executed. In February, with the view of paying for such repairs, he got additional advances from the same parties by increasing the amount of their mortgages. He made a part payment of their account to the shipbuilders, and gave promissory-notes for the balance, and he also granted them a second mortgage over the ship. The shipbuilders in return renounced any right of lien they might have over the ship, and undertook to have her ready for sea within one month. The owner further undertook to keep the ship insured in favour of the mortgagees, but this was never effected. Upon 15th April, and while he was still in possession of the ship, the owners chartered her to a firm of merchants for a voyage. On 22nd April the mortgagees entered into possession, declined to give up the ship to the charterers, and on 20th June the ship was sold under the orders of the Court of Session. The ship was unfit for sea in April, and probably until the middle of August, when she was delivered to the charterers. Upon 27th June the charterers demanded immediate delivery as they had re-chartered the vessel, and the sub-charterer was pressing them for delivery, and upon 4th July they brought an action against the new registered owner and the mortgagees for delivery, and failing delivery for damages. After delivery had been made in August they restricted the action by minute of 15th November to one of damages. *Held* (Lord Lee *diss.*) that the defenders should be *assoilzied*, as the mortgagees had only protected and rendered effectual their legal rights, which would have been materially prejudiced had the vessel been allowed to sail uninsured and in an unseaworthy condition. Laming & Company *v.* Seater and Others, p. 500.

Ship—Charter-Party—Marginal Note—Guarantee as to Ship's Capacity—Stowage of Machinery and Coal. By charter-party between Wright Brothers & Company and Mackill and others it was agreed that Mackill's vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment not exceeding what she could reasonably stow and carry," &c. The freight was fixed at a lump sum of £2200, and it was provided—"Owners guarantee that the vessel shall carry not less than 2000 tons dead weight;" and further—"Should the vessel not carry the guaranteed dead weight as above, any expenses incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." The ship was intended for a general cargo, partly of railway locomotive machinery, and the parties agreed upon and endorsed on the margin of the charter-party a note specifying the "largest pieces" of machinery, and their number, weight, and measurement, which the cargo was to contain. Wright Brothers & Company tendered a cargo not exceeding 2000 tons dead weight, including locomotives and tenders, two lots of coal, and general goods. The large pieces of machinery exceeded the number stated in the marginal note. The vessel sailed with dead weight of 1691 tons. It was admitted that her capacity equalled the guarantee, and also that 2000 tons dead weight of the cargo tendered could not have been carried without packing the coal along with the machinery, which was not done. Wright Brothers & Company claimed a deduction in the freight, and Mackill and others raised this action for the balance unpaid. *Held* (*rev.* the judgment of the Court of Session) that the marginal note was information afforded to the shipowners for the purposes of the contract; the cargo tendered was not such as was expected, as the bulk exceeded the proportion of dead weight indicated by the marginal note, and as it was owing

to this that the vessel carried less than the guaranteed dead weight, Wright Brothers & Company were not entitled to the reduction claimed, and were liable in the whole freight as stipulated. *Held* further (*aff.* the judgment of the Court of Session), that it was not proper stowage to stow coal among machinery unless with the consent of the shippers of the coal and of the machinery, and that the *onus* of obtaining such consent was on the charterers. Mackill and Others *v.* Wright Brothers & Company, p. 782.

Ship. See *Arrestment—Justiciary Cases.*

Shipping Law—Bill of Lading—Delivery Order—Title to Sue. The only title to a cargo shipped under a bill of lading, which the master is bound to recognise or entitled to act upon, is the bill of lading itself. The holders of the bill of lading for a cargo forwarded it to the master at the port of discharge, endorsed as follows:—"Captain K. will please deliver the contents of the within bill of lading against production of orders signed by us." Signed delivery-orders for parts of the cargo were from time to time presented by J. & J. C. to the master, who gave delivery in terms thereof. When the cargo had been all delivered, except about 60 tons, the master refused further delivery until certain claims which he had advanced for freight and demurrage were paid or secured to him, whereupon J. & J. C. raised an action for delivery of the 60 tons, founding upon a delivery-order granted by the holders of the bill of lading. *Held* that the pursuers, not being the holders of the bill of lading, had no title to sue. J. & J. Cunningham *v.* Guthrie and Another, p. 208.

———1878 *Black Sea Charter-Party—Liability of Consignee for Expense of Measuring and Weighing Cargo at Port of Delivery—Custom of Trade.* A cargo of grain was shipped from Sevastopol to Aberdeen under a charter-party known as the 1878 Black Sea Charter-Party, which provided for the payment of freight according to cubic measurement. The cargo was consigned by weight and not by measurement, the bill of lading setting forth the weight in Russian "poods." The shipowners having weighed the cargo, and also measured samples thereof, in order to ascertain the whole measurement, sued the consignees for the expense of the operation, alleging a general custom of the British shipping trade in the carrying of grain cargoes that these expenses fell to be borne by the consignee. The defenders alleged a contrary custom in the port of Aberdeen known to the pursuers. *Held* that the defenders were liable, it being established that by the universal custom of the shipping trade such expenses fell to be borne by the consignee. Watts, Ward, & Company *v.* Grant & Company, p. 660.

Shooting Rent. See *Sale of Land.*

Signature upon Blank Sheet of Paper. See *Cautionary Obligation.*

Singular Successor. See *Res Judicata.*

Skilled Witness. See *Proof.*

Slander—Issues—Newspaper Report of Judicial Proceedings—Counter Issue as to Fairness and Accuracy of the Report. A firm of merchants brought an action of damages against the proprietors of two newspapers for slander contained in the reports of proceedings in the London Bankruptcy Court, during which a former agent of the pursuers was reported to have said "that they were very hard up, and he had financed them from time to time" by means of accommodation bills. They proposed as an issue . . . "whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers had been or were in financial difficulties, and had been or were being financed by accommodation bills . . . to the loss, injury, and damage of the pursuers." The defenders averred on record that the report was a fair and accurate one of judicial proceedings, and as such privileged, and that the pursuers were bound to raise the question of its fairness in their issue; or alternatively, that they were entitled to raise that question before the jury by means of a counter issue. The Court (*aff.* Lord Kyllachy) approved of the issue and disallowed the counter issue, holding that the question sought to be raised by it was a matter for the direction of the Judge at the trial. Wright & Greig *v.* George Outram & Company and Gunn & Cameron, p. 707.

Slander. See *Reparation.*

Special Powers. See *Judicial Factor.*

Specific Implement. See *Entail.*

Specification. See *Justiciary Cases.*

Speculation as to Rise and Fall of Stock. See *Contract.*

Statement of Accounts. See *Judicial Factor.*

Stock Exchange. See *Contract.*

Stowage of Machinery and Coal. See *Ship.*

Street. See *Police.*

Submission. See *Res Judicata.*

Subornation of Perjury. See *Proof.*

Substitution in Moveables. See *Succession.*

Succession—Marriage-Contract—Bond and Disposition in Security—Heir and Executor—Real Burden—Obligation ad factum præstandum. An obligation to transfer into the names of certain parties a certain amount of Consolidated Bank Annuity stock is an obligation *ad factum præstandum*, and being of a definite nature, may, along with an obligation to pay interest until fulfilment, be validly imposed as a real burden upon land. A person borrowed from his marriage-contract trustees two sums of £5000 and £3500 3 per cent. consols, and these stocks were accordingly transferred from their names to his. In return, by bonds and dispositions in security he bound and obliged himself, and his heirs, executors, and representatives, when required, to purchase and transfer to the trustees the like sums of £5000 and £3500 3 per cent. consols, and in the meantime to pay them the amount of the interest which would have become due and payable to them had the transferred stocks been left standing in their names. In security of these obligations he disponed certain lands, which he subsequently disponed to gratuitous disponees. In an action against these parties at the instance of the marriage-contract trustees, *held* that the bonds and dispositions in security created good and effectual securities over the lands thereby disponed, and that the heirs or gratuitous disponees took the lands under burden of the said securities without relief against the executors. Edmonstone and

Another (Lumsden's Trustees) *v.* Seton and Others, p. 4.

Succession—Vesting—Interposed Liferent—Clause of Survivorship. A testator directed his trustees to convey his heritage to his two daughters equally between them in liferent, and to certain grandchildren named, and to grandchildren *nascituri*, "equally among them, share and share alike, any of whom failing the share or shares of the deceaser or deceasers to the survivors equally among them, share and share alike, in fee." *Held* that the right to their shares did not vest in the grandchildren till the period of distribution, which was the death of each liferenter as to the portion liferented by her. Marshall and Others *v.* Melville's Trustees, p. 24.

——— *Vesting — Term of Payment — Husband and Wife—Divorce for Adultery—Wife's Legal Provisions.* A testator directed his trustees, *inter alia*, in particular events, to hold certain shares of his estate in trust for behoof of his son, and to pay the said shares to him by such instalments, or in such portions, and at such times, as they might think fit; but so long as the said shares, or any part thereof, remained unpaid, to pay to him the interest or annual produce of such shares, or part thereof, so remaining unpaid, half-yearly, until the shares should be wholly paid over to him and discharged. He declared further that the various provisions of his settlement should not become vested interests till the respective terms of payment thereof. The trustees accordingly took possession of the son's shares, and held them for his behoof, with the exception of several instalments which were paid to him. His wife having obtained decree of divorce against him in respect of his adultery, in an action at her instance against the trustees under his father's settlement and himself, *held* that the shares of his father's estate had vested in him, and fell to be regarded as part of his estate in computing the pursuer's legal rights. M'Elmail *v.* Lundie and Others, p. 28.

———*Testament—Implied Revocation.* A testatrix by general disposition and settlement conveyed to her niece her whole heritable and moveable estate, under burden of debts and legacies, on the condition that her niece should pay any other legacies which the testatrix might think proper to leave by any writing under her hand, clearly indicative of her intention, although not formally executed. She appointed her niece her executrix. By a codicil to this will she revoked the conveyance of her moveable estate, and conveyed the same to other executors, directing them to fulfil any testamentary instructions left for them under her hand, and providing that any surplus of the moveable estate, after meeting debts and bequests, should be paid to her niece, but that any deficiency thereof should form a burden on her heritable estate. By a holograph document, addressed to her niece of date intermediate between the settlement and codicil, she directed that her heritable property should be sold, and that the price thereof, together with any surplus after payment of expenses, should be deposited in bank for behoof of her niece in liferent and certain others in fee. *Held* that the holograph writing was inconsistent with, and therefore impliedly revoked by the codicil, which was of later date. Storrar and Others *v.* Smail and Others, p. 43.

Succession — Assignation — Marriage-Contract—Power of Division, Exercise of. By a marriage-contract the wife conveyed, *inter alia*, to herself in liferent, and failing her to her husband in liferent, exclusive of the *jus mariti*, and in any case to the children of the marriage in fee, certain bank shares, subject to a power in the husband to divide the provisions made for them among the children. There were three daughters and one son. By his settlement the husband conveyed his whole estate to trustees to pay certain special legacies to the daughters, and "the whole residue and remainder of my estate, heritable and moveable, for behoof of my son," declaring that he had made this division in virtue of the powers in the marriage-contract. The husband predeceased the wife, who thereafter executed a transfer of the bank shares to herself in liferent, and the children equally among them in fee. The son conveyed to a creditor his whole interest in the residue of his father's estate. In a question between the son and an assignee of the creditor—*held* that the latter had no right to the bank shares, in respect that they had never formed part of the residue of the father's estate. Whyte *v.* Murray, p. 67.

———*Heritable and Moveable—Bond and Disposition in Security — Conversion — Terce — Jus relictæ.* The husband's infeftment at the time of his death is the measure of the widow's right of terce. The holder of certain heritable bonds had before his death taken steps towards realising the securities. Intimation and requisition for payment was served on the debtor in one of the bonds, but no further steps were taken. Similar intimation was made in respect of another bond, and the subjects of the security were advertised but not exposed for sale. The subjects under a third bond had been exposed for sale, but had not found a purchaser. In the fourth case the subjects had been exposed for sale and sold, but the purchaser having failed to pay the price had not obtained infeftment at the death of the bondholder. His widow claimed her legal rights. *Held* that the bonds had not been rendered moveable as to the widow by the steps taken to realise the securities, and that she was not entitled to any part of the sums contained in the bonds *jure relictæ*. Rossborough's Trustees *v.* Rossborough, p. 111.

———*Heritable and Moveable—Trust—Liferent—Residue — Capital and Income — Lease.* A testator in his trust-disposition and settlement, after making certain provisions for behoof of his widow in liferent, directed his trustees to pay the income of the residue of his estate to his sister and her children, and after her death, and when the youngest of the children had attained the age of twenty-five, to divide the capital of the residue amongst them. The testator was tenant of certain premises, where he carried on business as a purveyor of public entertainments, and when he died some years of the lease were still to run. His business was wound up after his death, and the trustees having failed to dispose of the lease or to sublet the premises, they became unoccupied.

The testator's widow repudiated her provisions under the settlement, and claimed her legal rights. *Held* that, in a question with the widow, the loss occasioned to the estate by the premises being unoccupied fell to be charged against the moveable estate of the deceased; and in a question between the trustees, as representing the fiars and the sister of the testator, the loss fell to be charged against the residue of the estate, and did not form any proper charge against the sister as liferentrix in the settlement. Rossborough's Trustees *v.* Rossborough, p. 111.

Succession—Vesting—Fee and Liferent—Clause of Survivorship. A testator in his trust-disposition and settlement, after providing an annuity to his wife, directed his trustees to hold the fee of the subjects liferented by his wife, and the whole residue of his estate, for behoof of his children in certain proportions. The provisions in favour of his sons he directed should be payable to them as follows—£2000 to each twelve months after his death, and the remainder twelve months after the death of his wife. The provisions to his daughters were to be held for them in liferent, and for their children in fee, and failing any of his daughters without issue, the share of such deceaser was to form part of the residue of his estate. He further provided that "in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid." The testator died in 1841, and his wife in 1852. A son died without issue in 1861, and three daughters died thereafter without issue. *Held* that the testamentary trustees of the said son had no claim to any part of the fee of the shares liferented by the three daughters whom he predeceased, in respect that the fee of the shares liferented by the daughters did not vest in the sons till the death of the liferentrices. *Observations per* Lord President on *Haldane's Trustees* v. *Murphy*, 9 R. 269. Steel's Trustees *v.* Steel and Others, p. 146.

——*Vesting Subject to Defeasance.* A testator left his whole personal means and estate to trustees to be held in trust for the equal use and behoof of all his children, and the respective heirs of their bodies, and failing any of his said children without lawful issue to the survivors and survivor of them and their lawful issue, share and share alike, "subject always to the uses, control, and disposal hereinafter directed, and declaring that the said shares shall not become vested interests in my children respectively until their respective majorities or marriages." The children upon reaching 25 were to become trustees, and upon the youngest child reaching 21 the trustees other than his children were to cease to act. There was power given to the trustees in certain cases, none of which occurred, to restrict the rights of daughters to a liferent, and to settle the fee of their shares of capital upon their children. At the close of the deed it was provided that "failing all my children and their lawful issue after the decease of my said beloved wife, my said trustees shall pay and deliver over the whole of my said estate . . . to my nearest heirs, executors, or assignees." The testator died predeceased by his wife and all his sons, and survived by his daughters, all of whom were over 25 at his death. One was then married but had no children; the others all died unmarried. The daughters dealt with the estate as having vested in them equally, and left settlements. *Held* that the estate vested in each daughter as she respectively married or attained majority, subject to defeasance in certain cases; that the provision in favour of "nearest heirs" applied only to the case of children "failing" before vesting; and that the settlements of the daughters must receive effect. Cheyne and Stuart *v.* Irving Smith and Others, p. 391.

Succession — Testament — Construction — Bequest Burdened with Trust for Issue—Vesting—Intestacy. A truster appointed his trustees to divide the residue of his estate in certain shares among his children, payable as soon as his estate was realised, and upon the death of his wife to divide in like manner the sum set apart for her annuity. The shares of deceasers dying before payment, and without issue, were to be divided among survivors, and the issue of deceasers were to take their parents' share. By a codicil the testator directed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised and can be invested, upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent, for their liferent use allenarly, and to the child or children of their bodies, if more than one, equally among them in fee." In an action of multiplepoinding at the instance of the trustees, *held* that the provisions to children vested *a morte testatoris;* that the sole object of the codicil was to protect the capital of a daughter's share for possible children; and that it did not result in intestacy on the part of the testator with respect to the share of a daughter dying without issue. Whyte and Others (Dalglish's Trustees) *v.* Dalglish and Others, p. 424.

——*Vesting—Heritable and Moveable—Conversion—Power of Sale.* A testator by trust-disposition and settlement, dealing with his whole estate, directed his trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." He also directed his "trustees at the first term after his wife's death, if she survived him, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of capital which may have been made to her by my trustees." . . . The trustees were empowered, "for accomplishing the purposes of this trust," to sell and dispose of the truster's whole estate, heritable and moveable, and convert it into money. His wife survived, and died leaving a testament disposing of her whole moveable estate without

having asked or received any money from the capital of her husband's estate. Part of said estate consisted of house property, which remained unconverted during the widow's lifetime, but was sold after her death. *Held* that the widow's right to half of her husband's estate was moveable, and that half of the price realised for the house property fell under her testament. Kippen's Trustees *v.* Leitch and Others, p. 497.

Succession—Double Legacy. A testator by trust-disposition and settlement left a legacy of £1000 to both A and B. By a codicil he recalled A's legacy of £1000, and gave "said sum" to B. By a subsequent codicil he renewed the legacy of £1000 to A, and made no reference to B. *Held* that the additional legacy of £1000 to B had not been revoked. Wright's Trustees *v.* Wrights, p. 514.

——*Vesting—Destination-Over—Vesting Subject to Defeasance.* A testator directed his trustees to realise the residue of his estate and to pay the free annual proceeds thereof to his sister during her life, and at her death to divide the residue among his nephews and nieces *nominatim* in certain proportions. The deed further provided that "if any of my said nephews or nieces die before my sister, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay or my said niece Patricia Ramsay, die without issue, the share of such deceaser or deceasers shall fall to their surviving brothers and sisters equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister, and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one." *Held* that the surviving brothers and sisters of one of the nephews who had predeceased both the testator and the liferentrix were entitled to take his share of residue as conditional institutes, and that the share of Edward Bannerman Ramsay, who had predeceased the liferentrix, had vested *a morte testatoris* subject to defeasance in the event of the beneficiary leaving children, but as he had died without issue, it fell to the executor under his settlement. Young and Others (Earl of Dalhousie's Trustees) *v.* Macdonald and Others, p. 525.

——*Trust—Direction to Divide and to See to the Investment of the Residue.* A testatrix by her settlement directed her trustees to divide the residue of her estate equally between her two daughters, "and to their respective heirs and assignees, but declaring that the provision hereby made . . . is an alimentary provision to their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their husbands, . . . but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions" *Held* that the daughters were fiars, and were entitled to have the residue paid over to them upon their own receipts, but (following the case of *Allan* v. *Allan's Trustees*, December 12, 1872, 11 Macph. 216) that the receipts should bear exclusion of the *jus mariti* and right of administration. Jamieson and Others *v.* Lesslie's Trustees, p. 538.

Succession—Trust of Special Fund—Joint Gift of Income in Liferent with Power of Disposal failing Children. A testator directed his trustees to hold £60,000 of his estate in trust "as a special fund for the sole use and behoof of the four daughters of my brother . . . the survivors and survivor of them, share and share alike . . . in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent." He further directed his trustees—"that the interest or annual income arising from said special fund . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly during their respective lives, . . . and that, subject to said liferent the said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters or either of them, to the extent of their respective mothers' share in said special fund in fee, and that immediately and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand however informal the same may be, and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing." These four nieces survived the testator. The first deceaser left neither children nor deed of nomination. The next left children. *Held* that she properly liferented one-third of the special fund from her predeceasing sister's death until her own, and that her children were entitled under the trust-deed to the fee of that third, unburdened by any liferent to their surviving aunts. Strachan's Trustees *v.* Williamson and Others, p. 570.

——*Vesting—Trust—Direction to Trustees to Retain.* A testator appointed trustees, and left his property to be divided equally among his three children—two daughters and a son. He directed that any share his daughter M might receive was "to go direct to her and her children." His daughter H's share he "settled in like manner," but provided, "also my trustees shall retain charge of her share, It is not to go into her hands." He further directed, "the same with reference to my son C, his share to remain in the hands of my trustees for his behoof." *Held* that the property vested at the testator's death in his three children, but that, whereas the trustees were bound to pay over M's share to her at once, they were to retain the shares of H and C for their behoof. Christie's Trustees and Others, p. 611.

——*Ademption of Legacy—Shares—Mortgage.*

By the Paisley Corporation Gas Act 1870 the shares of the Paisley Gas Company were extinguished, and the Corporation was required to substitute therefor to the shareholders annuities which were declared to represent shares of the company. In 1886 the Corporation, under the powers of their Act, redeemed these annuities, and by arrangement granted to the annuitants mortgages over the gas undertaking for the amounts due to them. A mortgagee, who was originally a shareholder of the Gas Company, died in 1888, leaving a settlement dated 1884, whereby she directed her trustees to assign and transfer to her niece "the shares standing in my name in the Paisley Gas Company." *Held* (Lord Rutherfurd Clark *diss.*) that the legacy had not been adeemed, and that the legatee, in the absence of any indication of intention to the contrary, was entitled to claim the testator's interest in the mortgage. Macintyre and Others (Mrs Mitchell's Trustees), p. 615.

Succession—Direction to Trustees to Pay—Fee—Life-rent—Intention of Testator. A testator under the *fourth* purpose of his settlement directed his trustees (first) to divide the whole residue of his estate as it came to be realised into five equal shares, and (second) to pay or make over one of said fifth shares to each of his daughters M, C, and E, the shares to be paid over as soon as conveniently might be after his decease, and the remainder when the same became available, the said shares to be at the absolute disposal of his said daughters. In a subsequent codicil with reference to the clause above named (second) the testator said, "I hereby revoke and alter the clause named (second) . . . to this extent, that in place of the absolute power therein given to my daughters M, C, and E, I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." *Held* (1) that "respective shares of my heritable estate" must be read as "respective shares of my whole estate," that being the obvious intention of the testator; and (2) (*diss.* Lord Adam) that the trustees were not entitled to hold any part of the shares of residue given by the clause named (second) to the testator's daughters M, C, and E, but were bound to pay over the whole of said shares to these daughters. Clouston's Trustees *v.* Bulloch and Others, p. 644.

———*Legacy — Accretion — Residue — Unascertained Class.* A testator directed his trustees to hold the residue of his estate for behoof of and equally among the issue of his only child, to accumulate the interest, and to pay the shares of accumulated principal and interest to sons on their attaining twenty-five years, and on the daughters attaining that age or being married, to hold their shares for them in liferent for their liferent alimentarily use allenarly, and their respective children in fee. He provided that if a grandson died before the period of payment without issue his share should accresce to the survivors, but there was no similar provision with regard to the granddaughters' shares. A granddaughter survived the testator, but died before the period of payment without leaving issue. *Held* that the share set free by her death went to form part of the undivided residue of the testator's estate. Muir and Others (Muir's Trustees) *v.* Muir, p. 672.

Succession—Power of Appointment. In an antenuptial contract of marriage the power was reserved to the husband to apportion a sum, which it was stipulated he should provide, as he thought proper among the children of the marriage, and failing his doing so, a similar power was given to the wife should she survive him. Should neither exercise the power of apportionment the sum was to be divided equally among the children. The husband died first, without having exercised the said power. After his death the wife became party to a bond and assignation in security by a son in favour of an assurance company, whereby she apportioned to the said son, his heirs and assignees, a sum of not less than one-fifth part or share of the sum stipulated for in the marriage-contract. She died possessed of considerable moveable property, leaving a trust-disposition and settlement in which she directed the trustees to pay the residue of her whole estate to the children who should survive her, with the exception of one daughter, to whom only a sum of £100 was left, in such shares as she should appoint by any writing under her hand, failing which in equal shares; declaring that these provisions should be in full satisfaction of any claim competent to them on her death, "whether legally or under my said marriage-contract." *Held* that the bond and assignation in security contained a valid appointment to the son therein mentioned to the extent of one-fifth of the estate held in trust under the marriage-contract, and that the remaining four-fifths of that estate fell to be divided equally among the other children of the marriage, or those in their right, the power of apportionment not having been exercised with regard thereto. Bowie and Others *v.* Paterson, p. 676.

———*Repudiation of Provisions under Settlement—Forfeiture — Intestacy — Fee — Liferent.* A testator directed the trustees under his settlement to pay over a sum of £2000 to his son, or in the event of their seeing fit to do so, to retain the said sum in their hands for his behoof, and pay him the interest, to hold the residue of his estate for behoof of his two married daughters in liferent, and their "heirs and successors equally amongst them" in fee; declaring that these provisions should be in full to them of any claims they might have against his estate after his death, "and that in the event of any of my children creating any dispute in regard to these presents the child so acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share in the event of it being that falling to my son

in the same manner as I have appointed in regard to the residue of my means and estate, and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or to retain same for his behoof as aforesaid." By a codicil he appointed his trustees, instead of paying over to his son the sum of £2000, "or any other or further sum which may happen to fall to him," to retain said sum in their own hand for his behoof, and pay him the interest annually, such interest to be purely alimentary, and he appointed his trustees at his son's death to pay and make over the said sum of £2000 to his heirs and successors equally among them. One of the daughters repudiated the provisions in her favour, and claimed legitim. *Held* (1) that the repudiation implied a forfeiture both of her own rights under the settlement and also those of her heirs and successors, and (2) (Lord Rutherfurd Clark *dies.*) that with regard to the share of residue so forfeited by the daughter, the son was entitled to the fee of one-half of it, subject to the directions contained in the codicil, and that the trustees were bound to hold the other half for behoof of the other daughter in liferent, and her heirs in fee. Graham and Others (Campbell's Trustees) *v.* Campbell and Others, p. 699.

Succession—Trust—Direction to Hold or Invest—Right of Beneficiary to Immediate Payment. A lady in her trust-disposition and settlement left the residue of her estate to certain persons named, equally—"The said shares of residue to vest at my death; declaring that the share falling to any of the said residuary legatees who are females, and may be married at the time of my death, shall be held by my said trustees, or invested for their behoof, exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors." *Held* that the shares of female married residuary legatees vested in them, and that the trustees were not entitled to retain such shares, the declaration above quoted being void for repugnancy. Duthie's Trustees *v.* Forlong, p. 709.

———*Vesting—Period of Payment—Substitution in Moveables.* A testator in his settlement directed his trustees to pay over the free yearly income of his estate, both heritable and moveable, to his son. In the event of the son dying without lawful issue the trustees were directed to convey the testator's heritage and his plate and pictures to J. M., son of his brother J. M., and the lawful heirs of his body, whom failing to G. M., a younger son of his brother J. M., and the lawful heirs of his body. With regard to the residue of his estate, the testator appointed his trustees, "in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, . . . to apportion and divide the said residue among the children of my said brother J. M. equally." Then followed this declaration—"That the share of succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The testator's personal estate amounted to £48,000, which was all capable of early realisation except a sum of about £5000. The testator's son died without children. J. M., the testator's nephew, survived him between five and six months, and then died unmarried and intestate. At the time of his death the trustees had not conveyed the heritable estate or the plate and pictures to him, nor had they divided the residue. *Held* (1) that the plate and pictures fell to be conveyed to the testator's nephew G. M., along with the heritage, as substitute heir of provision; and (2) that a share of the residue vested in the person of the testator's nephew J. M. Maclean's Trustees v. Macleans, p. 777.

Succession—Vesting—Nearest of Kin—Destination-Over—Period of Distribution. By postnuptial contract spouses conveyed to each other in liferent, and to the children of the marriage, if any, in fee, the whole estate of each, the fee of both estates to be divisible by the husband of the marriage, such division to take effect after the death of the surviving spouse, and at majority or marriage of the children. Powers of advancing funds for their maintenance and education, or settlement in business, were given to certain named trustees. Should all the children die during the life of the surviving spouse the funds were (failing a disposition by the spouses severally) to suffer division after the decease of the survivor, by the husband's funds falling to his own nearest of kin, and the wife's falling to her own nearest of kin. The husband died without executing any further deed, survived by his widow and one child. The latter died, survived by an only son. The widow sold certain heritable property, which had been bought by her husband, and conveyed the same with consent of her grandson. The price of the subject was delivered to trustees to be held for those entitled thereto under the above named contract. The grandson died under age, disposing of any right he might have in the said price in favour of his grandmother, who dealt therewith in her will. *Held* (*rev.* the judgment of the Court of Session) (1) that the persons favoured as to the husband's estate were his nearest of kin as a class to be ascertained as at his own death; (2) that the grandson's will carried the price of the heritable subjects, as it had not been challenged within the prescribed period. *Opinion* (*per* Lord Watson) that as a result of the Moveable Succession Act 1855 (18 and 19 Vict. cap. 23) "nearest of kin" is not equivalent to heirs *in mobilibus*. *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269, doubted. Murray and Others (Gregory's Trustees) *v.* Mrs Gregory's Trustees and Others, p. 787.

———See *Husband and Wife.*

Summary Ejection. See *Jurisdiction.*

Sunday Traveller. See *Justiciary Cases.*

"*Superfluous Lands.*" See *Railway.*

Superior and Vassal — Personal Obligation in Feu-Contract—Obligation on Vassal, his Heirs, Executors, and Successors whomsoever. A feu-contract provided that the subjects disponed should in all time coming descend to and be acquired by the heirs and successors of the vassal, who bound "himself, his heirs, executors, and successors whomsoever" to pay the feu-duties and implement the other prestations incumbent on them. On the death of the vassal his heir-at-law refused to take up the succession. In an action at the instance of the superior—*held* (1) (following the case of *The Police Commissioners of Dundee* v. *Straton*, February 22, 1884, 11 R. 586) that the deceased's executors were liable only for feu-duties falling due in the vassal's lifetime; and (2) that they were not liable for damages in respect of the heir's failure to enter. Aiton *v.* Milne and Others (Russell's Executors), p. 478.

——— *Obligation to Relieve from Public Burdens —Negative Prescription.* A contract and agreement was entered into between C and D in 1764 to the effect that "the said C has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu right to the said D, his heirs and successors," of certain lands described, "to be held in feu farm and heritage of the said C, his heirs and successors, for yearly payment of £3 sterling, . . . and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said publics a real burden upon his other lands . . . for the which causes, and on the other part, the said D, on the said C performing his part of the premises—that is, granting the said feu-contract in the terms above narrated, binds and obliges him, his heirs and successors, to content and pay to the said C, his heirs, executors, and successors whatsoever, the sum of £600 sterling." The deed contained a precept of sasine on which D was infeft in the said lands. This sasine was followed by a series of unchallenged infeftments confirmed by successive superiors, and by uninterrupted possession, but apparently no feu-contract was granted in pursuance of the above agreement. In an action by vassals into whose hands the *dominium utile* of the lands had passed after a series of transmissions against a singlar successor of C in the superiority, *held* that the defender was not bound to free and relieve the pursuers of ministers' stipend and other public burdens, in respect that the existing investiture of the lands made no mention of such an obligation, and that it could not be supplied from the contract of 1764, which was not a feu-contract, and merely imposed the obligation of relief as a personal obligation on C and his heirs. *Question* by Lord Kinnear, whether the negative prescription would apply if an obligation to free and relieve the vassal of public burdens contained in an original grant of lands was omitted from the investiture for forty years, and not actually enforced. Durie's Trustees *v.* Earl of Elgin and Kincardine, p. 664.

——— *Non-Entry — Casualty — Conveyancing Act* 1874 (37 *and* 38 *Vict. c.* 94)—*Composition—Relief.* John Hamilton of Rodgerton, who was entered with the superior, in 1804 disponed these lands to James Hamilton, who, when summoned to enter, tendered the heir of the disponer, John Hamilton of Greenbank, who was infeft on a precept of *clare constat*. James Hamilton died in 1854, leaving a settlement of the lands in favour of James Dunlop Hamilton, the second son of John Hamilton of Greenbank, and the trustees under the settlement when called upon to enter tendered the heir of the last entered vassal, John Hamilton junr. of Greenbank, who was infeft on a precept of *clare constat*. John Hamilton junr. conveyed the lands with an *a me vel de me* holding to his brother James Dunlop Hamilton, who held base of his brother down to the passing of the Conveyancing Act 1874. John Hamilton junr. died in 1877. James Dunlop Hamilton died in 1886, leaving a settlement of the lands in favour of his brother William Dunlop Hamilton, who was infeft thereon, and who was the heir-at-law both of the disponer and of John Hamilton junr., the last entered vassal who paid a casualty. In an action against him by the superior—*held*, by a majority of the whole Court (following the case of *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738), that a new investiture came into existence with the implied entry of James Dunlop Hamilton in 1874, and that the defender was liable in a casualty of composition. Harington Stuart *v.* Hamilton, p. 710.

Superior and Vassal. See *Revenue—Res Judicata.*

Supervision Order in Voluntary Winding-Up. See *Company.*

Supervision Order (Petition for) and for Appointment of Additional Liquidator. See *Public Company.*

Surplus. See *Entail.*

Surrogatum. See *Husband and Wife.*

Suspension. See *Justiciary Cases.*

Suspensive Condition. See *Possession.*

Tacit Relocation. See *Landlord and Tenant.*

Teacher's House. See *School Board.*

Tenant not to Sell or Retail Spirits upon the Premises without Consent. See *Landlord and Tenant.*

Tenement Occupied for the Purpose of Trade. See *Revenue.*

Term of Payment. See *Succession.*

Terms of Oath. See *Bankruptcy.*

Terce. See *Succession.*

Testament — Construction — Uncertainty — Bursary—Persons Benefited. A testator by his trust-disposition and settlement directed certain sums of money to be invested, and the interest paid in bursaries to deserving young men "either resident in the parish of Alves, or in the parish and burgh of Elgin." Parts of the latter parish lay beyond the burgh, and parts of the burgh extended beyond the parish. *Held* that residenters in any part of the parish of Elgin, or in any part of the burgh, might be benefited. Macpherson and Others (Anderson Bursary Trustees) *v.* Sutherland and Others, p. 430.

Threshing-Mill without a Guard over the Drum. See *Reparation.*

Time of Valuation to Ascertain Legitim. See *Parent and Child.*

Title. See *Trust for Behoof of Creditors.*

Title to Sue. See *Shipping Law—Bankruptcy—Reparation—Judicial Factor.*

"*To the Alarm of the Lieges.*" See *Justiciary Cases.*

Transference of Right to Fund Arrested. See *Jurisdiction—Arrestment.*

Transfer of Debenture. See *Revenue.*

Transfer of Shares. See *Revenue.*

Triennial Prescription. See *Prescription—Process.*

Trust—Investment—Law-Agent—Liability of Law-Agent. The law-agent of a trust is not bound to volunteer advice to the trustees. Adam Curror and John Curror, trustees acting under a trust-disposition and settlement, continued to hold as an investment of the trust-estate a loan made by the testator before his death to Adam Curror secured only on his personal obligation. In consequence of Adam Curror's bankruptcy the money was lost, and John Curror's representatives were obliged to make good this loss to the trust-estate. In an action by the latter parties against the representatives of the law-agent of the trust to recover the amount for which they had been found liable, the pursuers founded on averments to the effect that the law-agent had, in gross neglect and breach of his duty, failed to advise the trustees that it was their duty as trustees to obtain payment of the loan, and that the security upon which the money stood was not such as trustees were entitled to hold as a trust investment. *Held* that the pursuers' averments were irrelevant, and the action *dismissed.* Currors *v.* Walkers, p. 245.

———*Powers of Trustees under Trust-Deed—Investment of Trust Funds—Shares in a Company after Voluntary Liquidation and Reconstitution.* Trustees were empowered by trust-deed to lend the trust funds upon certain enumerated securities. They were also recommended not to change any of the investments made by the trustee, which they were authorised to continue without incurring personal responsibility. A company, which was not among the enumerated securities, but which paid large dividends, and in which the trustee held several shares, was wound up voluntarily for the purpose of being reconstituted with larger capital and more extensive powers. *Held* that, however desirable it might be for the beneficiaries under the trust-deed to become shareholders in the new company, it was not within the powers of the trustees to hold the shares allotted to them in lieu of those held in the old company. Thomson's Trustees *v.* Thomson and Others, p. 368.

———*Trust Management—Ultra Vires—Process—Proof—Expenses.* The beneficiaries under a trust-deed raised an action against the trustees to make good loss which it was alleged had been caused by their management of the estate, and averred that when the defenders entered office the estate was sufficient to cover the truster's liabilities, with a substantial reversion in favour of the pursuers, and that the defenders had exceeded their powers by borrowing upon instead of selling the heritable property. The First Division remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the debts due to the truster and paid by the trustees, and the yearly income and expenditure by the trust," and disposed of the case upon the basis of the report returned. On appeal, *held* that the pursuer was entitled to a proof of his averments respecting the value of the heritable property when the trustees entered office and could have sold it, on the ground that he had never renounced probation, or agreed to accept the report as including the evidence he wished to lead, and that it was still within his right to prove in the ordinary way disputed facts which were not proper matters of accounting, but that the appeal must be *affirmed* without costs, as the appellant had not previously asked for the restricted proof which was ultimately allowed him. *Opinion* (*per* Lord Watson) that a trustee who has power to sell or borrow is only required to show ordinary prudence in selecting either course, and the question whether or not he acted prudently is one of fact to be solved according to the circumstances of each case. Binnie *v.* Broom and Others, p. 794.

Trust. See *Succession.*

Trust for Behoof of Creditors—Powers of Trustee—Disposition ex facie Absolute—Sale by Consent—Title. A trust-deed for behoof of creditors granted in 1879 conferred power upon the trustee to sell the estates thereby conveyed, but provided that the power of sale "may be exercised by him with the advice and concurrence of" a committee of creditors to be appointed by the trust-deed. No committee was appointed. Prior to the date of the trust-deed the granter had conveyed a property to a creditor *ex facie* absolutely, but really in security of advances. In 1888 the successors of this creditor having obtained the consent of the trustee agreed to sell the property, and in implement of their agreement offered the purchaser a disposition by them with the consent of the trustee. The purchaser refused to accept a disposition without the consent of the granter of the trust-deed. *Held* that the disposition offered by the sellers was valid, and that the purchaser was bound to accept it. Gardner *v.* Scott's Trustees and Another, p. 535.

Trust for Creditors. See *Principal and Agent.*

Trust-Deed. See *Bankruptcy.*

Trust Management. See *Trust.*

Trust of Special Fund. See *Succession.*

Trustee. See *Bankruptcy.*

Tutor. See *Pupil.*

Ultra Vires. See *Trust.*

Unascertained Class. See *Succession.*

Unauthorised Cancellation. See *Bill.*

Uncertainty. See *Testament.*

Undivested Owner. See *Sale.*

Undue Detention. See *Ship.*

Undue Preference. See *Railway.*

Unlawful Games. See *Justiciary Cases.*

Unsafe State of Master's Plant. See *Reparation.*

Unsound Meat. See *Justiciary Cases.*

Valuation Roll—Lands Valuation Act 1854 (17 *and* 18 *Vict. c.* 91), *sec.* 6—*Cemetery—Yearly Value.* Land belonging to a cemetery company, laid out as a cemetery, from which the company derived an annual income by allotting the land in portions for burial purposes,

The Scottish Law Reporter.

WINTER SESSION, 1888–89.

In order to secure regularity of publication, it is occasionally necessary to insert the Reports of Cases slightly out of the order of dates on which they have been decided.

COURT OF JUSTICIARY.

Wednesday, September 12.

GLASGOW AUTUMN CIRCUIT.

(Before Lord M'Laren and Lord Lee.)

H. M. ADVOCATE *v.* MACLEODS.

Justiciary Cases — Fraud — Indictment — Relevancy — Specification — Fraudulent Bankruptcy — Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 13, *Sub-sec. B* (3).

An indictment charging panels with having, in pursuance of a scheme to that effect, obtained on credit and appropriated goods on false pretences, after setting forth the false representations alleged to have been made, and averring that the panels did by said false representations "deceive and impose upon" persons specified, continued "and did thus induce" them "to supply you on credit with yarn and hosiery goods" of values specified, "towards the settlement of which you did not pay more than" certain specified sums. Objections to the relevancy on the grounds (1) that the obtaining of the goods was not connected with the representations as effect and cause; (2) that non-payment being of the essence of the crime, the statement that part of the goods had been paid for effectually destroyed the charge so far as these goods were concerned, and as regarded the balance remaining unpaid, negatived the intention to defraud—*repelled.*

A charge under 43 and 44 Vict. cap. 34, section 13, sub-section B (3), of obtaining property on credit by false representations within four months prior to sequestration, and not having paid for the same, which did not specify the property obtained but only its value, *held irrelevant. Opinion* (*per* Lord M'Laren) that it is not sufficient to constitute this crime that the property be obtained within the four months, it being also necessary that the false representations be made within that period,

The Debtors Act 1880 (43 and 44 Vict. cap. 34), section 13, sub-section B (3), provides that "the debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction shall be liable to be imprisoned for any time not exceeding sixty days . . . (B) in each of the cases following . . . (3) if within four months next before the presentation of the petition for sequestration or cessio, he by any false representation or other fraud has obtained any property on credit and has not paid for the same."

Simon Macleod and Roderick George Macleod were indicted before the High Court of Justiciary at Glasgow on 12th September 1888, on the charge "that you, while carrying on business as hosiery manufacturers under the firm of S. and R. G. Macleod, at 73 Mitchell Street, Glasgow, having formed a fraudulent scheme for obtaining on credit the goods of others on false pretences, and appropriating them to your own use, did, in pursuance thereof, on 13th December 1886, write and despatch to R. Walker & Sons, manufacturers, Leicester, the letter No. 6 of the productions lodged herewith, which letter was duly received by them, and the representations as to your means and financial position therein contained were false, and on the dates in 1887 in the first column of the schedule annexed hereto, in

your said premises, you did verbally make the same or similar false representations as those contained in the said letter to the persons named and designed in the second column of said schedule, and in addition you falsely stated to the said persons mentioned in the said second column that £10,000 of the capital in your said business was your own, all made since you began business; and did by said letter, and by the foresaid false verbal representations to John Peach Butlin, referred to in said schedule, deceive and impose upon him and upon the said firm of R. Walker & Sons, and by said false verbal representations deceive and impose upon the other persons named in the second column of said schedule, and did thus induce the said firm of R. Walker & Sons, and the other firms mentioned in said schedule, during the period in the third column of said schedule set opposite to the respective names of the said firms in the said third column, to supply you on credit with yarn and hosiery goods to the values specified opposite to the respective names of the said firms in the fourth column of said schedule, towards the settlement of which you did not pay more than the sums in the fifth column of said schedule, and you thus did cheat and defraud the said firm of R. Walker & Sons and the other persons in the second column of said schedule, or the said firms represented by them, of the amounts respectively specified in the sixth column of said schedule, or otherwise, the estates of the said S. and R. G. Macleod, and of you the said Simon Macleod and Roderick George Macleod, having been sequestrated on 17th March 1888, and you being thus debtors in a process of sequestration, did in your said premises in Mitchell Street, between 17th November 1887 and 17th March 1888, being within four months of the presentation by you of the petition for the sequestration of your estates, by means of the said false representations, obtain property on credit, which has not been paid for, from (1) the said R. Walker & Sons to the extent of £297, 6s. 7d.; (2) Robert Pringle & Son to the extent of £5, 13s. 7d., and from the following firms named in said schedule, viz., (3) John Paton, Son, & Company, to the extent of £19, 14s.; and (4) David Sandeman & Company to the extent of £440, 12s., contrary to the Act 43 and 44 Vict. cap. 34, section 13, subsection B (3)."

The prisoners objected to the relevancy of both charges. Argued for them—I. The common law charge was defective in specification and made no averment of crime. The cases, the class under which it was sought to bring the present, were cases of pretended traders, who professed to carry on a legitimate trade and were really swindling their customers. It was clear that there was no such case here, for the indictment itself, which set forth "towards the settlement of which [goods] you did not pay more than the issues in the fifth column of said schedule," showed that the prisoners had paid part of the price before they were overtaken by misfortune. The indictment, further, did not connect the alleged false representations with the obtaining of the goods. The indictment and schedules showed a course of dealing with payments at intervals in a way common in contracts of a continuing character. Further credit, it must be presumed, would be given because of satisfaction with these honest payments, and not because of representations made before the course of dealing began. The one thing was not said to be the consequence of the other. Besides, a charge of obtaining goods on false pretences could not stand when the goods had been in part paid for, because such payment negatived the intention to defraud. The indictment logically involved the proposition that goods might be ordered on a representation that the buyer was in good credit, and be fully or partly paid for, and yet the buyer might be prosecuted on the mere statement that the original representations had been false. II. The statutory charge was bad, because the alleged "fraud" was, according to the indictment, committed more than four months before the sequestration. The simple grammatical reading of the statute was that the whole course, of which the fraud was the essence, must be committed within the four months. In any view that was a natural reading, and being the more favourable for the prisoner was the reading which the Court would favour in scanning an indictment.

Argued for the Crown—I. The indictment contained every essential element of relevancy in common law charges of obtaining the goods of others by fraud, for it averred (1) that false representations were made (2) for the fraudulent purpose of cheating, and (3) to the effect of obtaining the goods of the person cheated.—*H.M. Advocate* v. *Witherington* (H. C.), June 17, 1881, 4 C. 475. The false representations were connected with their successful result by the words "deceive and impose upon" certain persons, and "did thus induce" them to part with their goods. The objection that they parted with their goods in part because the goods first parted with had been paid for would be an objection probably unanswerable if the proof did not negative it, but it was no real objection to relevancy. II. The statutory charge was relevant. The statute placed the limit of time on the "obtaining" of the goods, not the fraud. A fraud once committed lived on into the future dealing. The reading proposed by the prisoners would defeat the statute, for it might exclude the case of a deliberate and continued fraud effectual within the four months, and strike only at the more venial case of a trader who had long been dealing honestly but fell into transgression for the first time within four months of his bankruptcy.

At advising—

Lord M'Laren—There are two charges here, one at common law and the other under the Bankruptcy Act of 1880. As regards the common law charge it does not appear that the indictment is open to any exception on the ground of failure on the part of the prosecutor to set forth the particulars of the crime. There have been cases—I know of one that occurred since the passing of the new Procedure Act—in which it was laid down that you do not necessarily make a relevant indictment by just copying the words of the schedule, because every indictment must be considered with reference to the particulars of the case, and it might be necessary to expand the description of the crime which is in substance indicated in the schedule of the Criminal Procedure Act. In the present

case it appears to me that there is a full and fair specification both of the representations on the faith of which the goods are said to have been obtained and of the particular transactions resulting in the loss to the dealers who gave credit. Two objections to the relevancy of the indictment have been stated, one of them being that there are no words properly connecting the representations with the obtaining of the goods, for the one is said not to be the direct consequence of the other. It is possible that the indictment might have been made more precise in this respect, but I think the words which follow the narrative of the representations made, viz., "and you did thus induce the said" firms to supply the goods, are sufficient to connect the representations with the resulting injury. The second objection is, that it is of the essence of the crime of obtaining goods on false pretences that the goods should not be paid for. It is argued, no matter whether the representation be true or false, if the goods are paid for no fraud is committed; there may be a moral fraud, but no one is defrauded in the sense of being injured in his property. Now, it may be that in the statement of facts in this indictment the defenders will be able to establish that they paid for certain of the specified goods; and in that case a question will arise for the consideration of the jury, whether the goods subsequently obtained were obtained in reliance on the original representation? If it were shown, for example, that the seller had meantime become aware that these representations were not trustworthy and had nevertheless gone on supplying goods to the panels because he had been paid for those already supplied and hoped for payment against future orders, then the case would very likely break down. If, on the other hand, it was proved that the seller supplied goods on the faith of the original representations, it would not be any answer to a case of that kind to say that an interval of time had elapsed between the representations and the obtaining the goods. Mr Ure's observation though entitled to weight ought to be addressed to the jury on the import of the evidence rather than to us on the question of relevancy.

Regarding the charge under the statute, I agree with my brother Lord Lee that in order to make a relevant charge under the Bankruptcy Statute there must be a separate schedule setting forth the particular goods that were obtained within the period of four months; the schedule in the indictment framed with reference to the common law charge—extending over a period of two years—is not properly applicable to the statutory charge. It would be necessary either to have a separate schedule or to have the particular items stated that were intended to be made applicable to the statutory charge. That appears to me to be sufficient to dispose of the question of relevancy arising on the statutory charge. I may say, further, although it is not necessary for the decision of the case that I have the greatest possible doubt whether any relevant charge under the statute could be framed upon the facts of this case. It appears to me that there is one possible interpretation of the statute which would be adverse to the relevancy, viz., that the representation and supplying the goods must both be within the specified period of four months. No doubt there is another possible interpretation, viz., that provided the goods were obtained within four months of sequestration on the faith of a written representation previously made an offence is committed. But as between the two interpretations, neither being a strained interpretation, but both fair and possible readings of the statute, I think that, in accordance with known rules, we ought to apply the principle of "strict construction," that is to say, the construction which gives the least extension to this new category of crime.

Lord Lee—I have arrived at the same result, and upon both the objections, though upon the objection to the charge under the statute I am not prepared to assent to the opinion which your Lordship has indicated upon the construction of the statute. With regard to the first charge, and indeed with regard to both charges, the kind of case which I think this indictment discloses is that of obtaining goods by false pretences, persuading men of business by means of a false representation concerning the financial condition of a firm, to enter upon a course of dealing, the result of which is, that goods are supplied on credit and not paid for. I am of opinion that that kind of charge is sufficiently alleged in the first part of the indictment. As regards the common law charge, it is in my opinion sufficiently set forth that this false representation was made by the panels in pursuance of a scheme, and secondly, that the result of these false representations was to induce the persons alleged to have been defrauded to supply the goods on credit to their ultimate loss. There then arises the question upon the facts, whether the balance of goods supplied to the panels after the first goods had been sent to them and paid for, were or were not supplied on the false representation? That is a question for the jury, and I say nothing upon it at present. I am of opinion, therefore, that the common law charge is relevant.

With regard to the statutory charge, I am of opinion with your Lordship, that it is necessary that there should be a sufficiently distinct allegation that the panel has by false representations obtained property on credit which has not been paid for, and that it is necessary that the goods so obtained must be specified. I do not find that they are. The only allegation here is that the panel fraudulently obtained goods from various firms amounting in value to (1) £290, (2) £5, (3) £19, and (4) £440, within four months of sequestration. I do not think that is a sufficient compliance with the statute. What were the particular articles so supplied? Is this sum of £440 to be made up out of goods supplied prior to the period of four months? What were the goods that the prosecutor undertakes to show were delivered in that four months, and amounting in value to the sums mentioned in the schedule? I do not find that there is any specification of these in the indictment, and I think that is sufficient for our decision on the relevancy of the statutory charge. I agree with your Lordship, that either of the constructions of the statute suggested by your Lordship is possible, but I do not propose to give any opinion as to which is to be preferred. I am for sustaining the objection to the relevancy of the statutory

charge, but repelling the objection to the charge at common law.

The Court sustained the objection to the relevancy of the charge under the statute, and *quoad ultra* found the libel relevant.

Counsel for the Crown—Sym, A.-D.—J. C. C. Brown.

Counsel for Simon Macleod—Ure.

Counsel for Roderick Macleod—Strachan.

COURT OF SESSION.

Tuesday, October 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EDMONSTONE AND ANOTHER (LUMSDEN'S TRUSTEES) *v.* SETON AND OTHERS.

Succession—Marriage-Contract—Bond and Disposition in Security—Heir and Executor—Real Burden—Obligation ad factum præstandum.

An obligation to transfer into the names of certain parties a certain amount of Consolidated Bank Annuity stock is an obligation *ad factum præstandum*, and being of a definite nature, may, along with an obligation to pay interest until fulfilment, be validly imposed as a real burden upon land.

A person borrowed from his marriage-contract trustees two sums of £5000 and £3500 3 per cent. consols, and these stocks were accordingly transferred from their names to his. In return, by bonds and dispositions in security he bound and obliged himself, and his heirs, executors, and representatives, when required, to purchase and transfer to the trustees the like sums of £5000 and £3500 3 per cent. consols, and in the meantime to pay them the amount of the interest which would have become due and payable to them had the transferred stocks been left standing in their names. In security of these obligations he disponed certain lands, which he subsequently disponed to gratuitous disponees.

In an action against these parties at the instance of the marriage-contract trustees, *held* that the bonds and dispositions in security created good and effectual securities over the lands thereby disponed, and that the heirs or gratuitous disponees took the lands under burden of the said securities without relief against the executors.

Under a settlement made in contemplation of marriage between Henry Thomas Lumsden and Susannah Edmonstone, dated 28th April 1832, there were *inter alia* conveyed, for the purposes of the settlement, two sums of £5000 and £3500 3 per cent. consols. These sums Mr Lumsden subsequently borrowed on separate occasions from his marriage-contract trustees, and the stocks were transferred from their name to his. In return, by two bonds and dispositions in security, dated respectively on 28th March 1849 and 9th November 1858, and duly recorded, he bound and obliged himself, his heirs, executors, and representatives whomsoever, at any time during his life or after his death when required, in manner provided for in the bonds, "to purchase and transfer, or procure to be transferred in the books of the Governor and Company of the Bank of England, unto and into the names of the trustees or the survivors or survivor of them, or their representatives," the capital stocks or sums of £5000 and of £3500 three pounds per centum Consolidated Bank Annuities, "and that upon or within the day or time to be specified in the notice to be given to or left for me in manner after mentioned." He also bound himself and his foresaids to pay to the grantees sums equal to the interest and dividends which would have accrued on the stock had they remained in the grantees' names, and at the time when such dividends would have become payable. In security of these obligations he disponed to the trustees the lands of Guisway or Cushnie, of which he was fee-simple proprietor.

By disposition and settlement dated 28th October 1867 Mr Lumsden granted and disponed the lands of Guisway or Cushnie to his wife Mrs Susanna Edmonstone or Lumsden, in the event of her surviving him, in liferent, for her liferent use allenarly, and to the heirs of his body in fee, whom failing to certain other parties. The disposition and settlement was recorded in the Register of Sasines on September 17, 1886.

Mr Lumsden died on 19th November 1867, and up to that date he had regularly paid and accounted for the interest or dividends on the two sums of £5000 and £3500 consols; but had not retransferred these stocks to the trustees under his marriage settlement.

In virtue of the disposition and settlement Mrs Lumsden succeeded on Mr Lumsden's death to the estate of Guisway, and enjoyed the liferent of it till her death on 18th April 1886. She was succeeded by Sir William Samuel Seton.

The present action was brought by Charles Welland Edmonstone and William Trotter, the surviving trustees under the marriage-contract.

They called as defenders the heirs of entail of the lands of Guisway, and sought, *inter alia*, to have it declared that by the bonds and dispositions in security before mentioned, valid securities had been created over the lands of Guisway for the obligation to purchase and transfer to the trustees the two sums of £5000 and £3500 3 per cent. consols, or for the sums of £5000 and £3500, or for a sum equal to the value of the stocks either at the date of the bonds or of citation in the summons, or for an annual payment of £255 till the stocks should be transferred.

The defenders pleaded—"(2) The said two bonds are not effectual incumbrances upon the said estate, in respect that they are truly obligations *ad factum præstandum*, or otherwise are obligations for the payment of an indefinite and unascertained amount. (3) The obligation undertaken by the granter of the said bonds being of a personal nature, is primarily enforceable against his moveable estate, and the holders of his moveable estate have no right of relief against his heritable estate."

The Lord Ordinary pronounced the following interlocutor on 31st January 1888:—"Finds that

the bonds and dispositions in security libelled in the summons create good and effectual securities over the lands thereby disponed, and that the heirs or gratuitous disponees of Henry Thomas Lumsden take the said lands under burden of the said securities without relief against his executors: Appoints the cause to be put to the roll for further procedure, &c.

"*Opinion.*—The first question is, whether the two bonds and dispositions in security libelled in the summons are good charges upon the lands thereby disponed? The late Mr Lumsden had borrowed from his marriage-contract trustees two sums of £5000 and £3500 3 per cent. Consolidated Annuities standing in their names in the books of the Bank of England. These sums were accordingly transferred from their names to his, and by the bonds in question he binds himself, and his heirs, executors, and representatives, when required, in a certain manner, or if not required during his life, then within six months after his death, to purchase and transfer, or procure to be transferred to the trustees, the like sums of £5000 and £3500 3 per cent. consols, and in the meantime to pay to them the amount of the interest which would have become due and payable to them upon the transferred stock if it had been left standing in their names. In security of these obligations he disponed his lands of Cushnie or Guisway and others; and in case the granter or his heirs or executors shall make default in transferring the stock or in paying interest, each of the bonds contains a provision that in that case it shall be lawful for the trustees to recover payment of such a sum as will at the time be sufficient to purchase the stock and replace the interest which may be due.

"The defenders maintain that these are not effectual securities upon the lands, because the obligations secured are *ad factum præstandum*, or otherwise are obligations for payment of an indefinite and unascertained amount. The primary obligation to purchase and transfer a certain amount of Government stock is in form an obligation *ad factum præstandum*. But it results in the payment of money; and it does not appear to be very material to the question whether it is in form an obligation to pay or an obligation to transfer.

"There can be no doubt that an obligation *ad factum præstandum* may be made a real burden on land, and the only question in either view is, whether it is sufficiently definite to satisfy the rule of law that no indefinite or unknown burden can be created on land.

"On this question I am of opinion that the defenders' plea is not well founded. An obligation to assign a definite proportion of the National Debt is not, in my judgment, an indefinite obligation in the sense of the rule upon which they rely. I do not think that the cases cited of *Stein's Creditors* and *Tod* v. *Dunlop* are apposite, But even if it were to be held that an obligation to transfer the specified amount of Government stock when required to do so is too indefinite to be well secured on land, the same objection would not apply to the obligation which is immediately prestable to pay annuities equal to the interests payable in respect of such stock. It is said that the undertaking to pay interest is merely accessory, and that the validity of the security must depend upon the character of the principal obligation alone. But the amount of the interest is in no way affected by the considerations which are said to make the principal obligation uncertain. It is not the interest upon an indefinite or variable capital sum that is to be paid, but a sum equal to the interest which the Government pays upon £5000 or £3500 of 3 per cent. consolidated annuities. In other words, it is an annuity equal to 3 per cent. upon each of these specified sums. The obligation to pay such annuities is perfectly definite, and there appears to be no reason why it should not be made a burden upon land."

The defenders reclaimed, and argued—(1) As to the capital sums. The obligation here sought to be imposed was really an obligation to pay money, but not a definite sum, and owing to its indefinite nature it could not be made the subject of a good and valid burden upon land. Suppose the obligation were held to be an *ad factum præstandum* obligation, there was no instance of an *ad factum præstandum* obligation not being *inter naturalia* of the right of possession being held to be validly imposed as a real burden upon land. (2) As to the interest. This was merely an accessory obligation to the payment of the capital sums, and if the principal obligation were not validly imposed upon the lands neither was the accessory. It was also not an obligation of a continuing nature, but merely lasted so long as the capital should be unpaid, whether such payment were made by the heir or the executor —Bell's Comm. (7th edition) i. 730 (5th edition, i. 690); *Newnham* (*Stien's Creditors*) v. *Stewart* March 25, 1791, and March 10, 1794, 3 Pat. App. 345; *Magistrates of Edinburgh* v. *Begg*, December 20, 1883, 11 R. 352; *Coutts* v. *Tailors of Aberdeen*, December 20, 1834, 13 S. 226; *Tod* v. *Dunlop*, December 13, 1838, 1 D. 231.

The respondents were not called on.

At advising—

Lord President—In this cause the Lord Ordinary has not disposed of all the conclusions of the summons. He has found "that the bonds and dispositions in security libelled in the summons create good and effectual securities over the lands thereby disponed, and that the heirs or gratuitous disponees of Henry Thomas Lumsden take the said lands under burden of the said securities without relief against his executors."

Now, the view I take of the matter depends on simple principles. There are two obligations here quite distinct from one another. The one is an obligation *ad factum præstandum;* the other an obligation to pay a certain sum of money. The obligation *ad factum præstandum* is of this kind—"To purchase and transfer, or procure to be transferred . . . the capital stock or sum of £5000 three pound per centum Consolidated Bank Annuities, and that upon or within the day or time to be specified in the notice to be given to or left for me in manner after mentioned." That certainly is not *de plano* an obligation to pay money, though it may involve the debtor in an *ad factum præstandum* obligation which he may not be able to perform without the expenditure of money. But what the debtor in an *ad factum præstandum* obligation has to do is to perform certain acts, and the act here required of him is to put his creditor in a certain position as the owner or transferee of

£5000 of 3 per cent. Consolidated Bank Annuities. In doing so he may have to expend more or less than that sum of money, but the obligation is a definite one, namely, to replace the marriage trustees in the same position as they occupied before they transferred the stock—to make them owners or transferees of so much consolidated stock.

The other obligation is to pay interest on £5000 3 per cent. stock. That is an obligation to pay money, and a perfectly definite and ascertained amount. The objections which have been taken may be answered in that way. It was objected that the obligations sought to be secured were indefinite. I think they are both perfectly definite. One is an obligation to perform an act which can be done only in one way. The other is to pay interest on a certain sum. I agree therefore with the view taken by the Lord Ordinary.

LORD MURE—I agree with the opinion expressed by the Lord Ordinary in his note. The question he had to decide was whether an obligation *ad factum præstandum* could or could not be made the subject of a good heritable security. I agree with him that the only question is whether the obligation is sufficiently definite to satisfy the rule of law that no indefinite burden can be created on land. Now, the terms of the bond put it beyond all question that the lands were disponed in security of £5000 consols. No doubt the value of that stock may vary in amount, but the granter is bound to make good the security for that amount. That is a definite obligation, and may be made a burden upon land.

LORD SHAND—If it could be maintained that an *ad factum præstandum* obligation could not be made a real burden upon land, there would have been some ground for the argument we have listened to. There is, however, no doubt, as the Lord Ordinary says, that such obligations may be made real burdens. In this case the obligation to transfer stock is an obligation *ad factum præstandum*, and is of quite a definite nature, and consequently I have no doubt that it can validly be made a real burden upon land.

The second obligation is simply an obligation to pay a sum of money—the interest on a certain amount of three per cent. stock. There is nothing indefinite in that. I am therefore of opinion that the argument on both points fails.

LORD ADAM concurred.

The Court adhered.

Counsel for Defenders and Reclaimers—Sir Charles Pearson—Low. Agents—Mackenzie & Kermack, W.S.

Counsel for Pursuers and Respondents—Guthrie. Agents—Cowan & Dalmahoy, W.S.

Wednesday, October 17.

SECOND DIVISION.

[Sheriff of Caithness.

TOD (SUTHERLAND'S TRUSTEE) *v.* GEDDES (MILLER'S TRUSTEE).

Landlord and Tenant—Lease—Tacit Relocation—Rei interventus—Agricultural Holdings (Scotland) Act 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 28.

Previous to the term of Martinmas 1884 the tenant of certain farms under a lease which expired at Whitsunday following, arranged verbally with his landlord the terms of a new lease at a reduced rent. The landlord handed to the tenant a letter to his factor of 1st December 1884, directing the latter to prepare a formal lease embodying the terms of the new arrangement. The landlord executed a trust-deed for behoof of his creditors, and no formal lease was executed. The tenant continued in possession of the farms, but paid no rent after Whitsunday 1885. *Held* that an action at the instance of the trustee for the rent payable under the old lease as having been continued by tacit relocation fell to be dismissed, in respect that since Whitsunday 1885 the tenant had not possessed by tacit relocation, but under the new arrangement.

Observations on the question whether a tenant abstaining from giving a notice to leave his holding required by the Agricultural Holdings (Scotland) Act 1883, and continuing to possess, could be held to validate *rei interventu* an uncompleted arrangement for a new lease at a different rent.

John Miller, a fishcurer and farmer, occupied certain lands on the estate of Forse, in the county of Caithness, on a lease which expired at Whitsunday 1885. The term of Whitsunday 1885 was the termination of a two years' lease of the subjects between the defender and Mr Sutherland, and accordingly it was necessary, under section 28 of the Agricultural Holdings (Scotland) Act 1883, that the defender, in order to prevent tacit relocation and to secure his right to remove, should have given notice of removal to Mr Sutherland at Martinmas 1884. Upon 8th November 1884, however, Miller had an interview with the proprietor Mr Sutherland of Forse, and the agreement entered into between them was expressed in the following letter, written by the proprietor to his factor and law-agent Mr Nimmo, writer, Wick:—"1*st December* 1884.—Dear Sir,—On the 8th of last month I arranged with John Miller, Boulglass, for a new lease to him from Whitsunday next of the farms and lots he now holds, at a yearly rent of fifty-three pounds (£53) and road-money. Duration of lease fifteen years, with breaks in his favour at the end of five and ten years. All improvements to be made solely at his own expenses, without any compensation to be paid therefor at the termination of the lease—wire fences excepted. As to the valuation he is now entitled to for the wood, flags, &c., on his houses, I have agreed that a sum of three hundred pounds (£300)—minus £2 per annum during the currency of the lease—is to be paid to him at his outgoing in lieu of all expenses and other

claims. A stamped lease to be entered into; also a stamped lease for fourteen years to be given to Widow Miller and the representatives of the late Benjamin Miller, Burrogill, on the same conditions they now hold the farm." The letter was given to Miller's wife on his behalf for delivery to the law-agent. It was handed to Mr Nimmo, but nothing was done in the way of preparing a stamped lease. Miller continued to occupy and work the farms.

Upon 24th February 1885 Mr Sutherland executed a trust-deed for behoof of his creditors, and Mr Henry Tod, W.S., Edinburgh, finally came to be the sole acting trustee under that deed.

Upon 25th April 1885 Mr Nimmo sent a letter to Miller, stating, *inter alia*—"With reference to Mr Sutherland's letter to me of 1st December last, I delayed preparing the leases in the knowledge that they would not be binding unless possession was had under them; and after the execution by him in February last of the trust-deed I brought it under the notice of the agents under the trust-deed, who informed me they had written to Mr Sutherland that it would be better to make no changes upon the rental by granting new leases." Miller paid no rent after Whitsunday 1885.

In 1887 Mr Tod, as trustee, raised an action in the Sheriff Court of Caithness for payment of £97, 13s. 11½d., being the rent payable under the old lease. He averred that the defender had been tenant by tacit relocation since the term of Whitsunday 1885, and that he declined to pay the rent.

The defender pleaded—"(2) Mr Sutherland's holograph document of 1st December 1884 constituted a valid and probative contract of lease in favour of the defender, binding upon the present pursuer. (3) The verbal agreement between the defender and Mr Sutherland of 8th November 1884 being proved *scripto*, and followed by *rei interventus* and homologation, constitutes a valid contract of lease in favour of the defender, binding upon the present pursuer. (4) The pursuer, as trustee for Mr Sutherland's creditors, is subject to all lawful duties and obligations entered into by Mr Sutherland affecting his heritable estate."

On a proof by writ or oath of the alleged lessor of the lease, the Sheriff-Substitute found that the "verbal agreement for a new lease averred by the defender, and the reduction to writing of the terms thereof, also averred by the defender, have been proved by Mr Sutherland's oath," and allowed the defender a proof of his averments of *rei interventus*.

It appeared from the proof that the defender had resorted to Mr Sutherland in November 1884 for the purpose of giving the statutory notice of his intention to quit his farm, but he abstained from doing so in consequence of the arrangement for a new lease at a reduced rate of rent. Mr Nimmo deponed that he did not execute a formal lease as directed by Mr Sutherland's letter of 1st December 1884 owing to the pressure of other engagements, and that after Mr Sutherland granted the trust-deed he ceased to think of making a formal lease. He further deponed that on 4th April 1885 he stated to the defender in conversation that he could not get a lease in terms of the said letter. This statement was, however, unsupported by other evidence.

The Sheriff-Substitute assoilzied the defender from the conclusions of the action.

In the course of the action Miller became bankrupt, and Alexander Geddes was confirmed trustee in his sequestration.

The pursuer appealed, and argued—There was here no settled bargain, and therefore there was no resiling from it by the pursuer, and no completion of it by the *rei interventus* of the tenant. Mr Sutherland certainly agreed to give a new lease, and wrote a letter to his agent to get that done, but before the end of the old lease he had granted a trust-deed to the pursuer, and he, as trustee, had repudiated the bargain for the lease as shown by Nimmo's letter of 25th April. The tenant knew that the bargain had been so cancelled, but he still continued to occupy the farm and to work it as he had been accustomed to do; he must therefore be held to have kept in the farm by tacit relocation, and so was liable for the rent due under the old lease. Even supposing a bargain had been completed between Mr Sutherland and the defender, Mr Sutherland was entitled to resile, and had resiled by his factor's letter of 25th April. The cases referred to in Morrison on Sale of Lands showed that always the document founded on was delivered by one of the parties to the other party, and although no definite answer was returned, that was sufficient to make a bargain. Here the letter founded on was not delivered by one party to the other, but was written by one party to his agent ordering him to do something, but before that something could be done the party had resiled from the agreement. Nor was *rei interventus* constituted even although the tenant on the faith of the new agreement had abstained from giving notice of removal to his landlord at Martinmas 1884. Three necessary elements of *rei interventus* were awanting. There was no definite and explicit act which could be stopped if necessary; the alleged act of *rei interventus* was not known to the party against whom it was pleaded; and it was not unequivocally referable to the agreement—Bell's Prin. 26; *Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656; *Arbuthnot* v. *Reid*, July 6, 1804, Hume, 815.

The respondent argued—There were two aspects of the case. Either the holograph letter of 1st December constituted a proper lease, or it did not. If it did, then the defender of course was working under the new lease, and no *rei interventus* was needed. It had been held in various cases that sales of property could be constituted by a probative document offering to buy or sell, given by one party to the other, without any formal acceptance of the offer—*Fergusson* v. *Paterson*, November 23, 1748, M. 8440; *Muirhead* v. *Chalmers*, August 10, 1759, M. 8444; *Fulton* v. *Johnston*, February 26, 1761, M. 8446; *Arbuthnot* v. *Campbell*, February 27, 1793, Hume, 785; *Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656; *Murdoch* v. *Moir*, June 18, 1812, F.C.; *Sutherland* v. *Hay*, December 12, 1845, 8 D. 283 If the letter of 1st December did not constitute a new lease when delivered by one party to the other, as it was addressed to the landlord's agent, then it could be shown there was *rei interventus*, and so the lease was set up. The tenant had had a communing with his landlord, and had received a promise of a new lease, and so he did not give warning to quit his farm

at Whitsunday 1885, which he would have needed to do if he did not wish to stay on at the old terms. Then he received the letter of 1st December, and trusting that the agent would make out a lease in proper form at his leisure he continued to occupy the farm. The letter from Mr Nimmo did not amount to a repudiation by Mr Sutherland of his engagement to give the defender a new lease—*Ballantine* v. *Stevenson*, July 15, 1881, 8 R. 959; *Stuart* v. *Macra, Stuart, & Campbell*, November 12, 1834, 13 S. 4, 7. There was either a completed bargain by handing Mr Sutherland's letter to his agent, or an incomplete lease was set up by *rei interventus*.

At advising—

Lord Young—This action is for the payment of certain rents alleged to be due for some heritable subjects, and is laid upon the footing that the tenant the defender held these subjects by tacit relocation since Whitsunday 1885. If he has held the subjects as tenant on tacit relocation, then the rent, some of which is admittedly due, must be paid to the pursuer, although the question of how far the tenant is entitled to withhold his rent in respect of meliorations made by him on the property is another matter.

The first and most material issue is, whether the defender was tenant of the lands in question by tacit relocation since the term of Whitsunday 1885 or not. The tenant says he was not, and in support of his denial he says that upon the eve of the time when it would have been necessary for him under an Act of Parliament to give notice to his landlord to terminate the existing lease as at Whitsunday 1885 he resorted to his landlord and made arrangement for entering into a new lease. Of course if it is shown that the parties agreed upon a new lease, which was acted upon, there is an end to the case. The results of the bargaining for a new lease are contained in the letter dated 1st December 1884, adressed by the landlord to his man of business expressing the terms of the new lease, and desiring him to carry these terms into effect by a formal deed. This letter he handed to the tenant for delivery to his man of business, communicating to him at the same time its contents, and the letter was delivered accordingly. Upon getting this letter the tenant says he abstained from giving the notice to his landlord of his intention to terminate the old lease which he would otherwise have done. Now, a letter so expressed by the landlord, addressed to his agent, even though given to the tenant to deliver, would not in itself constitute a lease for a period of years. Whether the fact that the tenant had abstained from giving notice to terminate the old lease in reliance upon the new terms, would be sufficient *rei interventus* to make these terms a binding contract, we do not need to decide. The bent of my own opinion is to the effect that it would be sufficient to prevent either of the parties resiling from their bargain. The period had elapsed in which he could have looked for a new farm, and he may have allowed it to pass in reliance on the former agreement for a lease, but, as I have said, we do not need to decide that question.

But unless the contract so made was departed from by either party, it remained, and was in existence as the lease of the lands instead of the old lease. The tenant remained on in possession of the lands, and I think his possession subsequent to Whitsunday 1885 must, on principles which have received effect in many cases, be attributed to the bargain set forth in that letter, and not to tacit relocation under the old lease. I think that the terms of that letter are inconsistent with any idea of tacit relocation. But that reduces the question to this, did the landlord validly withdraw his consent to the bargain contained in that letter before the old lease had come to an end so that the defender's possession cannot be attributed to carrying out the expressions of the new bargain? It is said that he did withdraw his consent by the letter from the landlord's man of business to the defender of 25th April 1885. I do not think that the letter expresses withdrawal from the bargain at all. The strongest expression in the letter is, "I delayed preparing the leases in the knowledge that they would not be binding unless possession was had under them." I do not think that that is accurate; I think the writer of that letter gives a more accurate account of what was really the state of affairs in his evidence when he says that he was too busy to prepare the leases, and it would be sufficient to prepare them before Whitsunday. The letter of 25th April 1885 goes on to state that after the execution of Mr Sutherland's trust-deed in February Mr Nimmo brought the landlord's letter of 1st December 1884 under the notice of the agents under the trust-deed, who informed him that they had written to Mr Sutherland that it would be better to make no changes upon the rental by granting new leases. That is not an intimation that the landlord is not going on with the lease. It is not a withdrawal from the bargain, but it is merely a statement of fact of what the Edinburgh agents had told the proprietor. The letter did not make Mr Sutherland signify that he departed from the arrangement under which he knew that his tenant had refrained from giving notice to terminate his lease. There is nothing in the letter to signify that he had taken up the position of being off with his bargain. Well, if the terms expressed in the letter of 1st December are not withdrawn or departed from, the possession, as the tenant says, is not under the old lease, but under the new arrangement, and the action which is founded on tacit relocation under the old lease cannot stand. Therefore I propose that we should negative the whole ground of the action, viz., that the defender had been tenant of these lands by tacit relocation since Whitsunday 1885, and dismiss the present action, reserving to the parties their rights *inter se* as to rent for same rent due and as to meliorations.

Lord Rutherfurd Clark—I am of the same opinion. I do not think that this letter of 1st December constitutes of itself a valid and binding lease between the pursuer and defender. It was not addressed to the defender, but to the proprietor's man of business, and it required him in terms to make out a stamped and formal lease between the parties. There is no question that this document would be sufficient to set up a lease if *rei interventus* had followed upon it, and if the defender had entered upon the possession of the farm without anything being said about resiling there is no doubt a good lease would have boen so constituted. But it is said that the pursuer resiled, and that that was either

by verbal intimation from Mr Nimmo to the defender in a conversation which took place on 4th April 1885, or by his letter of 25th April 1885. Now, let us take the last of these first. It is clear that this letter does not amount to resiling. It expresses no such intention, and therefore I do not look upon it as interrupting the right of the defender to validate his right by possession of the subjects. But it is said that sufficient intimation of withdrawal was given to the defender by his conversation with Mr Nimmo. I do not think that there is sufficient evidence to establish that. In the first place, it is not said that Mr Nimmo had instructions from his employer to make any intimation of withdrawal; and secondly, his evidence is quite different from his letter. I think it would be most unjust to the defender to hold that the pursuer resiled from his bargain. In my opinion the pursuer has not established the contention that the defender held his farm under tacit relocation.

Lord Lee—I agree, but I wish to say, as, I understand is also my Lord Young's view, that I think that at the time the landlord is said to have resiled from his bargain, it was too late for him to do so. It was said that mere abstention from giving formal notice was not enough to make *rei interventus* so as to validate the lease, but we cannot take mere abstention by itself. After the tenant had refrained from giving notice, and as the last day of giving notice had expired, the tenant must be held to have been in possession, not under the old lease, but on new terms. There was more than abstention, as he went on to possess the ground in the belief that he had made arrangements for a new lease which was to begin at Whitsunday.

The Court pronounced the following interlocutor:—

"... Find (1) that the defender possessed the lands and others libelled from Whitsunday 1883 till Whitsunday 1885 under a lease between him and George Sutherland of Forse, the proprietor of the subjects, and that the said lease terminated at Whitsunday 1885; (2) that he has since possessed the said subjects, not by tacit relocation under the said lease, but under an arrangement entered into between him and Mr Sutherland, set forth in the letter of 1st December 1886, addressed by Mr Sutherland to his agent Mr Nimmo, and delivered by Mr Sutherland to the defender's wife on behalf of the defender: Therefore dismiss the action, reserving the pursuer's claim for rent and the defender's claim for meliorations, and all answers to said claims: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer (Appellant)—Guthrie—MacWatt. Agent—Alfred Sutherland, W.S.

Counsel for the Defender (Respondent)—Strachan—M'Lennan. Agent—Thomas Liddle, S.S.C.

Wednesday, October 17.

FIRST DIVISION.

[Lord Trayner, Ordinary.

COWAN'S TRUSTEES *v.* COWAN.

(*Ante*, vol. xxiv. p. 469.)

Process—Multiplepoinding—Claims—Expenses.

In a multiplepoinding raised by trustees to determine the right to a certain portion of a truster's estate the question in the competition was argued between the heir-at-law of the truster and one of four next-of-kin. As a result the latter secured a judgment that the fund was in great part moveable, but was found liable in certain expenses to the heir-at-law in respect of failure in certain contentions. The respective rights of the heir-at-law and the next-of-kin having been thus determined, the three other next-of-kin lodged claims. *Held* that they could only be allowed to participate in the fund on condition of bearing equally with the next-of-kin who had litigated the question all the expenses incurred by him, including those in which he had been found liable to the heir-at-law, as the contentions in which he had failed were not of a reckless character.

Daniel Cowan, merchant, Broughty Ferry, died childless on 19th December 1881. In order to settle the rights of the heir-at-law and the next-of-kin to certain heritable property left by the deceased his trustees raised an action of multiplepoinding and exoneration. The question as to the right to the fund *in medio* was argued between James Cowan, the heir-at-law, and Henry Cowan, one of four next-of-kin. As a result of this competition Henry Cowan secured for the next-of-kin a large portion of the fund *in medio*, but was found liable in certain expenses to the claimant James Cowan.

After the respective rights of the heir-at-law and the next-of-kin had been determined claims were lodged by the other three next-of-kin, Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans.

The Lord Ordinary (Trayner) on 27th January 1888 pronounced the following interlocutor:—"Having heard counsel for the claimants, Ranks and prefers the claimant James Cowan to the sum of £45, 17s. 1d., with interest corresponding thereto since the date of consignation, being his share of the fund *in medio* in terms of the interlocutor pronounced by the First Division on the 19th March 1887: Finds the claimant Henry Cowan entitled to payment out of the fund *in medio* of the sum of £46, 12s., being three-fourths of the expenses in which he was found liable by the interlocutor of 20th May 1887, and three-fourths of the estimated expense incurred by him under the reclaiming-note: Further, ranks and prefers the claimants Henry Cowan, Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans, each to the extent of one-fourth of the balance of the fund *in medio*: Grants warrant to, authorises, and ordains the Union Bank of Scotland, Limited, Edinburgh, to make payment to the claimants of the sums to which they have been severally found entitled out of the sum consigned in their hands, conform

to deposit-receipt, and the Accountant of Court to exhibit and deliver up the said receipt for the purpose of said payments, and decerns."

Against this interlocutor Henry Cowan reclaimed, and argued — The other next-of-kin should bear equally with him the expense of the litigation carried on for their benefit. That was the only condition upon which they should be allowed to participate in the fund won by him for their benefit. That condition should also apply to the expenses in which he had been found liable to James Cowan, as his failure there was an incident of the litigation above referred to, and his contentions had not been of a reckless character.

The respondents, the other next-of-kin, argued —That they should only have to share in the expenses incurred by the reclaimer where he had been successful. The authority of *Morgan* v. *Morris* (*cit. sub.*) went no further than this. They were not under any obligation to contribute to the expense incurred by the reclaimer in maintaining untenable propositions.

Authorities — *Morgan* v. *Morris*, March 11, 1856, 18 D. 797-818; *Binnie's Trustees* v. *Henry's Trustees*, July 3, 1883, 10 R. 1075; *Jaffe* v. *Carruthers*, March 3, 1860, 22 D. 936.

At advising—

Lord President—The question argued in the multiplepoinding was between an heir and one of four next-of-kin. The fund *in medio* consisted of heritage, but the Lord Ordinary, by interlocutor pronounced on 9th November 1886, decided that the property was to be regarded as moveable for the purposes of the competition. Under a reclaiming-note to this Division that interlocutor was modified, and the heir was found entitled to a certain portion of the fund *in medio*. Then, when the division between the heir and the executors had been thus determined, three executors came forward and made an application, and desired to be allowed to participate in the fund which had been won by one executor. The question then came to be, on what terms they should be permitted to participate.

Now, the principle on which a question of this kind is to be solved, when all parties do not choose to come forward, but leave the question to be determined by the efforts of one of their number, is this—When they come in to the case they must bear their share of the expenses which the one who has litigated has incurred. That is a very obvious principle of equity, and in ordinary cases I think the way in which it is to be applied can be easily determined. In the present case the Lord Ordinary has found Henry Cowan, who came forward and fought the case for the next-of-kin, entitled to three-fourths of the expenses he has incurred out of the fund *in medio*. I do not see that that is consistent with the principle I have referred to. That principle requires one of two courses to be adopted. Either the incoming parties must pay over three-fourths of the expenses out of their own pockets, or the entire amount of the expenses must be deducted from the fund *in medio*. Either one or other of these courses is just and consistent with the principle referred to. The Lord Ordinary does not decide consistently with this principle when he finds that three-fourths of the expenses should be deducted from the fund *in medio*. He deducts the three-fourths which the parties coming in should contribute, but not the fourth, which is to be contributed by the claimant Henry Cowan. The principle is a very obvious one, and its application is, I think, not difficult. The only point of specialty in the present case is, that to a certain extent the successful litigant was unsuccessful. A reclaiming-note was presented against an interlocutor of the Lord Ordinary of date 9th November 1886, and under it he lost part of the fund *in medio*, and to that extent must be considered to have claimed too much. Now, it is said that he should bear the part of the expense incurred in supporting that claim. To that proposition I am not inclined to consent. No doubt it is possible to conceive a case of nimious and oppressive litigation where the litigant could not expect to be reimbursed for the expense he had incurred. The true view, I think, in estimating the expenses to be paid by parties coming in is, that when they ask to share in the fruits of a litigation they must bear the expense of any little mishap which may have occurred in the course of such litigation.

Lord Mure—I am of the same opinion. I think that when one person succeeds in creating a fund for the benefit of the executors they must bear their fair share of the expenses which he has incurred in creating that fund.

Lord Shand—There can be, I think, no doubt but that if Henry Cowan had not appeared in the multiplepoinding the whole fund would have been swept away to the benefit of the heir. The executors are taking benefit of this action of Henry Cowan's, and that being so, I agree with your Lordship that the legitimate expenses incurred in arriving at a settlement of the question which had to be decided must be paid equally by all the next-of-kin. The Lord Ordinary, I believe, thought that he was allocating the fund in that way, and his interlocutor, so far as it deducts three-fourths of the expenses, should be modified, as there should have been a deduction of the whole expenses. The first thing to be done is to deduct the expenses; the second, to divide the fund.

The only specialty in the case is the one referred to by your Lordship, namely, that Henry Cowan was wrong in part of his case. If his contentions had been reckless, then I should have held that he had no claim to be recouped for the expenses in putting them forward; but the argument he submitted was a fair one, and must be looked on as an incident of his pleading the case as he did, and those who take the benefit of his appearance must bear their fair share of the expenses he incurred.

Lord Adam concurred.

The Court pronounced the following interlocutor:—

> "The Lords having considered the reclaiming-note for Henry Cowan against Lord Trayner's interlocutor of date 27th January 1888, and heard counsel for the parties, Recal the said interlocutor reclaimed against in so far as it deals with the fund *in medio* falling to the next-of-kin: Find that the whole expenses incurred by the said reclaimer in the competition with James Cowan, the

heir-at-law, including expenses for which the said reclaimer was found liable to said heir-at-law, fall to be paid to the reclaimer out of the fund *in medio*: Find the reclaimer entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against, and of consent rank and prefer the said Henry Cowan to the sum of £143, being his share of the fund *in medio*, and the amount of the expenses to which he has been found entitled under the first and second findings of this interlocutor, as the same have been adjusted by the counsel for the parties: Further, of consent rank and prefer the claimants Mrs Margaret Cowan or Hodge, Mrs Catherine Cowan or Waddell, and David Scott Cowans, each to the extent of one-third of the balance of the fund *in medio*."

Counsel for the Reclaimer—Sir C. Pearson. Agents—Reid & Guild, W.S.

Counsel for the Respondents—Graham Murray—Salvesen. Agent—J. Smith Clark, S.S.C.

Wednesday, October 17.

FIRST DIVISION.

[Lord Lee, Ordinary.

HENDERSON *v.* HENDERSON.

Process—Reclaiming-Note—Competency—Boxing in Vacation after Expiry of Reclaiming Days—Personal Diligence (Scotland) Act 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 20.

By the 20th section of the Personal Diligence (Scotland) Act ten days are allowed for reclaiming against interlocutors of a Lord Ordinary loosing arrestments. An interlocutor loosing arrestments was pronounced on the last Wednesday of the summer session. The reclaiming days consequently expired on a Saturday in vacation, on which day the office was closed. The reclaiming-note was lodged on the following Tuesday, the first day after expiry of the reclaiming days on which the office was open. *Held* that the reclaiming-note was lodged in time.

This was an action of count, reckoning, and payment brought by Andrew Henderson against Mrs Isabella Burd or Henderson. In virtue of a warrant of arrestment contained in the summons the pursuer arrested the funds of the defender in the hands of the Union Bank of Scotland (Limited). The defender presented a petition to the Lord Ordinary craving to have the arrestments loosed, and the Lord Ordinary (Lee) on 18th July 1888 pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the foregoing petition, on consignation of the sum of One hundred and twenty pounds in the National Bank of Scotland (Limited), Recals the arrestments above referred to, and decerns."

The Personal Diligence (Scotland) Act 1838 (1 and 2 Vict. cap. 114), sec. 20, provides that such judgment shall be subject to the review of the Inner House by a reclaiming-note duly lodged within ten days from the date thereof.

The pursuer reclaimed, but the reclaiming-note, which in terms of the statute was due on Saturday 28th July, was not lodged till Tuesday 31st July. It appeared that in vacation the office was only open on Tuesdays, Wednesdays, and Thursdays.

The respondent objected to the competency of the reclaiming-note, and argued that it could not be received, not having been duly lodged within the time allowed by the Personal Diligence Act. Though the office was shut there was no difficulty in lodging the note at the Clerk's house, or posting it to him at the Register House—*Lockhart* v. *Cumming*, May 27, 1851, 13 D. 996; *Ross* v. *Herds*, March 9, 1882, 9 R. 710.

The reclaimer argued—(1) The reclaiming days falling in vacation the note was in time if lodged before the first box-day—Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), sec. 171; *Joel* v. *Gill*, January 11, 1860, 22 D. 357; Court of Session Act 1868 (31 and 32 Vict. cap. 100), secs. 94 and 107. (2) The office not being open in vacation except on Tuesdays, Wednesdays, and Thursdays, the reclaiming-note was in time as lodged on the first possible day after the expiry of the ten days. There was no obligation to lodge at the Clerk's house, or necessity that the Clerk's house should be open, or even should be in Edinburgh—*Craig* v. *Jex Blake*, March 16, 1871, 9 Macph. 715; *Russell* v. *Russell*, November 12, 1874, 2 R. 82; *Bain* v. *Adam*, February 7, 1884, 21 S.L.R. 389. The defender had suffered no prejudice by the delay.

At advising—

Lord President—In this case the Lord Ordinary pronounced an interlocutor on 18th July last, and according to the Personal Diligence Act the reclaiming-note had to be lodged within ten days, namely, on or before 28th July, which was a Saturday. Now, the obligation that the reclaiming-note should be lodged on that day was one incapable of fulfilment, because the office was not open, and there was no one to receive it. Where a limit of time is imposed by a statute there is always an implied condition that it is possible to perform the Act required. Now, it appears to me to have been impossible to perform the act in question, therefore if we were to hold that in consequence of the impossibility of performing it there was an implied obligation to lodge the reclaiming-note earlier, we should, I think, be construing the statute in a way not meant. I am consequently of opinion that we should sustain the competency of the reclaiming-note. In so deciding I do not interfere with the authority of the case of *Lockhart* v. *Cumming*, and I should be sorry to do so, as we have not only the authority of that case by itself, but its authority was expressly reserved in the case of *Joel* v. *Gill*, where a distinction was drawn between the circumstances upon which the decisions in the two cases were grounded.

Lord Mure—I am of the same opinion. Where a party lodges a reclaiming-note on the first possible opportunity beyond the ten days I think it is still a good reclaiming-note. If we were to hold otherwise we should be shortening the time permitted by the statute.

Lord Shand and Lord Adam concurred.

The case was therefore sent to the roll.

Counsel for the Pursuer (Reclaimer)—Rhind. Agent—William Officer, S.S.C.

Counsel for the Defender (Respondent)—Salvesen. Agent—D. Howard Smith, Solicitor.

Tuesday, October 23.

SECOND DIVISION.

JAMIESON AND ANOTHER *v.* ROBERTSON AND ANOTHER

Process—Multiplepoinding—Competency.

A creditor of a deceased person raised an action against his executrix, for payment of an alleged debt exceeding in amount the apparent estate, which was otherwise sufficient to pay all claims of creditors in full. Another creditor thereupon brought an action of multiplepoinding with the assent of the executrix, and in her name, against the creditors as defenders. *Held* that the action of multiplepoinding was competent.

Peter Duffus, crofter, Clashendrum, Kincardineshire, died on 27th June 1886, intestate and without leaving lawful issue.

Mrs Elizabeth Duffus or Jamieson was confirmed executrix-dative, and sold off and realised the whole of the said deceased Peter Duffus' estate so far as recoverable.

There remained in the hands of the executrix for distribution among the creditors (after paying the preferable debts) the sum of £94, 7s. 0½d., which, apart from the claim about to be narrated, was sufficient to meet the claims against the estate.

Ann Robertson, a servant of the deceased, had a disputed claim against the estate for £104, 17s., and brought an action for that amount against the executrix upon 15th April 1887, to which answers were duly lodged.

Upon 26th April 1887 James Dallas, one of the creditors on the estate, raised an action of multiplepoinding as real raiser in the name and with the concurrence of the said Elizabeth Duffus or Jamieson, as pursuer and nominal raiser, against the said Ann Robertson and the unpaid creditors on the estate, the above sum of £94, 7s. 0½d. being the fund *in medio*. To this action Ann Robertson objected, on the ground (1) that the action was incompetent, there being no double distress, and (2) that the action was unnecessary, the prior action of constitution at her instance being still in dependence and being a simpler and less complicated mode of action for dealing with her claim than a multiplepoinding.

The Sheriff-Substitute (Dove Wilson) repelled the defences and ordered claims. He added this note:—

"*Note.*—It is unfortunate that the rules as to the competency of bringing an action of multiplepoinding are so unsettled and difficult to understand. I deduce from the cases, however, that while the existence of a claim for a disputed debt, said to be due from a trust-fund, will not authorise the action where the trustee is competent and willing to defend an ordinary action for a claim, it will do so where he is unable or unwilling to defend it. Such is the position of the person who is here in the position of trustee. She says that the defender Ann Robertson is making a claim against the estate which she believes to be bad, but which she is unwilling and unable from want of funds to take the responsibility of rebutting. Whatever inconvenience the course of raising a multiplepoinding may occasion, I cannot find authority for saying that it is incompetent. On the contrary, she seems entitled to use this process for obtaining her discharge.

The cases I have found it necessary to consult are:—(1) *Crockat* v. *Panmure*, 1853, 15 D. 737; (2) *Mitchell* v. *Strachan*, 1869, 8 M. 154; (3) *Park* v. *Watson*, 1874, 2 R. 118; (4) *Kyd* v. *Waterston*, 1880, 7 R. 884; (5) *Robb's Trustees* v. *Robb*, 1880, 7 R. 1049; (6) *Pollard* v. *Galloway*, 1881, 9 R. 21; and (7) *Dill, Wilson, & Co.* v. *Ricardo's Trustees*, 1885, 12 R. 404.

"It is not surprising if I have been able to obtain from these cases only imperfect guidance. They extend over a period of more than thirty years, and they show that during all that time the law has been in a state of doubt and conflict. In the first of them the Lord Ordinary was overruled, and an Inner House Judge dissented. In the second an Inner House Judge doubted and withheld his concurrence. In the third the Court recalled the judgment of two Sheriffs. In the fourth the Lord Ordinary was overruled. In the fifth case the same Lord Ordinary intimated that he followed the preceding decision 'with the greatest possible regret.' In the sixth the two Sheriffs concerned differed in opinion, and the case was decided in the Court of Session, by two Judges voting one way and another the opposite way. In the seventh case there was no difference of opinion on the bench, but one of the Judges took the opportunity of saying that he thought a previous case had been wrongly decided. The cases I have quoted were not selected by me for the purpose of showing how much difference of opinion it was possible to put within a small compass. They are the cases which I had looked out as raising the questions most resembling the question here raised."

Against the interlocutor the defender Ann Robertson appealed to the Sheriff (Guthrie Smith), who pronounced the following interlocutors:—

"28*th September* 1887.—Having heard parties' procurators on the foregoing appeal, sists the process until the issue of the relative action raised in the name of Ann Robertson."

"3*rd March* 1888.—Having heard parties' procurators on the pursuer's motion to recal the sist and have the appeal proceeded with, in respect the relative action at the instance of the defender Ann Robertson against the pursuer has now been finally decided, makes avizandum."

"14*th March* 1888.—The Sheriff recals the sist; recals the interlocutor of 5th August; dismisses the action; finds the real raiser liable in expenses to the defender Ann Robertson; allows an account to be given in, and remits the same for taxation, and decerns."

The pursuer and the real raiser thereupon appealed to the Court of Session.

Argued for the appellants—The process of multiplepoinding was competent. It was in the circumstances the proper process, being certainly the cheapest and best form of action, and perhaps the only one. It was the proper action for executors to bring who wished exoneration

when there were conflicting claims against the estate—Bankton, iii. 8, 88; Ersk. Inst. iii. 9, 43. There were competing claims here, and that was sufficient to justify the action; it was not necessary that there should be double distress—*M'Dougal's Trustees*, July 9, 1830, 8 Sh. 1036. The only case apparently in favour of the view that the process was incompetent was *Robb's Trustees* v. *Robb*, July 3, 1880, 7 R. 1049, but there the trustees objected to the action of multiplepoinding being brought; here it had been brought in the name and with the concurrence of the executrix. The claim here made was larger than the whole free residue, and in any case would render the estate insolvent, which was a sufficient reason for bringing a multiplepoinding to settle the claims of all the creditors.

Argued for the respondent—The action of multiplepoinding was incompetent, and in any view it was inexpedient. There were not disputed claims here. The only matter in dispute was the amount of Ann Robertson's claim, which had been properly determined in a separate action of constitution at her instance. The multiplepoinding had been brought not by the executrix, but by one of the creditors as real raiser. A creditor was not entitled to make the whole estate the fund *in medio* of a multiplepoinding because one claim was larger than the executrix and the creditors were prepared to admit. The case of *Robb's Trustees*, and especially Lord Gifford's opinion, supported this contention. It was unadvisable that this small estate should be lessened by the expenses of a multiplepoinding.

At advising—

Lord Young—The question here is regarding the competency of an action of multiplepoinding, brought in name of Elizabeth Duffus or Jamieson, executrix-dative on the estate of the late Peter Duffus, a crofter, she being designed as the pursuer and nominal raiser, and the real raiser being a creditor on the estate of the name of Dallas. There are some six or nine creditors called as defenders, one of them being Ann Robertson. The executrix, we were told, assents to the action being brought in her name by one of the creditors on the estate on which she is the executrix, and all the creditors assent to this form of action with the exception of Ann Robertson, who says it is incompetent. The nature of her claim has been explained to us. She was a servant of the deceased, and her claim amounted to £104. By reason of that claim the estate, the whole amount of which was only £94, was unable to pay the creditors in full, and this action of multiplepoinding was raised. Now what is the objection to this form of action? I cannot conceive any, and I must look at it as if the action had been raised by the executrix herself. Now, Mr Sym, with that candour which we always expect from him, and which he always displays, admitted that an executrix who finds claims made in excess of the estate may raise a multiplepoinding for exoneration. But what difference does it make whether it was originally brought by her, or approbated by her when brought by one of the creditors? I can see no reason for drawing a distinction.

It appears that Ann Robertson had got the length of raising a summons against the executrix in another action to have the amount of her claim against the deceased's estate determined. Well, I think the proper course for the executrix was to bring a multiplepoinding, or when a multiplepoinding was brought in her name by a creditor, to bring the matter under the notice of the Court—it was the same Sheriff—and have the action brought under the multiplepoinding, but what happened was this. The learned Sheriff, I suppose at the instance of Ann Robertson, sisted the action of multiplepoinding until the amount of her claim had been settled in the other action. I cannot comprehend the course followed by the Sheriff. It was the reverse of the right course, which was to have held Ann Robertson's summons in the other action as a claim in the action of multiplepoinding. After sisting the multiplepoinding until the other action had been otherwise decided, the Sheriff then considered the competency of the multiplepoinding, and held that it was incompetent. I think he was wrong. I am of opinion it was competent, and that the appeal must be sustained, and the appellant found entitled to expenses.

Lord Rutherfurd Clark concurred.

Lord Lee—I concur. I think that this is not a case of a creditor taking the administration of the estate out of the hands of the executrix against her will by means of a multiplepoinding.

Counsel for the Appellants—Low—Kennedy. Agent—D. Listet Shand, W.S.

Counsel for the Respondent Ann Robertson—Sym. Agent—W. B. Rainnie, S.S.C.

Tuesday, October 23.

SECOND DIVISION.

[Lord Trayner, Ordinary.

FORD & SONS *v.* STEPHENSON.

Trust for Creditors—Principal and Agent—Right in Security.

A trader conveyed his whole estates, including his business, to a trustee for behoof of his creditors. In terms of the trust, the trader continued to conduct the business as manager for the trustee, and ordered the necessary supplies, which were paid for by the trustee. A merchant who in knowledge of the trust arrangement had supplied goods, raised an action against the trustee, as principal of the trader, for the price thereof. *Held* (*rev.* Lord Trayner) that the trustee was liable for payment of these goods because they had been ordered by his manager.

This was an action by William Ford & Sons, merchants, Leith, against Richard Stephenson, ironmonger, Duns, for payment of an account for goods supplied to the late Matthew Wilson, formerly grocer in Duns, for which the defender was said to be liable.

On 26th June 1866 the said Matthew Wilson, on the narrative that his affairs had become embarrassed, and that the defender had made advances to him, and was willing to undertake the

management of his affairs for behoof of him and his creditors, executed a trust-deed whereby he made the following disposition:—"Therefore I do hereby dispone, assign, and convey to and in favour of the said Richard Stephenson, as trustee, for behoof of me and all my just and lawful creditors, my whole estate and effects, heritable and moveable, real and personal, presently belonging and owing to me, or which may belong and be owing to me, or to which I may acquire right during the subsistence of this trust, and particularly without prejudice to the said generality, my whole stock-in-trade, shop fittings, household furniture, and the whole debts due and owing to me, conform to list and inventory thereof hereunto annexed, with the whole writs, vouchers, and instructions thereof, and all that has followed or may follow thereupon, and my whole right and interest therein, present and future, excepting always from this trust the foresaid policies of life assurance; but declaring that these presents are granted by me and shall be accepted in trust for the uses, ends, and purposes, with the powers, and under the conditions, provisions, and declarations underwritten, namely *Primo*, That the said Richard Stephenson shall take the full management and control of my whole means and estate, and that I shall act as his submanager, and that the business of a grocer shall be carried on by the purchase and sale of spirits, porters, ales, groceries, and other such goods, and that for such time as shall seem expedient to the said Richard Stephenson—that is, until it shall seem to him that the business is in so healthy a condition as that he may restore the possession and management to me, and that he may with advantage to me and my creditors resign and upgive the present trust; it being hereby provided that I shall have the occupancy of the dwelling-house, and the use of the household furniture; and the prices and proceeds of sales, and all purchases of goods to supplement the stock shall be under the control and management of the said Richard Stephenson, he being bound to make such weekly allowance for my services as shall seem to him necessary and proper for the maintenance of my family: *Secundo*, All expenses attending the creation and execution and the management of the trust, including a suitable remuneration to the trustee, and payment to the trustee of all advances made, or obligations undertaken by him in execution of the trust, shall be paid out of the first and readiest of my means and estate." By the third purpose Stevenson was empowered at his discretion alone to sell and dispose of the whole estate and effects disponed.

Wilson by a separate deed of assignation disponed and conveyed to the defender two life policies of assurance with the Life Association of Scotland, together for five hundred pounds, in part security of his advances in this present trust.

The pursuers were aware that the deed had been granted shortly after the constitution of the trust, and their knowledge of the general circumstances will appear from the following letter to them of 28th June 1866 from Mr W. K. Hunter, banker, Duns, to whom they had been referred by Wilson:—"Mr Wilson has now executed the trust-deed in favour of Mr Stephenson to which I alluded. The purpose of this trust is to carry on the business under Mr Stephenson's supervision, so that while the trust exists Mr Stephenson is the responsible party. He has opened an account here into which I understand all monies drawn are to be paid, and from which all accounts are to be paid. If, therefore, you have the sanction of Mr Stephenson for any orders you may execute, Mr Stephenson will take care that you are paid. In short, Mr Stephenson has taken the management, and is to carry on the business for behoof of Mr Wilson." Hunter had prepared the trust-deed, but he was not Stephenson's private agent. Thereafter Stephenson met all the pursuers' business accounts by cheques upon the account alluded to by Hunter, which was known as "Stephenson No. 2 account."

On 24th May 1870 the defender wrote to the pursuers:—"As I have entered on a lease of the farm of Chapel, and now reside there, I am not able to devote any of my time to his business, and I am anxious to bring the trust to a close; and I would be glad to consult with you as to the best mode of procedure, so as no interest should suffer by my withdrawal." On 3rd June he again wrote:—"Since I saw you I am glad to say that a friend of Wilson's here has promised to try and negotiate a loan for him in the course of a month; and should he be successful, I hope it will place Wilson in a position to dispense with my services and the trust-deed." On 14th June 1870 Wilson requested the pursuers to draw upon him at three months for the amount of his account, but the pursuers replied that such a course would be contrary to the present arrangement, and they therefore refused to accede to his request. On 16th June 1870 the defender wrote to the pursuers—"It was at my suggestion Mr Wilson wrote you to ask you to draw on him at three months for the amount now due to you, and he has this morning showed me your reply. His estate is now under advance to me of upwards £400, and I am not at this moment in a position to increase this sum; but, as I before stated, negotiations are in progress by some of his friends to raise a sum to relieve me of my advances; and so soon as this is completed it is his intention to revert to the usual plan of paying you monthly. I would be glad if you could accede to his wish to accommodate him at this time. If you cannot, the only thing for it that I can see is to bring his affairs to a standstill and advertise the business." The pursuers replied that pending the completion of the said negotiations they would take Wilson's acceptances with the indorsation of one or more of his friends. They stated—"We would gladly take Wilson's acceptances countersigned by yourself." On 23rd July 1870 the pursuers wrote to the defender pressing for payment of their account, and on 26th July 1870 they again wrote to the defender—"If you wish, as we understand, to withdraw from your present connection with him, and if he has no other security to offer us, then it can only remain to decide what steps should be adopted under the circumstances, and to enable us to judge of that we would like to know the precise nature of the deed under which you are connected with him." The trust-deed was accordingly sent to them for examination. On 1st August 1870 the pursuers wrote to the defender—"We will be sorry if the matter cannot be arranged, but we think it right to intimate to

you that we cannot allow it to remain beyond a day or two more in its present position. If we get sufficient security we would continue to supply Mr Wilson on our very best terms with goods to the amount of £400 or £500 as now; but if, say by Thursday, you find it is not likely to be provided, we trust that you will take immediate action to realise and pay our claim, and render unnecessary any steps we might think otherwise incumbent on us." About the same time an order for grocery goods sent by Wilson to the pursuers was refused by them, as it was not accompanied by the defender's written instructions. Thereupon the defender wrote to the pursuers on 4th August 1870—"I wrote you this forenoon, but since Mr Wilson has shown me your telegram to him of this date. As it is of the utmost importance that the business should be kept in its present state of efficiency till some arrangement is carried through, I will undertake to see you paid for the sugar, which I understand has been ordered by Mr Wilson." On 17th August 1870 the pursuers wrote to the defender—"We think it due to all parties to make you aware of the terms on which we are prepared to go on, and for Wilson's sake hope that they may meet the approval of his friends. First, we are willing to allow our claim to lie over on condition that we receive satisfactory security for its future payment. Second, that Wilson shall reduce the debt by a payment of fifty pounds every six months from this date, and pay interest on the unpaid-up amount at the rate of four per cent. per annum. Third, on this being arranged we agree to give him goods on one month's credit to the extent of £200 stg. It appears to us this is a very favourable arrangement for Wilson, and you will observe that while caring for ourselves we have also looked to the interest of his proposed securities, as in the first place the security is limited to our present debt; then by binding Wilson to reduce the debt, we thereby secure the gradual reduction of their risk; and further, by compelling Wilson to pay his goods by cash in one month he gets the discount of 2 or 2½%, which you are aware makes an immense difference in the year's profit, thereby giving his securities considerable security that they will never be called on. We would also suggest that in order further to induce his friends to befriend him you should agree to continue the trust-deed, which would enable his securities through you to put a stopper at once on Wilson should he be found failing in any respect to implement his engagement, and enable you at any time to look into his affairs. We would also suggest that were his securities to be, say four in number, the risk would be very small indeed to each, especially seeing Wilson is at present £200 stg. above the world and in a good business." Wilson at this time succeeded in arranging with certain parties, two in number, to become security for his debt to the pursuers, and the defender on 25th August 1870 intimated this to the pursuers, and added—"In the meantime send him what goods he may order, and I will see you paid until the arrangement is carried through." On 8th September 1870 he again wrote as follows—"I was only able to-day to see the gentlemen who propose being security to you for Wilson's debt of £350. They propose that you should draw on Wilson in seven bills for the amount named, and at the six months' date. On that being completed, and on my undertaking to continue the trust until the bills are paid up, they will then grant you a letter of obligation to secure you in the due payment of the bills. I trust this will be satisfactory for you." A bond and obligation was granted on 6th September 1870 by the said parties to the pursuers as cautioners along with the defender for the amount of his debt.

About this date it was suggested that the business should be sold, and the question was discussed between the pursuers and the defender, with Wilson's consent. However, no arrangements for this end were completed, and the idea was abandoned.

On 14th April 1882 the defender wrote to the pursuers—"I think it right that you should know from me the present state of Mr M. Wilson's affairs, especially as he intends seeing you to-morrow on the subject. You are aware that several years ago he was seriously embarrassed; at that time he executed a trust-deed in my favour, under which the business has been carried on, and I am glad to say that now he is perfectly solvent. The carrying on of the trust has involved me in raising, for the purpose of carrying on the business efficiently, a considerable sum of money, and I am anxious now to be relieved from this as well as the responsibility of the trust, but Wilson's difficulty seems to be in raising a sufficient capital to allow me to resign, and if this cannot be done, the only other alternative seems to me to dispose of the business. This on Wilson's account would be a serious matter, as the business is a good one, easily managed, and on the whole profitable; besides, the premises have now been bought and improved to suit the requirements of his trade. If you can suggest any way out of the difficulty, perhaps you will communicate it to Wilson, who will call on you sometime to-morrow." On 19th April 1882 he again wrote—"I have been seriously considering the matter as to which Mr Wilson called on you on Saturday. It appears to me the only way practicable under the circumstances is to try and get some-one who wishes to extend their business to take this one and retain Wilson as their manager, and give him either a share of the profits or a salary for his services. It's a nice tidy business, easily managed, with a most select connection, turning over about £4000 per annum, with good profits, and capable of great extension. He has a large and a growing trade of sending whisky to London and the south of England. It would take about £1000 to take the business in its present state, paying for stock and debts, and I must either arrange to let the premises on a long lease, or sell them, as it may be wished. If you know of anything likely to suit, kindly let me know, as well as your opinion as to this proposal." The pursuers replied on the following day—"We are favoured with yours of yesterday. We would be very sorry if Mr Wilson has to give up his business, but we cannot be surprised you should wish to be free of your present responsibility."

At this date efforts were again made for the sale of Wilson's premises, and inquirers were referred by the pursuers, from whom the advertisement proceeded, to the defender. The premises were not sold, and on 5th January 1883,

the pursuers wrote to Wilson—"We have your order for sugar, which has been forwarded, but we must remind you of the request we made in our last that your orders in future should be countersigned by Mr Stephenson. Looking at late delays in payment, we think this arrangement is proper and necessary in the interest of Mr Stephenson, as well as in yours and our own. Don't forget this in sending future orders."

After this date goods were supplied as before by the pursuers on Wilson's order, and were paid for by the defender's cheque, but the orders were not countersigned by the defender. Wilson died in September 1887, and his business was carried on for some months by his daughters, and finally given up. Latterly it had decayed, and the assets afforded about 10s. per £ to the creditors. The goods supplied by the pursuers had been paid for during the continuance of the trust by the defender, except those sent between 16th July and 19th September 1887, the price for which, amounting as restricted to the sum of £175, 17s. 7d., was the subject of this action.

The pursuers averred that in dealing with the business of Wilson they relied on the trust-deed as imposing liability on the defender, and further, that the whole of the account was incurred with the knowledge and approval of the defender, and on his behalf, in his conduct of the said business as trustee for Wilson, and on the order of himself or persons authorised by him. The defender averred that he procured the deed as a security for his advances, and in order that he might secure and enforce some supervision over Wilson's business. The trust-deed was not acted on to the effect of superseding Wilson in the conduct of his business, nor was that intended. The trust-deed was not intimated to creditors or published in any way. Of even date therewith Wilson granted to him, in further security of said advances and interest, an assignation in security of two policies of insurance on his life with the Life Association of Scotland for £200 and £300. His position was that of a secured creditor with some charge of the cash and banking transactions. Further, that no demand for payment of the price of goods supplied by the pursuers to Wilson was ever made to him, and that the pursuers were consulted as to the proposed sales of the business, because their interest as creditors was identical with that of the defender.

At the proof, the facts above narrated were established, and the correspondence produced, and the pursuers admitted that they had never informed the defender that they held him liable for their claims against Wilson.

The Lord Ordinary assoilzied the defender. He added this opinion—"I think it quite clear that the defender and the late Matthew Wilson never stood towards each other in the relation of principal and agent, or master and servant, in connection with Wilson's business, and that therefore the decision in *M'Phail's* case, 15 R. 47, has no application to the present. On the other hand, I am unable to distinguish this case in principle from the cases of *Eaglesham*, 2 R. 960; *Miller*, 3 R. 548; *Stott*, 5 R. 1104; and *Newcastle Chemical Company*, 9 R. 110.

"The trust-deed granted in favour of the defender was intended as a security to him for advances made; and although it authorises the defender to take the management of Mr Wilson's business, and to place Mr Wilson in the position of a sub-manager, the relations between the defender and Mr Wilson never took that shape. Wilson continued in the management of his business, as the pursuers knew. They corresponded with him on that footing. Even if the defender has assumed the position of manager of Wilson's business, that would not have inferred liability for Wilson's debts.

"The pursuers say that in sending the goods to Wilson, the price of which is now sued for, they relied on the defender being liable therefor. They had no good ground for so relying on the defender. They knew the terms of the trust-deed, and should have known that the trustee under such a deed was not personally liable for the debts of the truster. It is not pretended that the defender ever gave the pursuers any reason to suppose that he would be liable for Wilson's debts. On the contrary, the correspondence in process appears to me to establish that, while the pursuers relied on the defender taking a supervision of Wilson's business, they looked to Wilson alone as their debtor."

The pursuers reclaimed, and argued—Wilson was completely divested of all interest in the business in favour of the trustee, and occupied the position of a servant. The deed had been acted upon in this view from the beginning. It might be that the manager of this business conducted personally the bulk of the transactions, but the defender was owner of the business as trustee and was responsible. Thus Wilson's orders were paid by the defender's cheques. The defender's special guarantees were given to orders in excess of the usual course of supplies, and only emphasised his position as security to the pursuers. The distinction between the present case and those cited by the Lord Ordinary was that in the latter the trust-deeds were executed only for a temporary and definite purpose, while here the trust was to subsist as long as the defender considered beneficial to the estate.

Argued for the defender—The real relation of the parties must be considered, and the terms of the trust-deed were insufficient of themselves to decide the question in the case. The deed was executed as a security to the defender over and above the assignations of the policies of assurance in his favour. The business belonged to Wilson, who, though nominally manager, conducted it for his own behoof. The defender had no right to, and enjoyed none of the profits of the business. His whole object was supervision for Wilson's benefit. The correspondence showed that the pursuers did not regard the defender as their security. They sometimes requested a special guarantee from him before fulfilling Wilson's orders—*Eaglesham & Company* v. *Grant*, July 15, 1875, 2 R. 960; *Newcastle Chemical Manure Company* v. *Oliphant & Jamieson*, November 15, 1881, 9 R. 110; *Stott* v. *Fender & Crombie*, July 20, 1878, 5 R. 1104; *Miller* v. *Downie*, March 4, 1876, 3 R. 548; *Macphail & Sons* v. *Maclean's Trustees*, November 16, 1887, 15 R. 47.

At advising—

Lord Young—This is an action at the instance of a firm of merchants for payment of an account for supplies which were made to a grocery business in Duns which was at one time carried on

by a Mr Wilson, who died in September 1887. The period of currency of the account sued for is June 1887 to Wilson's death in September 1887. The amount as ascertained in the minute of restriction is £175, 17s. 7d. The action is not against Wilson's representatives as such, but against Stephenson, an ironmonger in Duns, in whose favour Wilson executed a trust-deed about twenty years ago. We have the trust-deed. I do not detain your Lordships by quoting it at length, but shall state what appears to me its import and effect. Wilson was in labouring circumstances at the time of its date, 26th June 1866. His business had not been going on satisfactorily. Stephenson acted the friendly part of undertaking to carry it on, and put it on a more satisfactory footing. In order to carry it on he had to make some advances. On the other hand, Wilson by the trust-deed divested himself of the business and everything else of which he could divest himself in Stephenson's favour, but as trustee always, in order that he might carry on the business and endeavour by his exertions and by his sensible management to put it on a better footing. By the trust-deed Wilson is completely divested and Stephenson invested subject to the trust. He appointed Wilson himself to carry on the business, as manager and under his supervision, accounting to him by paying over to him all the receipts, that is, the income from the business, while he, Stephenson, paid for the supplies made to the business.

Now, I cannot take the trust-deed as what it was represented to be—that is, a mere sham. I think it was a reality, and that we have not to consider the case of a trust not acted upon, for indeed the trust-deed was acted on. It was acted upon for twenty years. During that period the trustee received the receipts of the business, and paid for the supplies. His purpose was so to carry it on that the receipts should exceed the outgoings, for otherwise it would have been according to his trust and duty to bring the business to an end by selling it if possible, or at all events by bringing the losing concern in some way to an end so as to avoid loss. That during those twenty years Stephenson knew the exact state of matters from day to day is certain, for one of the admitted facts of the case is that the drawings were paid to him, and that the supplies were paid for by him. There was no other source of payment, for Wilson had nothing. He was the manager and had an allowance, but Stephenson had the funds with which the payments were to be made. It is for that reason I say that Stephenson knew the condition of the business for twenty years. The trust subsists still. The business, if worth anything at all, will be sold by the trustee, and in the course of the execution of the trust, for the trust includes all that Wilson possessed.

Now, the pursuers were acquainted with the fact of the trust-deed being granted from the first. In 1866 they, who were the chief merchants who made the supplies, received in reply to their inquiries letters from Hunter, the man of business who prepared the trust-deed, and who must have known what was intended by the parties. He said in one of these, that dated 26th June 1866—"A trust-deed is to be executed in Mr Stephenson's favour giving him the full management of the business, so that any orders you receive will be through Mr Stephenson" and again at 28th June 1886, "Mr Wilson has now executed the trust-deed in favour of Mr Stephenson to which I alluded. The purpose of the trust is to carry on the business under Mr Stephenson's supervision so that while the trust exists Mr Stephenson is the responsible party," Now, that what Mr Hunter there said would be the result of the trust, according to the state of the law, is not in my opinion doubtful. If a trustee carries on a business directly or through the medium of a manager, he is responsible for the debts undertaken in so carrying it on, whether they are undertaken by himself or by the manager acting within the scope of his authority. That is a familiar thing in the case of a trustee in bankruptcy. He may go on with a contract or (to take a familiar instance) continue to manage, with the landlord's consent, the farm of a bankrupt farmer. Or he may appoint the bankrupt as his manager and continue to manage the farm through him. He is responsible in such a case for the debts incurred by himself or by the manager. Now, the question here is whether the account sued for is a debt of the trustee incurred by Stephenson, the trustee, it being immaterial whether it was incurred by himself or by his manager Wilson with his authority. I do not doubt that it is a debt of the trust. Stephenson was not carrying on the business for himself. I observe some confusion on this matter in the examination of the witnesses, and the same was observable at the debate. It seems to have been supposed that the allegation was that Stephenson was carrying on the business for his own profit—a thing never suggested at all. It would have been a breach of trust if he had carried it on for his own profit. The legal responsibility was upon him because the contract was his contract. It is said that Stephenson is not liable for Wilson's debts. He is not. But he is liable for a debt incurred by himself in carrying on a trust to the party with whom he dealt. We know from the trust-deed what Wilson's authority to order the goods was. He was manager, and the orders he gave were from 1866 to 1887 given with Stephenson's sanction, which was shown by his paying the accounts so incurred. It is not suggested that the orders were in excess of his authority with regard to the account in question. Stephenson had a duty to see that the debts incurred in consequence of the orders given did not exceed his power as trustee to pay them—the drawings of the business. He was successful in that to a considerable extent. I observe that in one or two of his letters he alludes to that. He says (on 11th April 1882 in a letter to the pursuers) that the business is a good one, easily managed and on the whole profitable, and in a letter of 19th April 1882 he calls it a nice tidy business easily managed . . . and capable of great extension. That shows that he had performed his duty by seeing that the debts were not getting beyond the drawings, which were his means of meeting them.

Now, two incidents in the conduct of the trust were referred to at the debate. One of them occurred in 1870. It appears that then Stephenson had taken a farm and did not expect to be able to give to the business the same amount of attention as before. He told the pursuers of this fact, saying that he wished to bring his

actings as trustee to an end and be free from the position he occupied. The import of the answer to this letter is that the Fords appreciated his desire, but they pointed out that it would be fair to them that some arrangement should be made as to what was due to them, and that some provision should be made for the future. Nothing came of it at that time, and matters went on as before, Wilson, that is, being manager and accounting to Stephenson. In 1882 there was another manifestation of desire to be free from the trust on the part of Stephenson. He wrote to the Fords—"I think it right that you should know from me the present state of Mr M. Wilson's affairs, especially as he intends seeing you to-morrow on the subject. You are aware that several years ago he was seriously embarrassed; at that time he executed a trust-deed in my favour under which the business has been carried on," and that is the business which it has been argued to us was not carried under the trust at all. I am glad to say that now he is perfectly solvent. The carrying on "of the trust has involved me in raising for the purpose of carrying on the business efficiently a considerable sum of money, and I am now anxious to be relieved of the responsibility of the trust?" (what responsibility, if his present argument is right), "but Wilson's difficulty seems to be in raising a sufficient capital to allow me to resign, and if this cannot be done the only other alternative seems to me to dispose of the business. This on Wilson's account would be a serious matter, as the business is a good one, easily managed, and on the whole profitable; besides, the premises have now been bought and improved to suit the requirements of his trade." I may here notice that we were told in answer to our question that in 1874—thirteen years before the account sued for—Stephenson purchased the premises so that the trust business was thenceforth conducted in premises belonging to him, he charging the trust a rent for them, and taking credit for it out of the trust funds. That puts out of this case any question of need of delivery to transfer to him anything belonging to Wilson or brought into the premises when purchased for the business. The title being with him, and the business being his in trust, he asked the pursuers to assist him in disposing of the business, and on 20th April 1882 they write to him—"We would be very sorry if Mr Wilson has to give up his business, but we cannot be surprised that you should wish to be free of your present responsibility," and go on to say that though no one occurs to them at the time as a purchaser of the business they will communicate with him (Stephenson) if they hear of anyone who would be a likely person to take over the business. It is thus again pointed out to the defender that the pursuers are quite willing that he should be freed from his position on reasonable terms for themselves. If they continued their supplies, they wished him to continue responsible for them until the new arrangement should take place. Then come two letters, one in December 1882 and the other in January 1883. The former is as follows—"We have your telegram, and have forwarded, not without some hesitation, the hhd. whisky. When executing your last order we pointed out that the October goods were not yet paid, and you replied on 18th inst. that a cheque would be sent shortly. Instead of sending a cheque you now order this whisky, and do not say a word in explanation. We trust to have a cheque from you to-morrow, and in future we would like your orders for goods countersigned by Mr Stephenson." The other letter is as follows—"We have your order for sugar, which has been forwarded, but we must remind you of the request we made in our last, that your orders in future should be countersigned by Mr Stephenson. Looking at late delays in payment we think this arrangement is proper and necessary in the interest of Mr Stephenson, as well as in yours and our own. Don't forget this in sending future orders." Now, the meaning which these letters convey to my mind is this. The pursuers were, though business men, and properly alive to their own interests as such, evidently friendly to Wilson and to Stephenson, whose interference in Wilson's affairs, thereby involving himself in responsibility, they appreciated. They wished that no orders, and especially no large orders, should be executed without Stephenson's knowledge. He was kept aware of his responsibility for his manager's orders. They say in the letter "in the interest of Mr Stephenson as well as yours and our own," meaning that the business will thrive according as Stephenson's judgment is followed, and that Stephenson has an interest because he has a responsibility to them. But I cannot read these letters as meaning that between Stephenson and the pursuers goods would henceforth only be supplied when Stephenson signed the order. The ordinary law as to a trustee's order by himself or his manager, as I have already explained it, was applicable. It might have been superseded by a special contract that no order was to be good unless Stephenson signed it, but I do not think that that agreement was made. No distinction was made between the future and the past, and it is not said that orders were paid for which had Stephenson's signature, and that payment of others was refused because they were not signed. On the contrary, Stephenson paid for them all. Nor yet is it suggested that any of Wilson's orders were in excess of his authority as manager.

On the whole, therefore, I am unable to reach the conclusion that the defender is not responsible. Nor do I think that in this or in any case it makes any difference to the liability of the trustee that the beneficiary may be liable also. Wilson was no doubt a beneficiary in this trust. Profit made after payment of the debts and restoration of the business to a healthy condition would have gone to him. In the same sense a bankrupt is a beneficiary in the trust held by a trustee in bankruptcy, and rare cases have occurred in which a surplus has existed in a bankruptcy and the bankrupt received it. But the interest of Wilson in this trust makes no difference to the liability of the trustee, who carried on the business for twenty years.

I am unable, on the grounds I have now stated, to concur with the judgment of the Lord Ordinary, and I have reached my conclusion with regret, for I should be sorry if Mr Stephenson's kindness in acting as he did should cause him serious loss. I hope it may not do so. We were

told during the debate that the estate of Wilson will pay at least 10s. per £1. That makes the case not very important in point of money. But I am of opinion that the pursuers must have decree.

Lord Rutherfurd Clark—I am of the same opinion. I think the business was carried on by the defender. He says so in various letters, and his statement is in my judgment in accordance with the fact. He was carrying on the business at the time when the goods were ordered of which the price is here sued for. In these circumstances I hold that the true legal view is that the defender was the purchaser of the goods, and is therefore liable for the price. I therefore agree that the interlocutor ought to be altered.

Lord Lee—I have no difficulty in assenting to the doctrine that a trustee who, in carrying on a business under such a trust as that now before us, orders goods for the purposes of the business, either personally or by another deriving authority from him, must be liable in payment of the price. Nor have I any difficulty in holding with your Lordships that this trust was acted on for some time by the parties. But I have difficulty on the question whether the account sued for was incurred during a time when the trust-deed really represented the relation in which the defender stood to the pursuers. The question is, whether the goods charged for in this account were supplied to the defender's order or to the order of anyone authorised by him? The allegation in condescendence 4 is—"The whole of the said account was incurred with the knowledge and approval of the defender and on his behalf, in his conduct of the said business as trustee for Mr Wilson, and on the order of himself or persons authorised by him." If that is true, then the defender is liable without doubt. The view of the Lord Ordinary is—"I think it quite clear that the defender and the late Matthew Wilson never stood towards each other in the relation of principal and agent or master and servant in connection with Wilson's business." I cannot say that their relations never took that shape, but my difficulty is that there were two periods at which the relation constituted by the trust appears to have been superseded. The first was in 1870, the second in 1882. I think that the correspondence of 1870 shows that the pursuers accepted the defender's intimation as sufficient notice that the trust was then suspended, and that it was not until the defender agreed to continue the trust that the former relation was resumed. I refer particularly to the letters between 25th August and 13th September 1870, as proving that the trust was suspended at that time. But the question is, whether there was not another suspension of the trust in 1882. A letter from the defender to the pursuers intimating his unwillingness to continue in the trust has been read. This was followed by two letters, dated 28th December 1882, and 5th January 1883, which your Lordship has noticed. In the letter of 5th January the pursuers intimated to Mr Wilson their wish that "your orders in future should be countersigned by Mr Stephenson," and they added, "we think this arrangement is proper and necessary in the interests of Mr Stephenson as well as in yours and our own." What is the meaning of these letters. I think it can only be that any orders not so countersigned by the defender would not be regarded by the pursuers as given with his authority, and I should have thought it incumbent on the pursuers to show that the orders, the payment of which is sued for in this account, were so countersigned by the defender. But no argument was addressed to us on this point. It was not contended that there was any change in the relations between the pursuers and the defender at this time in point of fact. I therefore cannot dissent from your Lordship's judgment, but I wish to say, that if it had been shown that these letters were acted upon after January 1883 I might have come to a different conclusion.

The Court recalled the Lord Ordinary's interlocutor, repelled the defences, and gave decree for the sum of £175, 7s. 7d. with expenses.

Counsel for the Pursuer (Reclaimer)—Sol.-Gen. Robertson, Q.C.—G. W. Burnet—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defender (Respondent)—Comrie Thomson—MacWatt. Agents—Mack & Grant, S.S.C.

Friday, October 26.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

GREIG (INSPECTOR OF POOR OF CITY PARISH, EDINBURGH) *v.* SIMPSON (INSPECTOR OF POOR OF SOUTH LEITH).

Poor—Settlement—Residential Settlement—Continuity of Residence.

A workman came to reside in the parish of South Leith at Whitsunday 1879. On 9th April 1884 he left his wife and family in a house which he had taken there, and entered on a business engagement in Cupar, where he lived in lodgings. His wife and family remained in the same house in South Leith until 26th May 1884, when he removed them to a house which he had taken for a year in Cupar, and in which he lived with them until the month of October following. Between 9th April and 26th May he had visited his wife and children nearly every Saturday, and had remained with them until the following Monday morning.

Held that a residential settlement had not been acquired in the parish of South Leith by himself and his family.

In November 1887 George Greig, Inspector of Poor of the City Parish of Edinburgh, raised an action in the Sheriff Court of the Lothians and Peebles at Edinburgh against Andrew Craig Simpson, Inspector of Poor of the parish of South Leith, concluding for payment of £20, 11s. 4d. of outlay by him between 10th September 1886 and 30th September 1887, for the aliment of Abigail Simpson Morham, widow of John Wilson Morham, tailor's cutter, who died on 29th June 1886, and for the aliment and support of their

children, and for relief of all future payments on their behalf.

The following facts were established in the proof:—

The pauper was married to the deceased John Wilson Morham on 27th August 1875. At Whitsunday 1879 the parties went to reside at 44 Albert Street, Leith Walk, in the parish of South Leith, and they resided there until Whitsunday 1881. Morham and his wife and family thereafter lived for more than two years at No. 3 North Elliot Street, also in the said parish of South Leith.

On 9th April 1884 Morham went to Cupar in pursuit of his business as a tailor's cutter; he lived in lodgings there until 26th May 1884, at which date he removed his wife and children from North Elliot Street, South Leith, where he he had left them, to a house which he had taken for them in Cupar. Between 9th April and 26th May, Morham had been in the habit of returning to Leith on the Saturdays and spending the Sundays with his wife and family. In November 1884 Morham and his wife and family finally left Cupar. He died on 26th June 1886. The pauper became chargeable in the pursuer's parish on 10th September 1886.

The pursuer contended that the pauper had a settlement in the parish of South Leith, in respect that her husband occupied and resided with his family in various houses in the parish between Whitsunday 1879 and Whitsunday 1884; that Morham had thus acquired an industrial residential settlement in the said parish, which at his death was transmitted to his wife and family, whose settlement was and still continued to be in the parish of South Leith.

The defender contended that previous to the date at which Morham removed to Cupar (9th April 1884) he had not resided for the period of five years continuously in the parish of South Leith, and therefore that he had not acquired a residential settlement in said parish.

On 4th February 1888 the Sheriff-Substitute (Rutherfurd), after findings in fact to the effect already stated, found that a residential settlement had been acquired by the deceased in the parish of South Leith, and decerned for the amount sued for.

"*Note.*—The Sheriff-Substitute had the benefit of an ingenious argument on the part of the defender in this case, but he does not think it necessary to enter into a discussion of all the authorities that were cited. The doctrine of constructive residence in the acquisition of a settlement is now settled by a series of decisions, and as Lord Shand observed in the case of *Wallace* v. *Beattie*, 1881, 8 R. 345, 'the real test in questions of this kind is, where is the person's home?' In the present instance the Sheriff-Substitute thinks that it is not doubtful that the home of the pauper's husband, for the period of five years from the 26th of May 1879 to the 26th of May 1884, was in the parish of South Leith. It is true that for about six weeks prior to the term of Whitsunday 1884 he himself was absent in Cupar, where he had got work. But his home still continued to be in South Leith where his wife and family still resided in the house which he had taken up to the Whitsunday term, and he joined them there as often as he could from a Saturday to a Monday. That he considered his home to be in South Leith is evident from his letter to his wife, dated Sunday 18th May, in which he says, 'I am glad to think that I will be home beside you next Sunday, and then the Sunday after that I will have you all over here and settled."

The defender appealed to the Court of Session, and argued that the facts as set forth by the pursuer showed that the pauper lived for exactly five years in the parish of South Leith, and that being so, the question came to be, did her husband by leaving South Leith for Cupar within the five years break his own settlement and that of his wife and family, or did the fact that his wife and family continued to reside in the house they had occupied in South Leith, continue his residence in spite of his absence in Cupar? The point was decided in 1851 in the case of *Hodgert* v. *Petrie*, 1 Poor Law Mag. 350, and in *Hastings* v. *Semple*, 1866, 8 Poor Law Mag. 331, and 1 S.L.R. 123. The principles there laid down had ruled the practice since, and it was most undesirable that any alteration in that practice should now be made. The rule was, that when the head of the house removed his residence, then the severance from the parish residence was complete; and it should not be held to be postponed until the last member of the family left, or the last piece of furniture was removed. In the present case the position of Morham was just as if he had asked a neighbour to give his family shelter until the home he had taken for them was ready. When a husband changed from one parish into another, even if his family might not immediately come with him, the time of his residence in the parish was computed from the date of his first arrival in it. So looked at, the pauper's husband had not a five years' continuous residence in South Leith.—*Hamilton* v. *Kirkwood*, November 13, 1863, 2 Macph. 107; *Hewat* v. *Hunter*, July 6, 1866, 4 Macph. 1033; *Allan* v. *Shaw*, February 24, 1875, 2 R. 463; *Wallace* v. *Beattie*, January 6, 1881, 8 R. 345; *Deas* v. *Nixon*, June 17, 1884, 11 R. 945.

Argued for the respondent—So far as the intention of the pauper's husband could settle such a question, it was clear that he regarded South Leith as his residence until he finally removed his family and furniture on 26th May 1884 to Cupar, for he referred to it in his letter to his wife as "home." Besides, he was merely a lodger in Cupar; if he had obtained a better place in Edinburgh or Leith than he had got in Cupar he would never have removed his family to Cupar at all. There was no evidence in the case that when he went to Cupar in the prosecution of his business he went there *animo remanendi*. At the time he went to Cupar his taking a house and bringing his family to join him was a future event. Supposing that instead of settling in Cupar he had moved about as a journeyman tailor, could it have been urged that he had lost his Leith residence? Being a mere lodger, his position was just as if he had moved from place to place. His residential settlement in South Leith was not interrupted until he removed his family to Cupar on 26th May 1884—*Greig* v. *Miles*, July 19, 1867, 5 Macph. 1132; *Moncrieff* v. *Ross*, January 5, 1869, 7 Macph. 331; *Cruickshank* v. *Greig*, Janu-

ary 10, 1877, 4 R. 267; *Harvey* v. *Rodger & Morison*, December 21, 1878, 6 R. 446.

At advising—

Lord Mure—In this case the Sheriff-Substitute has proceeded upon the view that John Wilson Morham, the pauper's husband, after he went to reside at Cupar still continued to view South Leith as his home; and he thinks that as Morham's wife and children still continued to reside in South Leith, and as he visited them frequently on Saturdays during the time he was in Cupar, that Morham's constructive residence must in these circumstances be held to be South Leith. The Sheriff-Substitute in coming to this conclusion to a considerable extent has gone upon the ground that Morham in writing to his wife spoke of South Leith as "home." Now, while this expression may be taken as of some importance in considering Morham's intentions, it can hardly be viewed as conclusive of the present question, which must depend largely on the whole facts of the case. These are very clearly explained in the evidence of Mr Miles, who says—"I was a draper in Cupar for some years. I was engaged in business there in 1884. I required a cutter in the spring of that year. I was a draper, but I also carried on a tailoring business. It was in the month of March that I required a cutter. I advertised in the *Scotsman*, and had several applications in writing, including one from John Wilson Morham, North Elliot Street, Edinburgh. I came across and saw Mr Morham, and engaged him. The terms of his engagement were £2, 2s. 6d. a-week, and a month's warning on either side. He came over to Cupar about the middle of March, but I could not give the exact date. I arranged lodgings for him with Mrs Stark, 16 Crossgate. He was with me for seven months. He left in the month of October, having got another situation in Edinburgh." The result of this evidence is to make it clear, I think, that Morham entered into a permanent engagement with Miles, and that he made up his mind to go and settle in Cupar. And we have all this confirmed by the widow, who states that as soon as her husband got employment from Miles he proceeded to take a house for his family in order that they might all live together in Cupar. I may observe that what the statute deals with is not a "home" but "personal residence," and that being so we find from the evidence that Morham resided in Cupar from 9th April 1884; that he first took lodgings for himself, and thereafter a house for himself and family. It is possible that if he could have got a house from the first he would have taken it, but it is likely that going there in April he had to await the arrival of the term; and that during the interval he went into lodgings. From that time onwards it is clear, I think, that he intended to make Cupar his permanent residence and not again to return to Edinburgh. In this state of the facts I cannot see any room for the principle of constructive residence—a principle which in some of the cases to which we were referred seems to have already been carried far enough. Upon these grounds therefore I am unable to concur in the views which have been expressed by the Sheriff-Substitute, and I think his interlocutor should be recalled.

Lord Adam—This is an action by the Inspector of Poor of the City Parish of Edinburgh against the Inspector of Poor of the parish of South Leith, in order to obtain repayment of certain advances made by the pursuer to Abigail Simpson Morham and her children, and in order that he may be relieved of any future demands on their behalf. The ground of the pursuer's claim is that the pauper's husband, John Wilson Morham, had an industrial residential settlement in South Leith, in respect that he had resided there from Whitsunday 1879 to Whitsunday 1884. If this contention is made out, then of course there can be no relevant answer to the demand of the pursuer for relief from past and future advances. In reply, however, the defender alleges that Morham went to Cupar on or about the 9th April 1884, and that therefore the five years' continuous residence in South Leith was not made out. The whole question is one of time, and in determining it certain dates and facts have to be kept clearly in view.

Morham was a tailor's cutter, and in March or April 1884 he made an engagement with a Mr Miles, a draper in Cupar, on the terms that he was to receive £2, 2s. 6d. a-week, with a month's notice on either side. This engagement was viewed by Morham as one of a permanent character, for he immediately proceeded to Cupar, took lodgings for himself, and shortly after took a house for himself and his family. He continued to reside at Cupar, but (until he was joined by his wife and children) he almost always went back to South Leith on the Saturdays and spent the Sundays with his family. But for this Morham's residence in Cupar was from 9th April 1884 till October (when, getting a better situation, he returned to Edinburgh) continuous. Now, what is the effect in law of such a residence as this of Morham's at Cupar? It is said that Morham did not personally reside at Cupar, but that he was constructively resident in South Leith with his wife and family. In cases of constructive residence, however, the absence is generally temporary in its character; the party intends to return to the parish or district in which he is held constructively to reside, and that is what distinguishes the present case from those of ordinary constructive residence. Here the residence which Morham took up in Cupar was intended to be a permanent residence, and he arranged that his wife and children should come over to him there as soon as he had succeeded in securing a house. He never intended to return to the parish of South Leith, therefore his personal permanent residence was Cupar, and it is the personal permanent residence that must, in cases like the present, be looked for.

Upon these grounds I think the judgment of the Sheriff-Substitute is wrong, for Morham's absence from South Leith after 9th April 1884 certainly broke the continuity of his residence there. In coming to this decision I do not think that we are in any way going against the principle of the earlier decisions to which we were referred.

Lord Kinnear—The question we have to determine is, whether the residence of Morham at Cupar from the 9th April 1884 and onwards was casual, or whether, Cupar being recognised as his permanent personal residence, it is his absence therefrom that is to be viewed as casual?

Now, on the evidence it is clear, I think, that Morham intended to leave Leith and settle in Cupar, and that he began a period of industrial settlement in Cupar in April 1884.

With regard to the decisions to which we were referred, the only ones which have any application are those, the principles of which are in accordance with the views expressed by your Lordships, and in which I concur. As to the other class of cases connected with constructive residence, these have not to my mind any bearing on the present case. The only question which we have to consider is, whether the permanent residence of this man was, after 9th March 1884, Cupar? And I, for my part, think it was.

The LORD PRESIDENT was absent from illness.

LORD SHAND was absent on circuit.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor appealed against, and find as matter of fact (1) that John Wilson Morham, a tailor's cutter, died on 29th June 1886, survived by his wife Mrs Abigail Simpson or Morham, and several young children; (2) that on 10th September 1886 the said Mrs Abigail Simpson or Morham became chargeable to the City parish of Edinburgh, in which she was residing with her children, and that she was at that time and has ever since continued to be a proper object of parochial relief; (3) that between the 10th September 1886 and the 1st October 1887 the pursuer as Inspector of Poor of the said City parish advanced to Mrs Morham for behoof of herself and her children sums amounting in all to £20, 11s. 4d., conform to account No. 4 of process; (4) that the said John Wilson Morham had not continuously resided in the parish of South Leith for the period of five years immediately preceding the 26th May 1884: Find in these circumstances in point of law that the said John Wilson Morham had not acquired for himself and for his wife and children a residential settlement in that parish, which they retained at his death, and that the appellant, the Inspector of the parish of South Leith, is not liable for the sum sued for, or for the future aliment of the said Abigail Simpson or Morham and her children; therefore sustain the defences, assoilzie the defender from the conclusions of the action, and decern," &c.

Counsel for Appellant (Defender)—Guthrie Smith—Salvesen. Agents—Snody & Asher, S.S.C.

Counsel for Respondent (Pursuer)—Balfour, Q.C.—J. A. Reid. Agents—Curror, Cowper, & Curror, W.S.

Friday, October 26.

SECOND DIVISION.

[Sheriff of Renfrew.

SMITH & M'BRIDE *v.* SMITH.

Partnership — Goodwill — Right to Use Firm's Name.

James Smith and Joseph M'Bride carried on business under the firm name of "Smith & M'Bride." The partnership was dissolved in 1884, James Smith buying the goodwill of the business, which he continued to carry on under his own name of James Smith, but without having renounced his sole right to the firm's name of "Smith & M'Bride." In 1885 Joseph M'Bride, along with William Smith, brother of James Smith, and D. M'Kelvie, set up a similar business in the same town under the firm of "M'Bride, Smith, & M'Kelvie." In 1887 M'Kelvie retired, and Joseph M'Bride and William Smith continued the business, but designated their firm as "Smith & M'Bride," which was the name of the original partnership between Joseph M'Bride and James Smith. *Held* that the latter was entitled to interdict Joseph M'Bride and William Smith from using the firm name of "Smith & M'Bride."

Previous to August 1884 James Smith and Joseph M'Bride carried on business in partnership as aerated water manufacturers at premises in Sugarhouse Lane and Waverley Lane, Greenock, under the firm name of "Smith & M'Bride."

Upon 20th August 1884 the firm was dissolved by agreement between the partners, under which M'Bride sold to Smith for £300 his share and interest in the business, and Smith took over all the liabilities of the firm, and obtained right to collect all debts due to the firm, and to the goodwill of the business. The following notice of dissolution of partnership appeared in the *Edinburgh Gazette* of 22nd August 1884—"The copartnership hitherto carried on by Smith & M'Bride, aerated water manufacturers in Greenock, by the subscribers, the sole partners thereof, has this day been dissolved by mutual consent. The subscriber James Smith has acquired the said business, with goodwill, and whole machinery and stock-in-trade. He will continue to carry on said business in his own name, and he is authorised to receive payment of all outstanding debts due to said firm, and he undertakes to pay all liabilities due by the firm." Thereafter James Smith continued to carry on business in his own name at the same premises as formerly.

Upon 24th December 1885 M'Bride formed a partnership with William Smith, brother of the said James Smith, and David M'Kelvie, and under the firm of "M'Bride, Smith, & M'Kelvie" they carried on business as aerated water manufacturers at 61 Nicolson Street, Greenock, until 27th August 1887, when M'Kelvie retired from the partnership. Thereupon M'Bride and William Smith continued to carry on the business, but changed the name of the firm to "Smith & M'Bride."

In September 1887 James Smith brought a petition in the Sheriff Court at Greenock against

M'Bride and William Smith to have them interdicted from trading under the firm name or style of "Smith & M'Bride."

The pursuer averred that, although he commonly used his own name in the conduct of his business, he had not by agreement or otherwise parted with his right to use the style or firm of "Smith & M'Bride," which he acquired when he purchased the goodwill of that business in 1884; that he was still known as "Smith & M'Bride;" that he was entitled to the sole use of that firm's name; and that he had suffered loss and injury in his business through the defenders' unwarrantable assumption of that name. He had intimated to the defenders that he would be satisfied if they made the name "M'Bride & Smith," which it should have remained when M'Kelvie retired, or even if they made it "William Smith & M'Bride," but they had refused to accede to either of these proposals.

The defenders averred that by the terms of the *Gazette* notice (*supra*) the pursuer had renounced any right he might have had to the firm's name; that the old firm's name was extinct, and that upon M'Kelvie's retirement, "because of certain re-arrangement of their business and otherwise the defenders resolved thereafter to change their firm's name into that of Smith & M'Bride," the actual names of the only remaining partners.

The Sheriff-Substitute (NICOLSON) pronounced this interlocutor:—[After findings in fact in terms of the above narrative]—"Finds in law that the defenders are not entitled to assume and use the name of the firm whose business and goodwill the pursuer purchased from the defender M'Bride: Grants interdict in terms of the prayer of the petition, &c.

"*Note.*—'It seems settled law,' says Clark on Partnership, p. 1431, 'that when the goodwill of a business has been sold, the seller may recommence a similar business in the neighbourhood of the old premises, the only restrictions on this right being that in the case of a firm the seller shall not assume the old name, or represent himself as the successor of the former concern.' I presume that if the pursuer had continued to use the firm name of 'Smith & M'Bride' the defenders would not have ventured to assume it. Their defence is that he abandoned his right to the name, and agreed to do so. His intimating in the advertisement of the dissolution of partnership that he will continue to carry on the business in his own name cannot be so interpreted. His choosing to carry on the business in his own name, and announcing it publicly, did not imply that he gave up the right to the firm name, which he acquired along with M'Bride's share of the business and the goodwill, and had thenceforth the exclusive right to use. He says he still carries on the business in the old premises, under the old name and his own, but there is no proof of this, and in the Directory he appears only as 'James Smith, Aerated Water Manufacturer.' Be that as it may, he acquired the right, and he has not lost it, to the firm name of 'Smith & M'Bride,' by which he says he is still known in the conduct of his business. When the defenders parted with M'Kelvie the name of the firm had to be changed, and the omission of M'Kelvie was all that was necessary. Instead of 'M'Bride, Smith & M'Kelvie,' it should thenceforth have been 'M'Bride & Smith.' But instead of that, the name of the junior partner has been put first, and that of the senior second. Why so? 'Because of certain re-arrangement of their business and otherwise,' say the defenders (art. 4). 'Otherwise' is a very vague and comprehensive word, and if here I take it to mean 'because the name of Smith & M'Bride was already well known in the trade, while that of M'Bride & Smith was new,' I believe I rightly interpret the words and the conduct of the defenders. Their further explanation that the new name 'was simply adopted because of the individual partners composing said firm having said names,' I must regard as scarcely tolerable, if not simply incredible.

"That the assumption of this name by the defenders, and the consequent confusion of a new firm with an older firm represented by the pursuer is injurious to him, and that he is entitled to be protected from such injury, I cannot doubt."

The defenders appealed to the Sheriff (MONCREIFF), who dismissed the appeal, and added the following note:—"The Sheriff-Substitute's judgment is clearly right. Whatever may be the defenders' legal rights, there can be little doubt as to their *animus* or intention in adopting the firm of 'Smith & M'Bride,' viz., to obtain any benefit that was to be derived from the name of the old firm. The Sheriff-Substitute has explained this so fully that I need add nothing. As to the law of the case, I think that in a question with a partner who has sold his interest in the 'goodwill' of a business it must be held that he loses the right to use the old firm. This is correctly laid down by Lindley on Partnership (4th edition) p. 861—'The purchaser of a goodwill of a business acquires the right not only to represent himself as the successor of those who formerly carried it on, but also to prevent other persons from doing the like.' In the case to which he refers (which closely resembles the present), viz., *Churton* v. *Douglas*, 1859, Johnson's Chan. Reps. p. 174, there will be found a valuable exposition of the law by Vice-Chancellor Page Wood, which fully supports the statement in the text.

"It is said that the pursuer bound himself not to assume the name of the old firm. I do not so read the notice in the *Gazette*. That notice means no more than this, that it was the intention of the pursuer to carry on the business in his own name; and I think it is clear that he would have been at least entitled to have added, 'Successor of Smith & M'Bride,' if he had thought fit. Even if the pursuer were not entitled to use the old name of 'Smith & M'Bride' (which I do not affirm), it by no means would follow that M'Bride, who was bought out, and had assigned his whole interest in the concern to Smith, was entitled to do so, and represent himself as carrying on the business of the old firm. As to the time which had elapsed without the pursuer using the old firm's name (if this is the case) I think a sufficient explanation is, that until the assumption of the name by the defenders it was quite understood by the public that the pursuer was carrying on the business of the old firm. I therefore think that he is entitled to the protection sought, and that interdict has been rightly granted."

The defenders appealed to the Court of Session.

Argued for the appellants—The law put no restraint upon people using their own names to form a firm name, although there might be another firm of the same name in existence carrying on a similar business, provided there was no suspicion of fraud in the transaction. Everything here was done in *bona fide*. Besides, James Smith had renounced any right to the name of "Smith & M'Bride," which had become extinct. It could not be argued that this combination of names was never to be revived in Greenock without James Smith's consent.—*Burgess* v. *Burgess*, March 17, 1853, 3 De G. M. & G. 896.

Argued for the respondent—He had bought the goodwill of the business of Smith & M'Bride, and with it the sole right to use the firm's name. He had continued to use the articles which he had bought, and which were stamped with the name "Smith & M'Bride." He received letters so addressed. The name had not become extinct. M'Bride & William Smith had gone out of their way to put the junior partner's name first when M'Kelvie retired, in order to derive any benefit which might arise from the use of a name well known in the trade. His proposals had been most reasonable, and as they had not been acceded to he was forced to apply for the interdict to which he was entitled.—*Churton* v. *Douglas*, March 17, 1859, Johnson's Chan. Reps. 174; *Levy* v. *Walker*, February 5, 1879, 10 Ch. Div. 436.

At advising—

Lord Young—This is an application by a party who purchased a going soda-water making business, with its goodwill and stock-in-trade, to have the party from whom he made the purchase and another, now associated with him in a similar business, from adopting the name of the business which with the goodwill was so purchased. The Sheriff-Substitute, after finding the facts, finds in law that "the defenders are not entitled to assume and use the name of the firm whose business and goodwill the pursuer purchased from the defender M'Bride," and grants interdict accordingly. I think that that judgment is right in fact—indeed the facts are not disputed—and in law. It would require a strong case to restrain any man from carrying on a business in his own name, but here a business, which had been carried on apparently successfully under the firm of Smith & M'Bride, was purchased by the senior partner Smith, with admittedly the exclusive right to use the firm's name, while M'Bride, from whom it was bought, associated two new partners with himself—one Smith, a brother of his late partner, to whom he had sold the business, and a new man called M'Kelvie—and then set up a similar business under the title of "M'Bride, Smith, & M'Kelvie." Whether this was a proper proceeding in the circumstances need not be inquired into, but he was clearly within his legal rights. This new firm does not seem to have answered, and M'Kelvie retired. M'Bride & Smith were thus left alone and they suddenly in September 1887 inverted their firm's names, putting the junior partner first and the senior partner second, which brought the firm exactly to what the old one had been, which had been sold just three years before. Both Sheriffs find that the object—and the only object—of thus inverting the names was to obtain any benefit which might be derived from the name of the old firm, and no other explanation has been offered to the repeated questions of this Court. It is the obvious reason which occurs to anyone, and which was prominently and almost unpleasantly assigned to it by both Sheriffs some months ago, and which has not yet found any other explanation.

I am therefore of opinion that the judgments of the Sheriffs are in the circumstances right, and that we ought to affirm them, and dismiss the appeal with expenses.

Lord Rutherfurd Clark—I agree.

Lord Lee—It is well settled in law that no man who sells a business and its goodwill is entitled to do anything to derogate from his own grant to the purchaser. There is no ground here for holding that the purchaser had renounced any right he had to the firm's name. I therefore concur.

Counsel for the Defenders (Appellants)—M'Lennan. Agents—Miller & Murray, S.S.C.

Counsel for the Pursuer (Respondent)—Shaw—Graham Stewart. Agents—Emslie & Guthrie, S.S.C.

Tuesday, October 30.

FIRST DIVISION.

MARSHALL AND OTHERS *v.* MELVILLE'S TRUSTEES.

Succession — Vesting — Interposed Liferent — Clause of Survivorship.

A testator directed his trustees to convey his heritage to his two daughters equally between them in liferent, and to certain grandchildren named, and to grandchildren *nascituri*, "equally among them, share and share alike, any of whom failing the share or shares of the deceaser or deceasers to the survivors equally among them, share and share alike, in fee."

Held that the right to their shares did not vest in the grandchildren till the period of distribution, which was the death of each liferenter as to the portion liferented by her.

David Melville, merchant in Greenock, died on 30th September 1845, leaving a trust-disposition and settlement and two codicils, dated respectively 8th December 1836, 30th November 1838, and 11th April 1843. By the said trust-disposition and settlement he disponed to certain trustees therein mentioned his whole estate, moveable and heritable, in trust for the ends, uses, and purposes therein mentioned. After providing for the disposal of his moveable estate he proceeded as follows:—"In the seventh place, that my said trustees, acceptors or acceptor, survivors or survivor of them, the major number accepting and surviving being a quorum, shall, so soon as they see fit, give, grant, and dispone to and in favour of the said Mrs Martha Melville or Simpson and Mrs Catherine Melville or King, equally between

them in liferent, for their liferent use respectively allenarly, and in the event of any one of them deceasing without leaving lawful issue of her body, the share of deceased to be given and disponed and to belong to the daughter surviving in liferent, for her liferent use allenarly, but excluding the *jus mariti* of her present husband, or any future husband she may marry; and to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born, by my said two daughters, of their present or any future marriage, equally among them, share and share alike, any of whom failing the share or shares of the deceased or deceasers to the survivors equally among them, share and share alike, my whole heritable subjects and estates before described in fee." The heritable estate of the deceased was situated partly in Greenock and partly in Helensburgh. The above direction as to the disposal of his heritable estate was subsequently revoked as to his Helensburgh properties by the second codicil to his will, but remained in force as to the Greenock properties. The testator also by the same deed appointed a free yearly allowance to be made to his widow, which he subsequently increased by his first codicil. He was survived by his widow, who died in 1859, and by his daughters Mrs Simpson and Mrs King, who were his only children.

Mrs Simpson died on 1st December 1886, and Mrs King was living at the date when this case was presented to the Court.

Mrs Simpson's children were five in number. Two survived their mother, namely, Mrs Marshall and Mrs Fraser, two of the parties of the first part. The other three predeceased their mother, viz., (1) David Melville Simpson, who died 6th August 1882, intestate, leaving a widow and children. His eldest son was David Melville Simpson, one of the parties of the second part. (2) Alexander Simpson, who died in 1853, leaving no issue, and (3) John Simpson who died in April 1886, leaving a widow and two children. His only son was John Ewing Melville Simpson, born in July 1885, one of the parties of the first part. Under a general settlement executed by John Simpson his whole estate was conveyed to his widow Mrs M'Innes or Simpson, one of the parties of the first part.

Mrs King had two children. (1) David King, who died in 1863, and (2) John King, one of the parties of the second part.

A difference of opinion having arisen as to the disposal of these Greenock properties, a special case was presented to the Court to have the question determined. The point upon which doubt was entertained was as to what was to be done with the shares which Alexander Simpson, who died in 1853, and David King, who died in 1863, would have taken, had they survived the death of Mrs Simpson; and the decision of that question necessarily depended on whether at the time of their death they had a vested right in these shares or not.

The opinion of the Court was requested upon the following questions:—"(1) Did the fee of the said Greenock properties vest in the testator's grandchildren or their issue at the testator's death, or otherwise at a period prior to the deaths of the said Alexander Simpson in 1853, and David King in 1863? Or was vesting postponed till the death of his daughter Mrs Martha Melville or Simpson, or otherwise till a period subsequent to the deaths of Alexander Simpson in 1853, and David King in 1863? (2) Do the said Greenock properties fall to be divided into five equal shares, one of which is to be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson, or into seven equal shares, which fall to be conveyed as follows:—One share each to Mrs Marshall, Mrs Fraser, and John Ewing Melville Simpson, and two shares to be conveyed to each of John King and David Melville Simpson; or in what other proportions or shares do the same fall to be divided among the beneficiaries?"

The first parties maintained that the vesting of these properties did not take place until the death of the testator's daughter Mrs Simpson, or otherwise until a period subsequent to the deaths of Alexander Simpson in 1853 and David King in 1863, and that the properties should be divided into five equal shares, one of which should be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson. The necessary result of a survivorship clause where there was an interposed liferent was to postpone vesting till the period of distribution — *Young* v. *Robertson*, February 11, 1862, 4 Macq. 314 (*per* Lord Westbury, p. 319); *Snell* v. *White*, May 24, 1872, 10 Macph. 745; *M'Alpine* v. *Studholme, &c.*, May 20, 1883, 10 R. 837.

The parties of the second part maintained that vesting took place *a morte testatoris*, or otherwise at a period prior to the deaths of Alexander Simpson and David King, and that the properties should be divided into seven shares, one of which should be conveyed to each of the five persons named by the first parties, leaving two shares to be dealt with as follow — One to be conveyed to John King as heir of his deceased brother David King, and the other share to be conveyed to David Melville Simpson as heir of his father, who was heir of conquest to Alexander Simpson. "Any of whom failing" meant any of whom failing prior to the death of the testator. There were specialties in the case of *Young* v. *Robertson* distinguishing it from the present case, and consequently it was not decisive on the question of construction to be decided here. *Snell's* case, again, differed from the present as there was no interposition of a trust there. An interposed liferent did not necessarily defer vesting till the period of distribution. In many cases where there was a destination-over it had been held that vesting took place *a morte testatoris*.

At advising—

Lord President—The clause requiring construction in this settlement is that which occurs in the seventh head of the deed. In construing this clause I do not think we get much light from other portions of the deed, or even from the codicils. The testator contemplated generally that his two children should have the liferent of the properties mentioned, and that the fee should be equally divided among the children of his two daughters. There were two grandchildren alive at the time of the making of the testament—one daughter of Mrs Simpson and one son of Mrs

King—and they are mentioned in the deed as the parties to whom the fee of the properties was to be conveyed, but provision is also made for grandchildren *nascituri*, and grandchildren *nascituri* are obviously to be placed in the same position as those named in the deed. Now, the clause of the deed is expressed in this way—"My trustees shall, so soon as they see fit, give, grant, and dispone to and in favour of the said Mrs Martha Melville or Simpson and Mrs Catherine Melville or King, equally between them in liferent, for their liferent use respectively allenarly, and in the event of any one of them deceasing without leaving lawful issue of her body, the share of deceased to be given or disponed and to belong to the daughter surviving in liferent for her liferent use allenarly." Now, it may be as well to stop there for the purpose of disposing of this part of the clause. Mrs Simpson died in 1886, but she left issue, and therefore this part of the clause did not take effect—her liferent expired, and did not transmit to her sister—so that part of the clause is out of the case altogether. The clause then proceeds to exclude expressly the *jus mariti* of her husband, present or future, and thereafter goes on thus—"And to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born, by my said two daughters of their present or any future marriage, equally among them, share and share alike, any of whom failing the share or shares of the deceaser or deceasers to the survivors equally among them, share and share alike, my whole heritable subjects and estates before described, in fee." Now, the one party contends that the fee vested *a morte testatoris*, and it is maintained that the effect of this is that all the grandchildren who were in existence at the testator's death, or who came into existence afterwards, are entitled equally to share in the fee of these properties. That, it appears to me, is to ignore altogether the most important part of the destination—the clause of survivorship—which is expressed in terms which I should have thought it was only possible to construe in one way. "Any of whom" necessarily means any one of the grandchildren, whether named in the deed or afterwards born. If any one fails, then his share goes to the survivors. It is needless to say that the grandchildren to be born could not very well fail by predeceasing the testator, therefore the clause of survivorship never applied to them, and it must be construed to apply to those parties who may fail at some other period than the death of the testator. And when vesting did not take place at the death of the testator, the next inquiry is what is the period of distribution? For the death of the testator not being the period of vesting it is very difficult to find any other period of vesting except the period of distribution, if we except some special cases where the testator has either expressly or by implication assigned a term of vesting other than the period of distribution. Such cases have occurred, but where no other period is suggested the term of vesting is either (1) the death of the testator, or (2) the period of distribution. There is no choice except between these two; it is a mere alternative which it is. Now, I consider that to take the death of the testator as the term of vesting is impossible and inconsistent with the undoubted nature and scope of the provision in the deed, and against the plain words of the clause.

The next thing accordingly to consider is what is the period of distribution, and there is no doubt that there might be more than one, as part of the estate may be distributed at one period and part at another. In the result there is one portion of the estate set free on the death of the first liferentrix. Mrs Simpson died in 1886, and that was the end of her liferent, as she left children, and therefore the right of her sister to her liferent by survivorship did not come into existence. Accordingly the liferent of Mrs King remained where it was, and the liferent of Mrs Simpson became extinct. There is nothing in the deed to prevent immediate distribution of the half of the estate liferented by Mrs Simpson, and accordingly by the necessary operation of the deed the period of distribution of that half of the estate is her death, and the period of the distribution of the other half is postponed because of Mrs King's liferent. So long as Mrs King is alive no distribution of the half liferented by her can take place, but the parties claiming are entitled to have a distribution in equal shares among them—that is, *per capita*—of one-half of the estate set free by the expiry of Mrs Simpson's liferent.

Lord Mure—I agree with what your Lordship has pointed out, that at the death of Mrs Simpson one half of the estate was set free for distribution in terms of the seventh purpose of the settlement, and that that is to go in equal shares to the grandchildren of the testator, being the families of his two daughters, and I think that our answer to the first question should show that the child of Mrs King takes a share of that half.

The question we have to deal with is a question of vesting, and such are always a little puzzling. I am inclined to think that there was a kind of vesting *a morte testatoris*; that the fee vested in the families of the two daughters on the grandchildren being born. The fee was destined to a class, though no division could take place till after the death of the liferentrix. There was no vesting in individuals, but in a class. That view, however, makes no difference on the result at which your Lordship has arrived, and in which I agree.

Lord Shand—The trustees are directed by the testament to dispone the testator's heritable estate to his two daughters equally in liferent, and I think it is clear from the terms in which the direction to dispone is made that on the death of one liferentrix there is no accession of liferent to the other, but that half of the fee becomes liable to distribution. The question is how that half is to be distributed. On that matter we have the concluding part of the clause dealing with the fee, and the words of the clause are that the conveyance is to be "to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born by my said two daughters of their present or any future marriage, equally among them, share and share alike." If the clause stopped there, plainly there would have been vesting *a morte testatoris*, subject only to this, that any child coming into

existence after the death of the testator would have had a right to share with those born before that event. In that case I would have come to the conclusion that the property vested in each child, although his share might have been diminished by others being subsequently born, It is contended, still, that that is the result of the deed, but that view is, I think, unsound, because we have here a survivorship clause of the ordinary kind in these terms:—"Any of whom failing the share or shares of the deceaser or deceasers to the survivors, equally among them, share and share alike." There is to be an equal division of the estate, the share or shares of any one who has deceased—that is, without issue as the deed was granted by the grandfather—are to go to the survivors, share and share alike. There is nothing, so far as I see, to suggest a difficulty in giving to that clause its usual interpretation, which it received in the case of *Young* v. *Robertson*. Accordingly I am of opinion that as there were two children who did not survive the first liferentrix, and who left no children, their shares accresced to the others, and that therefore there are only five parties to take. Whether there could be any sort of vesting *a morte testatoris* perhaps is more a question of words than of any practical importance. What occurs to me is that there was no vesting in the children or the families properly speaking. Till the liferentrix died the fee was in the trustees, and there was suspension of vesting. If the trustees had conveyed to the daughters of the testator in liferent, I should say that there was no vesting in a class properly speaking, because there would then have been a fiduciary fee in the mothers for the children surviving the liferentrices. It is pretty obvious that if the liferentrices died without issue there was no vesting of the fee, because there was no issue to take, and any vesting which could be stated as a vesting *a morte testatoris* must have been a vesting of a fiduciary fee either in the trustees or in the daughters to hold for the grandchildren.

Lord Adam—I am of the same opinion. There are two possible terms at which vesting might have taken place. It might either have been *a morte testatoris*, or at the period of distribution, and by the terms of the clause of survivorship I think there was no term but the period of distribution at which it could have taken place. One half of the estate has by the death of Mrs Simpson been set free for distribution. That has now vested in the children surviving as a class, and there has been no vesting of the other half. That conclusion causes no difficulty about legal considerations, because the trustees hold the fee for the grandchildren who may survive the period of distribution. It is possible that none of the grandchildren may survive that period, in which case that purpose of the deed will lapse. If we were dealing with such a case as *Snell* v. *White*, where there was a direct conveyance by the testator, the presumption of a fiduciary fee might be necessary, just because there had been no trustees mentioned by the testator. If, however, the conveyance is made in the terms of the seventh head of this deed, I do not think it is necessary to presume a fiduciary fee in the daughters. The trustees have been appointed to carry out the purposes of the trust-disposition—to hold the fee for the purposes of the trust-deed—and one purpose is that of making payment among the surviving grandchildren of the testator when the period of distribution comes. I do not think there is any difficulty in coming to that conclusion.

The following interlocutor was pronounced:—

"The Lords having considered the special case and heard counsel for the parties—(1) Find and declare that the fee of the Greenock properties did not vest in the testator's grandchildren or their issue at the testator's death, but that on the death in 1886 of his daughter Mrs Martha Melville or Simpson one-half of the said properties fell to be distributed among the whole grandchildren of the testator or their issue then existing, and that the other half of the said properties has not vested in the grandchildren or their issue now in existence, but will fall to be distributed on the death of Mrs King among the whole grandchildren or their issue then in existence: (2) Find and declare that the said Greenock properties fall to be divided into five equal shares, one of which is to be conveyed to each of Mrs Marshall, Mrs Fraser, John King, David Melville Simpson, and John Ewing Melville Simpson, and decern."

Counsel for the First Parties—Guthrie. Agents—Smith & Mason, S.S.C.

Counsel for the Second Parties—C. S. Dickson. Agents—Cumming & Duff, S.S.C.

Counsel for the Third Parties—M'Clure. Agents—Smith & Mason, S.S.C.

Wednesday, October 31.

FIRST DIVISION.

M'PHEDRON AND ANOTHER *v.* M'CALLUM AND OTHERS.

Arrestment—Ship—Recal of Arrestment—Consignation—Caution.

An action having been raised against the owners of a ship, on the dependence of which arrestments had been laid on the ship, on the petition of the defenders the Court (following *Stewart* v. *Macbeth*, December 19, 1882, 10 R. 382) *recalled* the arrestments on consignation of the amount sued for and a sum to meet the expenses of the action.

John M'Phedron and John Currie presented this petition for recal of arrestments laid on their steamship the "Easdale," on the dependence of an action against them for £176, 11s. 8d. at the instance of John M'Callum and others, the owners of the steamship "Hebridean."

The petitioners averred that the action was called in Court on 25th October, and defences did not fall to be lodged till ten days thereafter. They were prepared to lodge defences when due, and to dispute the conclusions of the summons. They had offered to consign the sum sued for in the hands of the Clerk of Court, but the pursuers refused to withdraw their arrestments. Further, that they were under engagement to carry cargo,

and were suffering loss and damage owing to this refusal. They therefore prayed the Court to recal the arrestments on consignation of £176, 11s. 8d.

Service of this petition was dispensed with of consent.

The petitioners argued that the sum offered by them for consignation was more than sufficient. The sum sued for in the action was illiquid, and they intended to dispute the amount of the claim. No prejudice would be caused to the pursuers in that action by recalling the arrestments, as the petitioners were resident in Scotland, and always within the jurisdiction of the Court. The petitioners, on the other hand, had been suffering loss and damage as averred.

The respondents maintained that there should be consignation of a sum to meet the expenses of the action as well as the amount sued for—*Stewart* v. *Macbeth*, December 19, 1882, 10 R. 382.

The Court, following the case of *Stewart* v. *Macbeth*, *supra*, pronounced the following interlocutor:—

"The Lords of consent dispense with service of this petition, and having heard counsel for the petitioners and for the respondents, and considered the petition, Recal the arrestments therein mentioned, and prohibit and discharge the use of further arrestments as prayed for, upon the petitioners finding caution to the extent of £200, or upon the consignment of that sum in the hands of the Clerk of Court, and decern."

Counsel for the Petitioners—Deas. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Respondents—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, October 31.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

M'ELMAIL *v.* LUNDIE AND OTHERS.

Succession—Vesting—Term of Payment—Husband and Wife—Divorce for Adultery—Wife's Legal Provisions.

A testator directed his trustees, *inter alia*, in particular events, to hold certain shares of his estate in trust for behoof of his son, and to pay the said shares to him by such instalments, or in such portions, and at such times, as they might think fit; but so long as the said shares, or any part thereof, remained unpaid, to pay to him the interest or annual produce of such shares, or part thereof, so remaining unpaid, half-yearly, until the shares should be wholly paid over to him and discharged. He declared further that the various provisions of his settlement should not become vested interests till the respective terms of payment thereof. The trustees accordingly took possession of the son's shares, and held them for his behoof, with the exception of several instalments which were paid to him. His wife having obtained decree of divorce against him in respect of his adultery, in an action at her instance against the trustees under his father's settlement and himself, *held* that the shares of his father's estate had vested in him, and fell to be regarded as part of his estate in computing the pursuer's legal rights.

This action was raised by Mary M'Elmail against Robert Stark Lundie and others, the surviving and acting trustees under the trust-disposition and settlement of John Lundie senior, pawnbroker in Glasgow, and against John Lundie junior. The pursuer sought to have it found and declared that by dissolution of the marriage between her and the defender John Lundie junior by decree of divorce in respect of his adultery she became entitled to her legal provisions of terce and *jus relictæ* out of the estate then belonging to him, and that his estate included his share in the trust-estate of his father John Lundie senior.

The pursuer was married to the defender John Lundie junior on 10th February 1870, and on 22d February 1887 she obtained decree of divorce against him on account of his adultery.

John Lundie senior died in July 1869. By his trust-disposition and settlement, dated 23d and recorded 30th July 1869, he conveyed his whole means and estate to Robert Stark Lundie, his son, and certain other trustees, chiefly for the following purposes—(1) Payment to his widow of an annuity of £60, to meet which a capital sum was to be set apart. Upon her death this sum was to be "divided into six equal shares or portions, and my said trustees shall pay over one share thereof to my son the said Robert Stark Lundie, and one share thereof to my son James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times, as they may think fit; but so long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof, so remaining unpaid up, and that half-yearly by equal portions, at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." The other three shares the trustees were directed to hold in trust for the testator's three daughters in liferent, and their children in fee, and upon the death of each of his daughters who should leave lawful issue, they were directed "to pay over to such issue equally amongst them, if more than one, share and share alike, the fee and capital of the said share liferented by their parent." (2) He directed his trustees to apportion and divide the whole residue of his estate, after payment of expenses, into six equal shares, and to deal with them in the same manner as he had directed with respect to the payment of the capital sum payable upon the death of the widow. It was further provided—"Declaring that the foresaid provisions to my said three sons, and to the issue of my said three

daughters, shall not become vested interests in them until the respective terms of payment thereof, and accordingly upon the death of any of my said sons or daughters without leaving lawful issue the said provisions of such of them so dying without leaving lawful issue shall accresce and be paid to and divided equally amongst my surviving sons in fee, and my surviving daughters in liferent, and their issue respectively in fee."

On the death of the testator his widow claimed her legal rights out of his estate, and the claim was admitted and settled by the trustees, and one of the daughters claimed her legal right of *legitim*, and was also settled with. In these circumstances John Lundie junior became entitled to compensation out of the funds thereby set free, and the whole interest of his father's estate, as at the date of the testator's death, amounted to upwards of £6000. The trustees paid over to John Lundie junior the income of his share, and also paid to him in instalments about £2000 of the capital sum, but still retained in their hands at the time of the decree of divorce about £4700.

The trustees declared themselves willing to pay over the half of the income of this sum to the pursuer, but refused to let her participate in the capital.

The defender John Lundie junior averred his willingness to pay to her year by year one-half of his income, "not being able to obtain funds from the said trustees to settle with the pursuer."

The pursuer pleaded, *inter alia*—"(1) The pursuer having become entitled, on the dissolution of her marriage with the defender John Lundie in respect of the latter's adultery, to terce and *jus relictæ* out of his estate, including his interest in his said father's estate, is entitled to declarator as craved. (2) The share or shares of the defender John Lundie in the trust-estate held by the other defenders under the provisions of the trust-deed, and also in respect of the funds set free by legal claims as aforesaid, being vested in him at the date of dissolution of his said marriage, are subject to the legal rights of the pursuer as if the said marriage had been then dissolved by his death.

The defenders the late John Lundie's trustees pleaded—"(3) The share of the defender John Lundie in the trust-estate administered by the present defenders not having vested, they are entitled to absolvitor. (4) The pursuer having no higher right than the defender John Lundie in the trust-estate administered by the present defenders, they ought to be assoilzied. (5) The present defenders being bound to exercise the discretion conferred on them by the settlement, and having resolved to retain the balance of capital of the other defender's share, are entitled to absolvitor from the conclusions for count, reckoning, and payment."

The defender John Lundie pleaded—"(2) The defender not having been able to obtain money from his father's trustees to settle with the pursuer, but having offered to account to her for one-half of his income, and one-half of the value of said furniture, and to allow her to retain the said sum of £500, should be assoilzied, with expenses, from the conclusions of the summons, in so far as directed against him."

The Lord Ordinary (KINNEAR) pronounced the following interlocutor:—"Finds and declares in terms of the declaratory conclusions of the summons, and appoints the defenders, Lundie's trustees, to lodge an account showing the amount in their hands of the defender John Lundie's share of the trust-estate of the deceased John Lundie, and that *quam primum*, &c.

"*Opinion.*—I do not understand it to be disputed that on the divorce of a husband for adultery the wife has right to her legal or conventional provisions in the same manner as if the husband had died. It follows that the pursuer is entitled to claim her share of the defender's moveable estate in name of *jus relictæ*. The only question is, whether the defender John Lundie's share of his father's estate, in the hands of the other defenders, his father's trustees, is vested in him so as to form part of his moveable estate.

"It is maintained that nothing vests in him under his father's will except such portions of his share as the trustees may from time to time think fit to pay to him in the exercise of their discretion.

"I do not think this a sound construction. The trustees are directed to divide the estate on the death of the widow, and to hold one share 'for the use and behoof' of John Lundie from the period of division. They are to retain John Lundie's share for such time as they may deem expedient, and to pay it by such instalments as they may think fit. But the interest of the portion retained by the trustees is to be paid to him 'until the said share shall be wholly paid over to him and discharged.' Sooner or later, therefore, the whole is to be paid to him and to him alone. There is no destination-over with regard to any part, and in the event of his death before the whole had been paid, the unpaid portion must go to his representatives. No one could take it except through him. It is true that it is declared that the provisions to the testator's sons and daughters shall not become vested interests in them until the respective terms of payment. But that must in my opinion be referred to the term of payment fixed by the testator himself. The trustees are empowered to pay to John Lundie at the same time as to the other sons. They are also authorised for his benefit to retain his share, or a part of it, and pay it by instalments. But that cannot be construed into a power to withhold it absolutely from him and his representatives. It is unnecessary to consider whether the discretion of the trustees could be effectually exercised against creditors during the lifetime of the beneficiary. It is certain that if the right has vested it can be of no effect against his representatives after his death, and the pursuer is placed by the divorce in precisely the same position as if she were a widow claiming *jus relictæ* on the death of her husband. The principle laid down in *Beattie* v. *Johnston*, 5 Macph. 340, and in the later case of *Harvie*, appears to me to be directly applicable."

The defenders, the trustees, reclaimed, and argued—The pursuer could not claim as *jus relictæ* any part of the share held for John Lundie under the terms of his father's settlement. By the terms of the deed vesting was postponed till "the respective terms of payment." These were in the discretion of the trustees as regarded John Lundie, and thus the share held for him only vested by instalments as paid. The trustees were directed to "hold" the share, and

therefore there was no force in an argument based on the appropriation of the shares. By an exercise of their discretion they could make him a liferenter. The widow was in no better position than a creditor who had attached a share. Yet the latter as an assignee of John Lundie could no more than John Lundie himself enforce payment against the trustees. Even if there had been vesting it was of such a qualified type, that no payment could follow upon it. *Smith* v. *Chambers* was *a fortiori* of the present, because there a power to retain was superinduced upon a general vesting; here the power to retain came first—*Smith* v. *Chambers' Trustees*, November 9, 1877, 5 R. 98, H. of L. April 15, 1878, 5 R. 151; *Smith's Trustees* v. *Smith* July 11, 1883, 10 R. 1144.

The pursuer argued—But for the clause postponing vesting till the respective terms of payment, there could have been no question that John Lundie's share had vested. That direction was satisfied without referring it to the payment of the instalments of John Lundie's share. The different terms of payment in the deed were—(1) the death of the widow; (2) the realising of the estate (3) the respective dates of the daughters' deaths. There was no distinction between the share of John Lundie and his brothers, save the discretion in the trustees to hold for his behoof. The very fact that it was set apart to be held for him implied vesting. The direction to pay was as strong as to hold, and the trustees might have paid at once. Their power to hold threw no doubt on the amount of the share. It was not a familiar idea that a share should vest by instalments. The Court also had always been anxious to avoid leaving to trustees a discretion as to the term of payment. *Smith* v. *Chambers* differed *toto cœlo* from the present case, in respect that the deed there empowered the trustees to cut down the fee. Any discretion to withhold was personal to John Lundie, and as he was now to be looked upon as dead so far as the pursuer was concerned, it must have ceased—*Leighton* v. *Leighton*, March 8, 1867, 5 Macph 561; *Hunter's Trustees* v *Hunter*, February 9, 1888, 15 R. 399; *Ferrier* v. *Ferriers*, May 18, 1872, 10 Macph. 711.; *Sutherland's Trustees* v. *Clarkson*, October 29, 1874, 2 R. 46; *Scott, &c.* v. *Scott's Executrix*, January 27, 1877, 4 R. 384.

At advising—

Lord President—The pursuer of this action is Miss Mary M'Elmail, who was the wife of the defender John Lundie junior, but that marriage was dissolved on the 22nd February 1887 by the pursuer obtaining decree of divorce on the ground of adultery against her husband. Now the effect of that decree was to entitle the pursuer to her legal rights—that is to say, of terce and *jus relictæ*—in the same way as if her husband were naturally dead. There is no question here as to terce, but the pursuer contends that one great portion, if not the whole, of her husband's estate at the dissolution of the marriage was his right and interest in the trust-estate of his father held and administered by the other defenders the trustees, and she seeks to have it found and declared that she became entitled to her *jus relictæ* by the decree of divorce and that her husband's estate included "the share or shares of the trust-estate of the said deceased John Lundie, carried to the other defenders, as trustees foresaid, by the said deceased John Lundie's trust-disposition and settlement, which share or shares are thereby, and particularly by the second and fifth purposes thereof, provided to and appointed to be held for the use and behoof of the said John Lundie, defender, therein designed John Lundie junior, and the profits, interests, or annual produce thereof, and all right, title, and interest in the estate of the deceased John Lundie subsisting as at the said dissolution of the said marriage in the said John Lundie, defender."

Now, the Lord Ordinary has decerned in terms of these declaratory conclusions, and the trustees have reclaimed against his judgment, on the ground that at the dissolution of the marriage by decree of divorce no part of John Lundie junior's right in the estate of his father had vested in him, and that therefore his share in that estate did not form part of his moveable estate. That of course necessarily depends on the construction of the deed of settlement by John Lundie the elder, and in that deed there are several clauses to which it is necessary to refer in order to solve that question.

The testator there among other things provides a certain annuity to his widow, and a capital sum is set aside to secure that annuity, but this capital sum he directs on the death of his spouse is to "be divided into six equal shares or portions, and my said trustees shall pay over one share thereof to my son the said Robert Stark Lundie, and one share thereof to my son James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times as they may think fit; but so long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof, so remaining unpaid up, and that half-yearly by equal portions, at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." And then he directs one of these shares to be held for one married daughter, another for another married daughter, and a third for an unmarried daughter, but in the case of all the provision is to them in liferent and to their children in fee.

Now, this portion of the estate fell to be divided into shares on the death of the widow, and at that time the proceeds of that security, or whatever it was, were to be paid over so far as regards two of his sons, but were to be held by the trustees for his son John Lundie; and as regards the residue of his estate he repeats in terms the same provision and orders the trustees "to apportion and divide the whole of the free residue and remainder, of my said heritable and moveable means, property, and estate, under deduction of expenses of management, incidental expenses, and all expenses in connection with this trust, into six equal shares, and so soon as my estate shall be realised they shall pay over one share of said residue to my son the said Robert Stark Lundie; and my trustees shall pay over one share of said residue to my son, the said James Buchanan

Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior;" and then the clause proceeds in the same terms as in the above-mentioned clause as to John Lundie. Two of the testator's sons accordingly are to have immediate payment of their shares, and John Lundie is to have his share held in trust for him as is provided in the previous section as to the capital sum held in security for the widow's annuity.

All this, however, does not throw very much light on the question of vesting raised by the trustees, but it is necessary to keep the precise provisions of these two clauses in view in dealing with the important clause regarding the vesting of the different interests. That clause is in these terms —"Declaring that the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof. And accordingly upon the death of any of my said sons or daughters without leaving lawful issue the said provisions of such of them so dying without leaving lawful issue shall accresce and be paid to and divided equally amongst my surviving sons in fee, and my surviving daughters in liferent, and their issue respectively in fee." Now, there are two things to be attended to here—(1) to ascertain precisely what the testator here assigns as the term or terms of vesting, and (2) what is the effect of the death of a son or daughter dying without issue before vesting takes place? As regards the latter question there can be no doubt that if any fail—die without issue—there is accretion to the survivors. The words requiring particular construction are, "the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof." In the first place, it is quite clear that the testator had in mind more than one term of payment, and that these terms were appointed either to different persons or to different portions of the estate. That is the idea suggested by the word "respective" and therefore we must endeavour to ascertain what are the respective terms of payment as regards the subjects and the objects of the gift in the prior clauses of the deed.

Now, the trustees seem to bring their contention to this—That, in so far as John Lundie junior is concerned, there is no term of payment except the precise time at which money is actually passed from the hands of the trustees to the hands of John Lundie, and therefore that every instalment made under direction of the previous clause is a separate term of payment. *Prima facie* it appears that the phrase "term or terms of payment" refers to something the testator has already fixed by the provisions of the deed, and therefore in ordinary circumstances we must always look at the deed to see what are the terms of payment in the mind of the testator. There can be no mistake at all that there are several terms of payment here. First, as regards the payment of the capital sum set aside for the widow's annuity, the term of payment is the death of the widow. That is a separate matter from the term of payment of other parts of the estate. Then, in the next place, as regards the children of the daughters who are to take the fee, the term of payment there is in each case the death of the mother. That is another and separate term of payment. Then, as regards the two sons Robert Stark Lundie and James Buchanan Lundie, the term of payment of the residue is undoubtedly "so soon as my estate shall be realised." These two are then to obtain immediate payment of their shares. The question is, whether that is not also the term of payment of the share of John Lundie. The trustees say "No," because they are not entitled then to pay over his share. The direction to them is to pay "by such instalments, or in such portions, and at such times, as they may think fit." There is certainly a distinction between the case of John Lundie and of his two brothers, but that does not quite solve the question whether the testator did not mean the term of payment of which he speaks in the vesting clause to be the same in the case of all the sons. It is quite true that the trustees are not authorised to pay over the share of John Lundie all at once, but by instalments—instalments of what number or of what amounts is left to their discretion; still, from the time at which the estate is realised they are to pay to him as well as to the others. It may be that they may not pay till some time after, that they may not have paid till a considerable time after the arrival of the period at which they are directed to pay over to the other sons, but still this is the term of payment, and so far as regards residue the only term of payment. There is no other term of payment as to residue. Then as regards the other capital sum to be divided on the widow's death, there is only one term of payment. Therefore we come back to the vesting clause with this light from the other provisions of the deed, that there are several terms of payment appointed to different sums and persons, and we must see whether there is anything in the word "respective" to create in the case of John Lundie a different term of payment from that at which his brothers are to receive their shares.

I have come to the conclusion with the Lord Ordinary that the only terms of payment are those which I have mentioned—1st, The term of payment for the capital sum set aside in security of the widow's annuity; 2nd, the term of payment for the issue of the daughters of the testator; and 3rd, the term of payment for the residue of the estate. There is no other term of payment mentioned in this deed. To say that the "term of payment" here necessarily means in the case of John Lundie the time at which each particular instalment is handed over to him is, I think, a very false reading of the phrase. That is the time at which payment may be made. The term contemplated by the truster is a different thing altogether. The one is a term in the mind of the testator; the other is the result of accident. No doubt we have seen cases in which an express provision has been made that there should be no vesting until the sums should be paid over, and where the testator so expresses himself there can be no doubt of his intention. He then means that until the money is placed in the hands of the beneficiary he has no vested interest in it. But it is not so said here. Here the testator uses only the ordinary terms of vesting, which mean in every case the terms provided by the testator himself when the funds are to be distributed.

Lord Mure—I am of the same opinion. The judgment of the Lord Ordinary proceeds upon the footing that the share of John Lundie in the

residue was vested in him at the date of the decree of divorce by the realisation of the estate. I think the Lord Ordinary is right. The clause providing for the disposal of the residue is pretty distinct; the testator directs his trustees "to apportion and divide the whole of the free residue and remainder of my said heritable and moveable means, property, and estate, under deduction of expenses of management, incidental expenses, and all expenses in connection with this trust, into six equal shares, and so soon as my estate shall be realised, they shall pay over one share of said residue to my son the said Robert Stark Lundie." He then directs another share to be paid over to James Buchanan Lundie, and the clause continues—"And my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the realisation of my estate as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times, as they may think fit." Here there is a distinct order to pay in certain proportions. Then comes a provision—"So long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof, so remaining unpaid up, and that half-yearly by equal portions at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." Therefore this share from the realised estate the trustees are distinctly appointed to hold for behoof of John Lundie, though they have a discretion to give it to him by instalments, upon which they have acted.

If that clause stood alone there would be no doubt as to the vested right of John Lundie in the sums held for him. There is, however, a subsequent clause, which declares "that the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof." On that it is maintained that because there is a discretion to pay at certain periods there is no vesting in John Lundie till the times at which payment is made to him. I agree with the conclusion to which your Lordship has come, that the clause cannot be so interpreted, and that the leading provision of the deed vests in John Lundie this money held by the trustees for his behoof.

Lord Adam—By the second purpose of the trust-disposition and settlement the truster provides an annuity to his widow, and a capital sum is set apart to meet this, and on her death he directs the capital sum to be divided as is there set forth. It is needless to consider that clause further. It contains the same provisions as the clause dealing with residue. The capital sum is to be divided in the same way as the residue, except that the division is to be on the death of the widow.

Perhaps I may make the remark, as I agree with the reasoning of the Lord Ordinary, that he seems to have thought that the whole estate was to be divided on the death of the widow. That, however, makes no difference in the reasoning in which he proceeds, but I merely point out that he does not distinguish between the two periods of division.

In the fifth purpose of the deed the testator directs the trustees to divide the residue into six equal shares, and to pay so soon as the estate is realised one-sixth share to each of his two elder sons, but they "shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the realisation of my estate as they may deem expedient." Now, I agree with Sir Charles Pearson that that one share belongs to John Lundie, when, as Lord Mure points out, the clause goes on, "and they shall pay the said share to him by such instalments, or in such portions, and at such times, as they may think fit." No option is given them as to whether they shall pay the whole share to John Lundie or not. He is to have the whole share. That is still clearer from the next clause—"so long as the said share or any part thereof shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share or part thereof so remaining unpaid up, and that half-yearly by equal portions at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." So long as the whole or part of the estate is not paid over, the clear intention and direction of the testator is to give John Lundie the absolute right to a one-sixth share.

If the question had been on the construction of this clause alone, I should have thought that the mere direction to pay in instalments was not sufficient to suspend vesting, but there is a clause which declares when vesting shall take place. It is there declared "that the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof." If we could construe "terms of payment" as equivalent to the times when the funds may be paid to John Lundie, if that were the meaning of the phrase, then there would be no vesting till they were paid over to John Lundie, no matter as to the amount of the instalments in which they were paid. I agree with your Lordship that that is not the meaning of "terms of payment." What the testator means is, 1st, the death of the widow; 2nd, the realisation of the estate; and 3rd, the terms of payment on the death of their mothers to the grandchildren. These are the "terms of payment," and not the actual times when the trustees happen to pay over his share to John Lundie. I do not think, so far as the clause is concerned, it at all modifies the meaning of the previous clause by which an immediate right is given to John Lundie in his share of the residue upon the realisation of the estate.

Lord Shand was absent.

The Court adhered.

Counsel for the Defenders (Reclaimers)—Balfour, Q.C.—J. A. Reid. Agents—Buchan & Buchan, S.S.C.

Counsel for the Pursuer (Respondent)—Sir C. Pearson—Kennedy. Agents—Campbell & Somervell, W.S.

Counsel for the Defender John Lundie—Low. Agents—Morton, Neilson, & Smart, W.S.

Thursday, November 1.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

SMITH *v.* HIGHLAND RAILWAY COMPANY.

Reparation—Private Line of Railway—Reasonable Precautions for Safety of Public.

While a train of waggons was being shunted, at moderate speed and with the usual precautions, on a line along a quay, which was private property, but open to the public, a boy attempted to cross the line, but was caught by the buffers of the waggons, and sustained injuries of which he died. The deceased was aged eleven, and was upon the quay for the purpose of amusement. In an action at the instance of his father against the railway company, who had laid down the line under an arrangement with the proprietor of the quay, *held* that no fault had been proved on the part of the defenders, and therefore that they were not liable in damages.

Charles Smith, farm servant at Rosevalley, Elgin, sued the Highland Railway Company for £250 as damages for the death of his son George Smith, who was killed by being crushed between two waggons during some shunting operations upon the quay at Burghead. The harbour was private property, and the railway company had the right to use it for their traffic by agreement with the proprietor. It was not, however, fenced, and no objection was made to members of the public frequenting it. On the day of the accident George Smith had gone upon the quay, apparently to look at a ship which was unloading there. The railway lines ran along the quay 3 feet 11½ inches from the edge, which left a space of 2 feet 6 inches between a waggon standing on the line and the edge of the quay. George Smith was standing on this space. Opposite the vessel there were seven waggons upon the line, six loaded and one empty, with open spaces between them. A train started to pick up these waggons from about 42 yards distance, under the charge of a driver and fireman, and preceded by two servants of the railway company on foot. Before starting the driver blew the whistle of the engine twice, and the train moved along the rails at the rate of three miles per hour. Upon being warned by a person on board the steamer that the train was coming the deceased tried to escape between the empty waggon and one of the loaded ones, but failed to do so before the train struck these waggons, and was caught between the buffers and crushed, sustaining injuries of which he died.

The pursuer averred fault on the part of the defenders, but he did not particularly specify in what it consisted. He pleaded—"(1) The pursuer's son having been killed through the fault of the defenders, or those for whom they are responsible, the pursuer is entitled to reparation from the defenders."

The defenders denied that they were in fault.

A proof was allowed, the result of which sufficiently appears from the findings in the interlocutor of the Sheriff-Substitute (RAMPINI), which was in the following terms:—"Finds that the pursuer is a farm-servant at Rosevalley, in the parish of Duffus, and the defenders are the Highland Railway Company, incorporated under Act of Parliament, and that they have a station at Burghead, and a line of rails for goods traffic only running therefrom to the end of the south pier or quay of the harbour of Burghead; that the distance between the outside of the line of rails and the edge of quay is 3 feet 11½ inches, and that waggons standing upon them overlap the said space of 3 feet 11½ inches to the extent of 1 foot 5½ inches; that the said south pier or quay is the property of William Young, Esq. of Burghead, and that the defenders have laid down rails thereon, and possess the right to use the said quay under the agreement; that the space between the outside of the said line of rails and the edge of the quay is not a public thoroughfare, but that the use of it by the public is not objected to either by the said William Young or by the defenders: Finds that on Saturday the 28th day of May 1887 the pursuer's son George—a boy of about eleven years of age—was sent into Burghead by his parents on a message, and that about six o'clock of the evening of that day he was standing on the said quay opposite the point marked with a red cross on the plan, and opposite the after-hold of the steamer 'Ranger,' which was lying alongside the quay; that there was at this time on the rails seven waggons, of which the four westmost and the two eastmost were loaded with coals, and one—being that lying between the fore and aft holds of the said steamer—was unloaded; that this waggon was separated from the four westmost waggons by a small open space; that the whole of the said seven waggons were standing on the rails, with spaces between them; that while the waggons were in this position a train of eighteen or twenty empty waggons was started from the station; that the said train was propelled by a locomotive in the charge of Paul Junor, its driver, and Angus Thomson, its fireman, and that the said train was accompanied by Donald Budge and William Clark, servants in the employment of the defenders; that the said William Clark gave the signal to start, and the train was started accordingly by Paul Junor, the driver, after he had whistled twice in a sufficiently long and loud manner to give warning that the train was about to start; that the train accordingly started at a pace not exceeding three miles an hour; that Clark and Budge preceded the train on foot; that while the train was in motion a person on board the steamer called the attention of the boy George Smith to the approach of the train, and that the boy thereupon moved to jump on board the steamer, but that, apparently changing his purpose, and seeing the opening between the empty waggons and the first of the four loaded waggons to the west, he turned to cross the line through that space, and in doing so was caught by the buffers of the said waggons, which being set in motion by the train of empty waggons coming up against the two eastmost waggons, he was crushed between the said buffers, and received such injuries that he subsequently died therefrom: Finds that the shunting of the trucks was conducted by those acting on behalf the defenders with due care and caution and according to the usual manner of such an operation: Finds in point of law that the acci-

dent was entirely attributable to the conduct of the said George Smith, and not to any neglect on the part of the defenders: Therefore assoilzies them from the conclusions of the petition: Finds them entitled to their expenses, &c.

"*Note.*—This is an important case, and it has been very ably argued. The Sheriff-Substitute concurs with the agents in their expressions of regret for the sad and fatal nature of the accident, and of sympathy with the pursuer in his bereavement. But he cannot concur with the views urged by the pursuer's agent as to the liability of the defenders. The whole evidence goes to show that the unfortunate boy was alone to blame. In the Sheriff-Substitute's opinion the defenders are entirely exonerated from any responsibility for the accident.

"The case of *Balfour* v. *Baird and Brown*, December 5, 1857, 20 D. 238, is so exactly in point, and resembles the present in so many respects, that it is hardly necessary to advert to any of the other authorities cited, though the Sheriff-Substitute has, of course, carefully examined them. In that case, as in this, the accident occurred on a place which was private property, though open to the public; the injured party was a young boy; the boy was not there on any legitimate business; and no special precautions had been taken to secure the safety of the public. These are the main features of both cases, and on each of these the Sheriff-Substitute purposes making a few remarks.

"1. The quay in question is the property of Mr Young of Burghead, but it is used by the railway company under the agreement produced in process. The public are freely permitted to frequent it, but they do so, not as a matter of right—for there is no public thoroughfare here—but with the tacit and implied permission of the proprietor and of the defenders. And if that is so, they clearly do this at their own risk. If persons choose to make use of private property for their own needs or conveniences, knowing full well that operations of a more or less dangerous character are being habitually carried on upon it, it is only reasonable to hold them bound to look out for themselves. And here the danger was palpable and obvious to all. A line of rails four feet or so from the edge of the quay; a line of waggons, some loaded, some unloaded, standing opposite a steamer which was discharging its cargo, were—even in the absence of the approaching train—indications of the carrying on of operations at the spot which called for the exercise of more than the ordinary caution on the part of persons frequenting it. The unfortunate boy may not, perhaps, have been a trespasser, as was the child whose death was the cause of the case of *Lumsden* v. *Russell*, 18 D. 468, but he was not there in the exercise of any public right—for unquestionably no such right has been proved.

"2. But it is said the pursuer's son was a mere child, and it is not to be disputed that this circumstance is of weight in the determination of the cause. 'The capacity to neglect,' says the Lord Justice-Clerk in *Campbell and Ord* v. *Maddison*, 1 R. 153, 'is a question of fact in the individual case, as much so as negligence itself, which is always a question of fact.' Here we have to deal with the case of a boy of eleven years of age, against whose intelligence not a word is averred. That the boy lost his head is certain, or he would not have rushed into danger as he did. But a man of mature years might have done the same, and the Sheriff-Substitute presumes that had he done so a jury would hardly have acquitted him of negligence. And that is the position that the Sheriff-Substitute takes up upon this branch of the question. Had the poor boy been of less than ordinary intelligence, there might or might not have been some ground for the pursuer's contention. But he was nothing of the sort. He is not necessarily to be considered as a man, but as what he really was—a boy of ordinary intelligence, who is entitled to be credited with having sufficient sense and judgment to avoid rushing with his eyes open into a very patent, and, as it has most regrettably turned out, a fatal danger.

"3. It has already been shown that the boy was not on the quay in the exercise of any public right, and it can scarcely, the Sheriff-Substitute thinks, be seriously disputed that he was not there on any lawful or legitimate business. Here again the case of *Balfour* v. *Baird and Brown* is very much in point. In that case the Lord Justice-Clerk said, 'That boys will frequent such a place in numbers, and often, as appears here, to the annoyance of people carrying on traffic, is to be expected. But boys have no business there. They are there only to amuse themselves. They have no right to be there. They come for idleness and amusement; the place is for business, and for business connected with the canal.' That is what precisely happened in the present case. The boy was there for his own amusement. He was apparently watching the unloading of, or the operations which were being carried on on board the steamer, Had he gone straight home after accomplishing the purpose for which he was sent to Burghead, he might have been living to this day.

"4. There only remains the question whether the defenders have taken all the precautions they were in law bound to take for the safety of the public. And this branch of the inquiry may be separated into two—(1) Whether the company's structural arrangements were all that they should have been; and (2) whether the operations which brought about the accident were being carried on in accordance with the obligations, statutory and otherwise, of the company.

"(1) The quay was not fenced—that is clear enough; and it is also pretty clear that there was no absolute impossibility, though there might have been inconvenience, in fencing it. But if this fact is relied on as an adminicle of evidence to support the pursuer's allegation of negligence, it is of very slight weight indeed. Equally valuable is the evidence as to the closeness of the rails to the edge of the quay. It may be frankly admitted that four feet would be too little room for passengers to pass backwards and forwards between the rails and the edge of the quay if this were a public thoroughfare. It is not so, however, and it must be kept in view that the concession of this space or of any space at all, is a voluntary concession to public convenience on the part of the railway company, which they lie under no obligation to grant. And until recently the rails were much closer to the water's edge. When the present harbour extension works were in progress Mr Morrison,

the harbour-master, suggested, and the railway company agreed to his suggestion, that the rails should be shifted two feet back to their present position 'to enable the fishermen and the pilots to move comfortably along when there were waggons on the rails.'

"It is said that the structural arrangements of the defenders in respect to this quay have not been approved by the Board of Trade. The answer to this was that it was not necessary that they should be so; this was a line for goods traffic only, and as to such lines no inspection is either obligatory or usual.

"(2) Various exceptions are taken by the pursuer to the manner in which the defenders were carrying on their shunting operations on the occasion in question. They may be conveniently discussed under the heads locomotives, speed, and men.

"*Locomotives.* — The Sheriff-Substitute can find no statutory prohibition for the use of locomotives in such operations. The three Locomotive Acts quoted regulate the use of such engines on turnpike roads, and for agricultural purposes only. And the evidence establishes that not only is the employment of locomotives more convenient than horse-haulage for such operations, but that it is in some respects much safer, and as a matter of practice is much more common. The exercise of due care is as much implied in the one as in the other; and this leads the Sheriff-Substitute to examine the conduct of the persons in charge of the locomotive on the occasion in question. The two men in charge of the engine were Paul Junor, the driver, and Angus Thomson, the fireman. As to the former, William Nicolson, the station-master, states that he had been an engine-driver for some time, and was quite competent for his work; and it may at once be said that there is no insinuation on the part of the pursuer to the contrary. The Sheriff-Substitute is satisfied, notwithstanding the evidence as to whistling, that these men started and drove their engine as they were bound to do. Junor states—'I whistled twice. It was a continuous whistle. They were both long whistles, and that was my regular practice. The whistle was to give the alarm to clear the rails.' And Thomson, corroborating this testimony, says—'We whistled twice whatever; they were long whistles.' The Sheriff-Substitute is not inclined to lay much stress on the fact that the train of waggons was propelled instead of being drawn by the locomotive. The defenders are clearly entitled to conduct their operations in the manner most convenient to themselves, provided that they do so with all due regard to the safety of the public. That the position of the engine may have somewhat diminished the strength of the whistle may be conceded. But it did not annihilate it altogether. There is ample evidence that the whistle was heard by persons standing in proximity to the steamer, and even if there had not, the driver seems to have done all that it was incumbent on him to do. He was bound to blow his whistle to clear the line when the train started. The negative fact that some persons did not hear it is not sufficient to rebut the positive proof that he whistled sufficiently long and loud to relieve himself and his employers from all responsibility on this score for the accident.

"*Speed.*—Whatever the actual speed was, and the evidence is contradictory on this point, the Sheriff-Substitute thinks it plain that it was not in excess of, but indeed much below, the ordinary speed of trains engaged in shunting operations. It was at any rate under three miles an hour. Even if it had been considerably greater, there is no proof that the train was not under the driver's control. To say, as one of the witnesses has said, that the train would be more under control if there had been a man with a brake on the foremost waggon, may be perfectly true. But it is not clear to the Sheriff-Substitute that even with this extra precaution the accident might have been averted; and he is not prepared to hold that any extraordinary precautions of this kind were necessary in connection with the place where the accident occurred, or with the operations which were being carried on.

"*Men.* — That the four men who were in charge of this train were either incompetent for their duties, or that they did anything that they ought not to have done, or left undone anything that they ought to have done, is, in the opinion of the Sheriff-Substitute, not established by the proof. Few cases of this nature occur where the freedom from liability of the defenders is so satisfactorily made out. On the other hand, the negligence of the boy appears not to have been contributory only; it was the cause of the accident. The boy lost his life by a fatal error of judgment, and no one is responsible for this but himself."

Upon a reclaiming petition the Sheriff (IVORY) recalled this interlocutor, and found that the deceased had been killed by the fault of the defenders. In particular, the Sheriff found—"(1) That the running of locomotive engines and trains on the said quay was a dangerous operation; and to secure the safety of the public walking on or using the same, it was necessary that proper and sufficient bye-laws or regulations should have been issued by the defenders to regulate the due conduct of such operations, and ensure that all reasonable and necessary precautions should be taken by their servants in conducting the same; but no such bye-laws or regulations were issued by the defenders; (2) that the twenty empty waggons which formed part of the train should not have been attached thereto, as they prevented the engine-driver from keeping a good lookout, and from having the train under due control, and rendered the steam whistle practically useless for warning parties off the rails; and that a locomotive engine without waggons should have been sent to do the work required, namely, to bring up to the station certain waggons on the quay which had been loaded with coals from a steamer lying there; (3) that seeing there was such a long train, and so great a distance between the engine-driver and the foremost waggon, a man should have been placed on the latter, or at least sent in front of the train, to keep a good lookout, and, if any persons were in danger, to give them due warning, and, if required, to signal to the guard to stop the train; but no such man was placed on the said waggon, or kept a sufficient lookout in front of the train; (4) that before the shunting operations commenced a man should have been sent forward to see that there were no workmen engaged in filling the waggons standing on the

quay, or other persons standing in the proximity of the same in a dangerous position, if the waggons were driven together by the train coming up to and striking them; but no such precaution was taken; (5) that the train was driven along the rails at a speed which was dangerous to the safety of the public walking on or using the quay, and that, instead of approaching the loaded waggons slowly, it came up to them at a dangerous rate of speed, causing the stationary waggons to strike violently the one against the other, and to crush and kill the deceased between the buffers of two of them: Finds that the said accident was caused, and the deceased lost his life, by or through one or more of the said faults of the defenders or of those for whom they are responsible: Finds that at the time when the deceased attempted to cross the rails as above stated, he was standing on a narrow ledge between the line of rails and the harbour, and was in a position of great danger, occasioned by the failure on the part of the defenders or their servants to take the necessary precautions above mentioned; that on the train of empty waggons approaching the loaded waggons at a dangerous speed, the deceased lost his self-possession, and, in his alarm, attempted to escape from his dangerous position by attempting to cross the rails through a vacant space between two stationary waggons; and that the deceased's conduct on this occasion did not constitute such a culpable neglect of his own safety as to amount to contributory negligence, or preclude the pursuer from receiving compensation from the defenders: Finds in law that the pursuer's son, having lost his life through the fault of the defenders, or of those for whom they are responsible, the pursuer is entitled to reparation therefor: Therefore repels the defences, and finds the defenders liable to the pursuer in damages; modifies the same to £100; and decerns: Finds the defenders liable in expenses," &c.

The defenders appealed, and argued — The Sheriff-Substitute had decided rightly. The place where the accident occurred was not a public thoroughfare, and a less degree of vigilance was requisite than in such places. There had further been no negligence, but the operations had been carried on with the usual precautions. If the boy had stood still he would have been safe. He had been guilty of contributory negligence—*Balfour* v. *Baird & Brown*, Dec. 5, 1857, 20 D. 238; *Forbes* v. *Aberdeen Harbour Commissioners*, January 24, 1888, 15 R. 323; *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258; *Fraser* v. *Edinburgh Tramway Company*, December 2, 1882, 10 R. 264.

The pursuer argued—There was negligence here on the part of the railway company, considering that the place was frequented by the public. (1) There was insufficient warning by whistling; (2) the trucks were moved at too great a pace; (3) the men in charge were not in front of the train—*Morran* v. *Waddell*, October 24, 1883, 11 R. 44; *Shaw* v. *Croall & Sons*, July 1, 1885, 12 R. 1186; *Illidge* v. *Goodwin*, December 22, 1831, 5 Carring & Payne, 190; *Thomson* v. *North British Railway Company*, November 16, 1876, 4 R. 115.

At advising—

Lord President—In some respects this case is in an unsatisfactory condition. It is certainly difficult to find out what is the ground of action. There is none disclosed on record, and it is very much to be regretted that when the case was before the Sheriff-Substitute and the record closed, he did not advert to it, and either throw out the action altogether or call upon the pursuer to amend his record. That would have been of less consequence so far as we are concerned, if the ground of action was clearly disclosed in the evidence, but I confess it is very puzzling in reading the proof to find it out precisely. The findings on which the Sheriff's judgment proceeds, are, some of them, not justified at all by the evidence, and seem to have been suggested by the Sheriff himself from his own knowledge or opinion. On the other hand, the findings of the Sheriff-Substitute commend themselves more to my mind, because I do find a pretty well digested series of facts brought out.

In these circumstances I do not think it either necessary or desirable to go into a minute examination of the evidence at all, except in so far as is necessary to show the ground of judgment which commends itself to me. I think this poor lad had no right to be where he was, and by his having no right I mean that as one of the public he had no business occupation to take him to the harbour at all. The harbour works are intended for the occupation of persons with business to transact, and for no one else, and the public have no right to be there unless they are there with such occupation. It is therefore vain to represent it as a public highway. It is nothing of the kind. It is plainly devoted to a particular kind of business, and no one has any right to go there unless he is engaged in that business. This lad was there for no purpose but an idle one, and he was therefore in a place where the defenders are not bound to expect him to be. He was there without any legitimate occupation, and as he must have known that the place was dangerous, he took the risk of the ordinary perils attending the place. But then if it can be shown that the railway company conducted the shunting in the harbour in an unusual or reckless manner, and in such a manner as to cause unnecessary danger to persons legally there on business, it would raise a case of a difficult kind. But I must take leave to state that in the result of my examination of the evidence I can find nothing in the proof which is inconsistent with the ordinary practice and use of railway companies in their shunting operations. We all know that the process of shunting depends greatly on how much accommodation there is for sidings. For example, here, if there had been ample siding accommodation into which waggons might have been shunted, probably the empty waggons would have been put there, and the shunting at the quay would only have been done with an engine. But then it is not proved that there was a siding, or that the shunting could have been done otherwise than it was. To justify an allegation that it had been recklessly done would require the most minute investigation. Instead of that we have no sort of evidence, and the conclusion which I draw from it—and it is the only possible one—is, that it has not been proved that the shunting

operations were conducted recklessly. I am therefore for altering the judgment of the Sheriff, and for reverting to that of the Sheriff-Substitute.

Lord Mure—I am of the same opinion. It is plain that this poor boy went through curiosity to see the ship which was lying in the harbour, and was on the edge of the quay at the time the shunting was going on. He was not aware he was exposed to any risk, but the moment he was warned of his danger he seems to have got flurried. He tried to get into the ship, but changed his mind, and ran across the rails through the opening between the waggons and got crushed. It is also plain, I think, that if he had been more knowing he would have stayed where he was. Two boys—Hendry and Mitchell—who saw the accident have deponed distinctly that he would have sustained no hurt if he had done this.

In these circumstances it would, I think, require very clear proof of negligence in the shunting operations on the part of the railway company to support liability against them. Mr Guthrie put three points very clearly, on which he maintained that they had failed in their duty. First, he maintained that no one was in front of the waggons when they were being shunted along the quay. Now, certainly Budge was as close to it as he could possibly be, because he had succeeded in coupling the waggons. Secondly, Mr Guthrie maintained that there was insufficient whistling. I do not know if any amount of whistling would have been intelligible to this boy. Lastly, he maintained that the speed at which the waggons were shunted was too great. This contention also, I think, fails. I am therefore of opinion that no fault has been proved sufficient to render the defenders liable.

Lord Adam—The pursuer must establish fault on the part of the railway company before he can recover in this case, and unless he does establish such fault the question of contributory negligence on the part of the pursuer does not arise. I agree with the Dean of Faculty that in this case it is not necessary to consider this question, because I am very clearly of opinion that the pursuer has not proved fault on the part of the railway company. It is not very clear from the proof how the accident happened. I think, however, it happened in this way. The engine and waggons went down the quay a few feet—or rather, I should say, along, for it is not proved there is any incline, and the whole distance was only 128 feet—until they came into contact with the two loaded waggons which were standing opposite the quay. I think it is proved that they came along without any undue speed. Clark came down on one side of the empty waggons, and Budge came down on the other side, but before them. I think it is proved that at the crossing, which is immediately above this part of the quay, Budge had crossed in front of the going waggons, and went along with them till they came into contact with the standing waggons, and then the whole train was set in motion, but not at a fast rate of speed. I think it is also proved that in the meanwhile Budge proceeded to couple, and had actually coupled, the first and second loaded waggons, and that the train moved on slowly and steadily till it came into contact with the empty waggon without any shock or rebound, but with steady onward progress crushed the boy between the buffers. I think the medical evidence shows no appearance of anything except slow and steady crushing, and that being so, and these being to my mind the facts, I can find no fault on the part of the railway company. So far as I can see, they left nothing undone which they ought to have done. I can therefore see no fault in this case; and I think therefore that we must return to the Sheriff-Substitute's interlocutor, the findings of which, I think, are quite satisfactory.

Lord Shand was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor of the Sheriff appealed against, adopt the findings in fact contained in the interlocutor of the Sheriff-Substitute of date 16th January 1888, and hold the same as repeated *brevitatis causa*; affirm the said interlocutor; of new assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Defenders (Appellants)—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Pursuer (Respondent)—Guthrie. Agents—Gibson & Paterson, W.S.

Saturday, November 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

LAWRIE *v.* PEARSON.

Process—Expenses—Caution—Insolvent Defender.

In an action of accounting by a beneficiary under a trust against the trustee, it transpired that the defender had executed a trust-deed for behoof of his creditors. Intimation of the action was made to the defender's trustee, who declined to sist himself. *Held (rev.* Lord Fraser) that the defender was entitled to litigate the question without finding caution for expenses.

This was an action of count, reckoning, and payment at the instance of Mrs Emily M'Guire or Lawrie, 4 Gilchrist's Entry, Greenside Row, Edinburgh, against David Pearson, solicitor, Kirkcaldy, the sole surviving trustee and executor under the trust-disposition and settlement of the deceased Andrew Greig and his spouse, the maternal grandparents of the pursuer.

The pursuer, who was a beneficiary under the trust, alleged, *inter alia*, that the defender was personally liable for loss occasioned to the trust-estate by investment of the trust funds upon unrealisable securities.

The defender denied this averment, and alleged that he had already accounted to the pursuer, and was not now indebted to her.

After the date of the action the pursuer ascertained that the defender had executed a trust-deed

for behoof of his creditors, and she added the following plea-in-law—"(1) The defender being insolvent, and having divested himself of his whole estates, is not entitled to defend this action without finding caution for expenses."

The Lord Ordinary (FRASER) pronounced the following interlocutors:—

"16*th May* 1888.—In respect it is stated that the defender has executed a trust-deed in favour of Honeyman, writer, Kirkcaldy, appoints intimation of the dependence of the action, with a copy of this interlocutor, to be made to Mr Honeyman, and allows him, if so advised, to appear for his interest within eight days after intimation."

"6*th July* 1888.—In respect the defender has divested himself of his whole estates for behoof of his creditors, and of the failure of the trustee on the defender's said estates to sist himself for his interest, appoints the defender to find caution for expenses within ten days."

"19*th July* 1888.—In respect the defender has failed to find caution for the expenses of process as ordered by the interlocutor of 6th July current, on the motion of the pursuer, and in respect the pursuer restricts her claim under the alternative conclusions of the summons to the sum of £250 (said sum being exclusive of and in addition to the sums which the defender has already transferred to the pursuer in the course of the process), decerns against the defender for payment to the pursuer of the sum of £250 under the said alternative conclusion of the summons, reserving to the pursuer her right in and against the various funds in which the trust-estate under the defender's charge is or may be invested, and decerns: Finds the pursuer entitled to expenses," &c.

The defender reclaimed, and argued—Caution for expenses by a bankrupt was a question of discretion for the Court, and was readily dispensed with where the bankrupt is defender. A bankrupt might defend without caution where the subject of litigation was a right which did not pass to the trustee—*Taylor* v. *Fairlie's Trustees*, 1830, 8 S. 666—*rev.* H. of L., 1833, 6 W. & S. 301; Goudy on Bankruptcy, 355. The defender was solvent.

Argued for the respondent—The action was raised before the pursuer was aware of the trust-deed. As the defender was divested of his property, and the pursuer could not arrest it, he must find caution for expenses—*Stevenson* v. *Lee*, June 4, 1886, 13 R. 913. This was a matter for the discretion of the Court—*Thom* v. *Andrew*, June 26, 1888, 25 S.L.R. 595.

At advising—

LORD YOUNG—I cannot avoid coming to the conclusion that the Lord Ordinary has fallen into error in the view he has taken of this case. It is an action of count, reckoning, and payment against Mr Pearson, a solicitor in Kirkcaldy, as trustee under the testamentary trust of Mr and Mrs Greig. Mr Pearson defends the action, and he says that he has already sufficiently accounted, and that he is not indebted to the pursuer; and we have been informed that the real question in this accounting turns upon the point whether the defender is personally liable for having made certain investments of trust money on heritable securities which have turned out badly. Before this action was raised, but, as we were informed very properly by Mr M'Lennan, without the knowledge of the pursuer, Mr Pearson had executed a voluntary trust-deed with a view to the judicious management of his affairs and payment of his debts. The pursuer now puts in a plea that as the defender is insolvent, and has divested himself of his whole estate, he is not entitled to defend the action without finding caution. On this plea being brought under his notice, the Lord Ordinary ordered intimation to be made to the trustee, and as the trustee declined—and very properly declined—to have anything to do with the case, the Lord Ordinary pronounced the interlocutor ordering the pursuer to find caution for expenses. It was here, I think, the Lord Ordinary was in error. In my opinion Mr Pearson is absolutely entitled to defend himself without finding caution. The trust is a voluntary trust, although it would not have affected my opinion if this had been a trust on a bankrupt estate. No trust-estate in which the defender acted as trustee and executor would have been affected by his sequestration any more than by his voluntary trust; it would have remained in his hands, and he would have been responsible to the beneficiaries for it, and neither the trustee upon a voluntary trust executed by him nor the trustee in his sequestration could with any propriety have interfered. I therefore think that the Lord Ordinary's view was erroneous, and I would propose to your Lordship that we should recal the Lord Ordinary's interlocutor appointing the pursuer to find caution, and also the subsequent interlocutor decerning him to pay £250, and remit the case to the Lord Ordinary to proceed.

LORD LEE—There are two questions to be considered in a case like the present. The first is, whether the defender has so completely divested himself of his estate as to have no title to defend the action? But the question of his title to defend the action is not raised in this case, but only the question whether he should find caution before he can be allowed to do so. There may certainly be cases in which the defender might be called upon to find caution, but the general rule as to caution which applies to pursuers in actions does not apply to the case of defenders. There is no better illustration of this than the well known case of *Stephen* v. *Skinner*, May 31, 1860, 22 D. 1122, where Stephen was seeking to suspend a charge. In the present case no ground has been shown to us why the defender should be made to find caution as a condition of defending the action.

LORD JUSTICE-CLERK—I quite agree in the judgment of your Lordships, and only wish to add that if this doctrine of making the defender in an action find caution be carried to its legitimate limit it would amount to intolerable hardship. If we were to affirm that principle it would amount to this, that where an action of any kind is brought against a bankrupt or person under a voluntary trust, he would be compelled to find caution or else submit to decree being given against him for any amount that might be asked. I therefore concur in the judgment proposed.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the defender against Lord Fraser's interlocutor of 19th July last, Recal the said interlocutor, and the previous interlocutor of 6th July 1888: Repel the first plea-in-law for the pursuer: Find the defender entitled to expenses from the date of the interlocutor reclaimed against: Remit to the Auditor to tax the same and to report, authorise the Lord Ordinary to decern for the taxed amount thereof, and remit the cause to his Lordship accordingly, and to proceed otherwise as accords."

Counsel for the Defender (Reclaimer)—J. A. Reid—Macdonald. Agent—W. G. L. Winchester, W.S.

Counsel for the Pursuer (Respondent)—M'Lennan. Agent—Robert Broatch, Solicitor.

HIGH COURT OF JUSTICIARY.

Monday and Tuesday, November 5 and 6.

(Before the Lord Justice-Clerk.)

H. M. ADVOCATE *v.* PARKER AND BARRIE.

Justiciary Cases—Culpable Homicide—Indictment—Accumulation of Panels—Relevancy—Specification—Separation of Trials.

James Parker and James Barrie were indicted on a charge that, time and place specified, "you James Parker, when pilot in charge of the steamship 'Balmoral Castle,' there being risk of a collision between the said vessel and the steamship 'Princess of Wales,' did fail to slacken speed by stopping and reversing, contrary to article 18 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Act Amendment Act 1862, and you James Barrie, when pilot in charge of the said steamship 'Princess of Wales,' there being risk of a collision as aforesaid, did fail to slacken speed by stopping and reversing, and did put to starboard the helm of the said steamship 'Princess of Wales,' contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill A. F." Objections to the relevancy on the ground (1) that it was not competent to charge the panels together in one indictment, the acts of negligence being separate, and (2) that the indictment was wanting in specification in respect that the regulations founded on were insufficiently set forth, that facts were not alleged sufficient to infer breach of the regulations, that the charge of failure to navigate with proper and seamanlike care was too vague, and that *culpa* being of the essence of the crime ought to be specifically set forth —*repelled.*

Dingwall v. *H. M. Advocate*, May 26, 1888, 25 S.L.R. 494, *commented* upon and *distinguished.*

Motion to separate the trials on the ground that panels might mutually prejudice each other by their defence, *refused.*

James Parker and James Barrie were indicted at the High Court on a charge "that on 16th June 1888, on the Clyde, near Skelmorlie, Ayrshire, you James Parker, when pilot in charge of the steamship 'Balmoral Castle,' there being risk of a collision between the said vessel and the steamship 'Princess of Wales,' did fail to slacken speed by stopping and reversing, contrary to article 18 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Act Amendment Act 1862, and you James Barrie, when pilot in charge of the said steamship 'Princess of Wales,' there being risk of a collision as aforesaid, did fail to slacken speed by stopping and reversing, and did put to starboard the helm of the said steamship 'Princess of Wales,' contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill Andrew Ferguson, joiner, Cross Street, Partick, William Ferguson, painter, Breadalbane Street, Glasgow, and Allan Stewart, painter, Plantation Street, Govan, who were on board the said steamship 'Princess of Wales.'"

At the first diet of compearance held before Sheriff-Substitute Hall, at Kilmarnock, on 26th October 1888, the following objections were stated to the relevancy—"(First), that both panels are charged in the indictment while the acts of negligence are separate; (second), that the rules founded on are not sufficiently set forth; (third), that facts are not alleged sufficient to infer breach of the rules; (fourth), that the charge of failure to navigate with proper and seamanlike care is wanting in specification; (fifth), that *culpa* is not set forth in the libel, *culpa* being of the essence of the crime; (sixth), that the indictment does not set forth facts relevant and sufficient to constitute an indictable crime," and were reserved by the Sheriff-Substitute for the consideration of the Court at the second diet.

COMRIE THOMSON, for Parker, without dealing *seriatim* with the objections stated at the first diet, objected to the relevancy on two main grounds, (1) that it was incompetent to charge two persons for such offences as were disclosed in the indictment in the same indictment, and (2) that the indictment was wanting in specification.

Argued in support of the first objection—This was not an inquiry to find out who was to blame for a casualty. It was a trial upon distinct charges against each panel. The panel Parker might suffer serious prejudice from being tried along with the other accused. He might suffer from the evidence of witnesses called by Barrie, whom he would be unable to cross-examine or contradict. No doubt his Lordship would direct the jury that such evidence was not evidence against him, but the effect of such evidence on the mind of a jury could not be removed by any direction from the bench. It was usual to charge two or more persons in one indictment only when they had been engaged in perpetrating a common crime—*H. M. Advocate* v. *Gibson and Others*, September 5, 1871, 2 Coup. 128. Further, it was

clearly laid down in the case of *Clelland* v. *Sinclair*, March 18, 1887, 14 R. (J. C.) 23, that it was incompetent to charge two persons in one indictment in cases like the present.

Argued in support of the second objection—The indictment set forth two breaches of duty against Parker—(1) a failure to observe article 18 of the Regulations for Preventing Collisions at Sea, and (2) a failure to navigate his vessel with proper and seamanlike care, but neither of these was alleged with sufficient specification. The reference to the articles was neither accurate nor sufficient. Article 18 provided that "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary." The words in the indictment, "did fail to slacken speed by stopping and reversing," did not accurately set forth either of the alternatives provided by the regulation. Further, both alternatives ought to have been set forth. A failure to adopt one of them was not necessarily a breach of the regulation. Again, the indictment failed to set forth that the "Balmoral Castle" was approaching the "Princess of Wales" so as to involve risk of collision, or that it was necessary to stop and reverse both of which conditions must be present before the regulation applied. The second breach of duty alleged was too general. It was not said in what manner the accused failed to navigate his vessel with proper and seamanlike care—*H. M. Advocate* v. *Drever & Tyre*, November 2, 1885, 5 Coup. 680. Further, *culpa* was of the essence of the crime charged, and ought to have been set forth in accordance with the case of *Dingwall* v. *H. M. Advocate*, May 26, 1888, 25 S.L.R. 494. The indictment did not relevantly charge even the statutory misdemeanour of wilful breach of the regulations under section 27 of the Merchant Shipping Act Amendment Act 1862 (25 and 26 Vict. cap. 63), as the Act was not referred to as provided by section 9 of the Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35).

Dickson, for Barrie, adopted the argument submitted for Parker as applicable to his case, and argued further—In the case of this accused two breaches of the regulations were alleged, a breach of art. 18, and a breach of art. 15. These charges were mutually contradictory. The two articles did not apply in the same circumstances. Further, the breach of art. 15 was not relevantly set forth. That article provided that "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other." The indictment failed to set forth that the ships were meeting end on, and accordingly did not allege a case to which article 15 was applicable.

The Solicitor-General, for the Crown, argued—The case of *Clelland* v. *Sinclair* was not applicable. The irrelevancy in that case was that two persons were charged together on a vague and general indictment. Here the fault alleged against each is distinctly specified.—*H. M. Advocate* v. *Wood & King*, 15th April 1842, 1 Broun 262. The allegations of breach of the regulations were sufficiently made by reference to the articles of the regulations contravened, the regulations being produced—Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), sec. 15. Further, with reference to the alleged breach of article 18, the prosecutor had chosen one of the alternatives provided, viz., stopping and reversing, and undertook to prove that that course ought to have been followed. The case of *Dingwall* v. *H. M. Advocate* (*supra*) did not apply to a case of culpable homicide. To so apply it would be to run counter to the schedule in the Act.—*H. M. Advocate* v. *Macleod and Mackenzie*, 14th May 1888, before Lord Trayner (not reported).

At advising—

Lord Justice-Clerk—I have listened to a very able argument indeed, and have received every possible assistance in dealing with the questions raised. The first objection taken at the former diet was that both panels are charged in one indictment, while the acts of negligence were separate. That to me is a novel objection relating to a case in which, whatever were the offences committed by the panels at the bar, they were offences committed simultaneously, and led to one result, being that which brought about this criminal investigation. There have been in the course of the last thirty or forty years very many cases in which two persons, by separate acts committed at the same time, contributed to the unfortunate result of loss of life, involving them in the charge of culpable homicide. I think I am right in saying that in no single case that has occurred has there been an instance of a separate prosecution against two persons so charged. In every case the prosecution has been against both together, and in no case, so far as I know, has any objection been made to the competency of such a proceeding. I can see, on the other hand, that there would be very unsatisfactory results if in every case in which two or three or four people by separate acts of carelessness in the execution of their duty, and by their combined fault, caused an accident, each prisoner was to be tried separately before a separate jury, and if the Court had not the full facts of the whole case completely before it in one inquiry. It is said by Mr Thomson that it would be perfectly vain, after a jury had heard evidence led in a case of this kind for one of the panels, which might tend to throw guilt upon the other, to direct them that as regards the other prisoner they were not entitled to take that evidence into account at all. But I am bound to assume—and there is nothing that has occurred in the history of this country to lead any Judge to assume the contrary—that when a jury receive a distinct direction in law from the Judge sitting on the bench the jury will regard it.

The case of *Clelland* is the only case which has been quoted from the bar which has any bearing on this case. That case, however, was a very different one indeed. It was a case in which the prosecutor charged the masters of two steam vessels together before the River Bailie in Glasgow under a complaint which practically made no statement of facts whatever. Both of them, he said, had mismanaged their vessels, and the vessels had come into collision. That would not in any circumstance be considered a relevant charge. It would simply be a statement that two people behaved recklessly, and nothing more. Of course that never would be dealt with, even in the most summary court, as being a fair and relevant statement for the information of the

prisoners as to what each of them did in order to contribute to the disaster which followed. It is true that Lord M'Laren in the course of his opinion says—"The collision may have been the result of the negligence of one or of both, but if the last were the case, then there were separate acts of negligence, and it is not in accordance with the spirit of our criminal law that two persons should be charged, in the circumstances of this case, in one libel." If I had considered that that was the ground of judgment of the three Judges who heard the case I should certainly feel myself bound by it, however much I might differ from it, and however much I might be satisfied—as I am satisfied—that the whole course of decisions is quite contrary to that doctrine. But I take that statement of Lord M'Laren to be an expression of his individual view alone, because I find in the opinions both of his Lordship and of the other Judges the real grounds upon which they proceeded—that it was an act of oppression to charge the two men simply with having caused a collision without any explanation whatever of what either of them did, and to put them upon their trial without either of them having the slightest notice as to what was the fault attributed to him. Now, it is different here. The indictment here makes a specific and separate statement in regard to each prisoner, and it will be in the power of counsel at the bar in addressing the jury—and it will be the duty of myself in charging the jury—to point out what are the specific things alleged against each of the prisoners, and what are the specific things which must be proved before either of them can be found guilty upon the charge made against him. I am not now speaking on the question whether the charge is sufficient. I am speaking merely of the fact that this case is different from the case of *Clelland* in respect that there is a specific allegation against each of the accused. While I am speaking of that I may as well refer to the objection which was taken to the general statement that "you did both fail to navigate your respective vessels with proper and seamanlike care." I quite concur with Mr Thomson that that by itself would be a wholly irrelevant charge, but then the prosecutor does not undertake to prove that as a separate charge at all. Nor does he make it as a separate charge. He makes his specific charges, and makes his general statement. In the case of other crimes, before the passing of the recent statute, it was almost the invariable practice, after the statement of specific facts describing that the act was committed in a certain manner, to add "or in some other manner to the prosecutor unknown." If that latter statement was made in the form of a specific and separate charge it was irrelevant. In one case a charge was held irrelevant in which the prosecutor prefixed to these latter words "you did then and there," making it read "you did then and there" commit the crime libelled "in some manner and by some means to the prosecutor unknown." That was held irrelevant for want of specification, but in another indictment raised against the same person the words were again used in the proper way to cover some slight differences in evidence, and not as a substantive charge, and the indictment was held relevant. I refer to the case of *M'Que* (H.C.), February 20, 1860, 3 Irv. 552 and 578, and 32 Scot. Jur. 478. Therefore, as regards the first and fourth objections, I have no difficulty in repelling them.

The second objection is that the rules or regulations founded on are not sufficiently set forth. Now, it must be kept in view that this is a charge of culpable homicide brought at common law, and the prosecutor is perfectly entitled in making such a charge to make the rules which are issued for the guidance of persons of skill in executing their duties a test as to whether they acted with reasonable care and skill. The regulations in this case are merely documents for the information of the prisoners and their advisers in order that they may meet the case which the prosecutor intended making. The Act of Parliament provides that where it is necessary to set forth documents in an indictment it shall be sufficient to refer to such documents by general description, and the present regulations are just a document to be produced. Now, in the indictment I find the regulations are referred to as being regulations issued in pursuance of the Merchant Shipping Acts Amendment Act 1862, and that notice is given in the list of productions that an official copy of these regulations is to be produced. The section applicable is not section 9 of the Act of 1887, which was referred to, but section 15, which provides—"Where in an indictment any document requires to be referred to, it shall not be necessary to set forth the document, or any part of it, in such indictment, but it shall be sufficient to refer to such document by a general description and where it is to be produced, by the number given to it in the list of productions for the prosecution." Therefore I must also repel the second objection.

The third objection is that facts are not averred sufficient to infer breach of duty. Mr Thomson made the statement that the rules are not accurately quoted in the indictment. The prosecutor has taken one of two alternatives, and has charged each of the prisoners with not stopping and reversing when they ought to have done so. I think that they can have no reason to complain of want of specification by the prosecutor limiting himself to one and not stating the two alternatives, which would have given him a general latitude.

The last and most formidable objection I have to deal with is the objection based upon the case of *Dingwall*—that the indictment should have contained as a preliminary statement the words "culpably and recklessly, and in breach of your duty," and that according to the case of *Dingwall* this indictment should be considered irrelevant. That brings me to the question whether the case of *Dingwall* compels me to hold this indictment to be irrelevant because it does not contain the words which the statute of 1887 says in express terms it need not contain. The question is a somewhat difficult one. Either the case of *Dingwall* implies that in all cases of crime the words, or some of them, given in section 8 of the statute of 1887 must be used, or it implies that in certain cases they or some of them must be used. After giving the question the best consideration I can, I cannot accept the decision in the case of *Dingwall* as applying generally to all cases, and that for two reasons. In the first place, to hold that it applied generally would be simply to wipe out a clause and relative schedule out of the statute as if it had not been

enacted. Second, I cannot accept *Dingwall's* decision as applying generally, because I gather from statements made by the learned Judges, in giving their opinions, that they did not consider that the schedule contained an example relative to the case they were deciding. Now, as regards the first point, I cannot hold myself bound by a decision of two Judges against the strong dissent of another, and against numerous decisions of Judges in previous cases giving effect to sections 2 and 8. Indeed, I hold myself bound, on the contrary, to assume that their Lordships did not intend altogether to set aside these clauses of a statute, and that therefore their decision is not to be so read. It is no doubt true that Lord Young in *Dingwall's* case speaks in a tone of ridicule of the omission of the expressions referred to in section 8, and asks, "Will anyone give me a good reason why these words should be omitted? There are plenty of superfluous and unnecessary words, *e.g.*, the name and designation of the public prosecutor, which is always the same. Is it economy? You would save more by omitting 'by authority of Her Majesty's Advocate' than by omitting 'falsely and fraudulently.'" But even assuming that the clause were in its intent ridiculous, it is a perfectly clear and distinct enacting clause. The prosecutor cannot be held to have tabled an irrelevant indictment merely because he has obeyed the statute and left out words which the statute has said may be left out and shall be implied. No doubt, also, Lord M'Laren says, "I should only like to add that every libel must, in my opinion, set forth a crime—must set forth what conveys the notion of a crime—and that, I think, this indictment does not." But the answer to that is, that if the statute declares that certain words wherever they would have been necessary to relevancy under the old form are to be implied, then a court of law is bound, in reading the indictment, to read in such words just as if they had been actually written. To refuse to read them in, and to throw out the indictment for want of them, would be nothing else than disobedience to express and unambiguous statutory enactments. The order given by the statute must be obeyed, and if the order is distinct and intelligible, a court of law is bound to give effect to it. To hold otherwise would be to justify disobedience to statutory enactments on grounds relating to the policy or propriety of their contents. This would be to change the position of the judge from that of an interpreter and administrator of the law and to constitute him its censor, entitled to veto its provisions if unable to consider them expedient or agree with the reasons which led to their being passed into law. I cannot, therefore, accept the case of *Dingwall* as an authority binding the Court in every case to ignore the provisions of clause 8, and to reject indictments framed in strict accordance with section 2 and Schedule A.

The second point, viz., that the learned Judges held that the schedule was not applicable to the particular case, I gather to have been the real ground of judgment. For Lord Young, referring to Lord Rutherfurd Clark's opinion, says that he understands Lord Rutherfurd Clark to "assume that the case given in the schedule under the name of Norah Omond is a charge of falsehood, fraud, and wilful imposition." And his Lordship adds—"I see no reason for arriving at that conclusion. . . . The case is *toto cœlo* different from the specimen relied on." And Lord M'Laren says—"When we look into the schedule it appears uncertain whether the case is meant as a statement of the crime of falsehood, fraud, and wilful imposition, or of dishonest appropriation, a new *nomen juris* introduced by this statute." I may be permitted to say that while willing to submit to the decision in *Dingwall's* case where it clearly applies, yet until it has been considered by a full bench I dissent altogether from the reasons given. I dissent from what is laid down by Lord Young, because while I know he has a strong view that to obtain goods on the false pretence of a *bona fide* business purchase with the distinct intention not to pay for them is not a crime by the law of Scotland, the contrary has been affirmed by a full bench in the case of *Witherington*, 4 Coup. 475. And that case was really following up numerous previous decisions of the High Court, sitting with a bench of three Judges. This was what the prosecutor averred in the case of *Dingwall*, and this is what his Lordship in that case stated was not crime by the law of Scotland. In this conflict of opinion I am bound by that of the full bench, with which I concur in every particular.

Again, with reference to the reasons given by Lord M'Laren, I find from his opinion above quoted that his Lordship proceeds in *Dingwall's* case on the assumption that the statute has created, as regards crimes relating to property, a new *nomen juris*, viz., "dishonest appropriation of property." Lest it should be supposed that I acquiesce in that statement of what is contained in the Act, I must here say parenthetically that his Lordship has fallen into an unaccountable error in matter of fact. For the statute, in no part of it, establishes any new *nomen juris*. It is a procedure Act, intended to abolish the use of *nomina juris*. It does not mention such words as "dishonest appropriation of property" in any connection applicable to a substantive charge of crime. The words "dishonest appropriation of property" do not occur in the part of the statute which deals with the libelling of the crime charged. They relate to the notice of previous convictions to be used in evidence after trial and conviction, and to nothing else. As the statute extends the use of previous conviction in aggravation (after proof of crime) to all convictions for offences of a similar nature, it for convenience permits a number of these convictions to be described in the indictment by a comprehensive phrase, which is a form of notice intended to prevent surprise, the particulars being afterwards duly given in the list of productions. It is, therefore, clear that to speak of these words as a novel *nomen juris* for crime is entirely to mistake the meaning of the Act. But the important fact brought out by Lord M'Laren's special reference to these words in the case of *Dingwall* is that it is thus indicated that in the opinion he was giving he intended, as Lord Young also plainly intended, to deal with cases relating to offences against property, and to such offences only. I have, therefore, no hesitation in holding that, pending the decision of a full bench, I am not bound by that decision, except in so far

as it relates to the particular crime in question, in the case of *Dingwall*, and to the part of the Schedule A applicable to that crime. The charge here is that the accused did guiltily do, or fail to do, certain acts libelled. The prosecutor undertakes to prove, according to what is required by law, the guilty character of the acts alleged to have been done. It is important to observe that it is the responsible public prosecutor alone to whom the privilege of thus libelling is given. He, on his responsibility, indicts and accuses of crime. The statute declares that the acts he specifies are to be read as being alleged to be done contrary to the criminal law of the country, and that if the charge with certain words read in would have been sufficient under the former law to make a relevant accusation, then they should be read in. Obeying the statute, I read them in here. It is not disputed that if these words were written in, the indictment would be relevant. The statute says they should be implied. That means, that for the purposes of relevancy they are in the indictment.

I have only to add on the question of relevancy that Lord M'Laren refers to one case in which the qualifying word "wilfully" is used in the schedule in support of his view. He refers to the schedule, which gives an instance of the charge of fire-raising, thus—"You did set fire to a warehouse . . . and the fire took effect on said warehouse, and this you did wilfully (or culpably and recklessly)." But that very exception proves the rule, instead of being, as his Lordship suggests, an illustration of the application of the rule as he understands it. There are but few cases where the same Acts described in the same words may fall into one or other of two categories of crime, where a description in ordinary words without adjectives will not set forth the difference clearly enough—as, for example, between murder and causing death without murderous intent. But there are certain cases in which general words will not indicate any difference. The case of crime by raising fire is one of these. To say that a man set fire to a house gives him no notice whether he is accused of malicious crime or only of criminal carelessness. In such a case, therefore, where the same general words apply equally to an offence of great malignity and deliberate criminality and to an offence in which there was no wicked intent but only punishable carelessness, the schedule indicates that if the higher offence is to be charged this intention shall be given notice of. But here in this case, and in most other cases, no such ambiguity exists, and there is no need for the specification given in the case of fire-raising. That case, by its exceptional character, brings into relief other cases in the schedule in which no such words are used, and the statute expressly declares that these forms may be used. I hold that the prosecutor has properly applied the schedule in this case, and repel the objections to the relevancy.

The panels pleaded not guilty.

Comrie Thomson then moved for a separation of the trials, on the ground that the interests of the panels being necessarily conflicting, the panel Parker might suffer serious prejudice from being tried along with Barrie, as witnesses might be called by Barrie for his defence whom he could neither cross-examine nor contradict.—*Burke and Macdougall*, 24th December 1828, Syme's Rep. 345 (Lord Pitmilly at p. 351), and Hume, ii. 519; *Kettle and Others*, 10th June 1831, Bell's Notes 182; *Clancy and Others*, 3rd May 1834, Bell's Notes 183; *Cleary and Others*, 26th January 1846, Ark. 7. The case of *Rowbotham and Others*, 15th March 1855, 2 Irv. 89, 95, was distinguished from this case by the fact that the persons there accused together all contributed to one act of negligence, those who contributed to another act of negligence leading to the same accident being tried under a separate indictment—*Macintosh* v. *Wilson*, 17th March 1855, 2 Irv. 136.

The Solicitor-General did not consent.

The motion was refused.

Counsel for the Crown—The Solicitor-General, Q.C.—Wallace, A.-D. Agent—Crown Agent.

Counsel for Parker — Comrie Thomson — M'Lennan. Agents—

Counsel for Barrie—C. S. Dickson—Younger. Agents—J. & J. Ross, W.S.

COURT OF SESSION.

Tuesday, November 6.

FIRST DIVISION.

STORRAR AND OTHERS *v.* SMAIL AND OTHERS.

Succession—Testament—Implied Revocation.

A testatrix by general disposition and settlement conveyed to her niece her whole heritable and moveable estate, under burden of debts and legacies, on the condition that her niece should pay any other legacies which the testatrix might think proper to leave by any writing under her hand, clearly indicative of her intention, although not formally executed. She appointed her niece her executrix. By a codicil to this will she revoked the conveyance of her moveable estate, and conveyed the same to other executors, directing them to fulfil any testamentary instructions left for them under her hand, and providing that any surplus of the moveable estate, after meeting debts and bequests, should be paid to her niece, but that any deficiency thereof should form a burden on her heritable estate. By a holograph document, addressed to her niece of date intermediate between the settlement and codicil, she directed that her heritable property should be sold, and that the price thereof, together with any surplus after payment of expenses, should be deposited in bank for behoof of her niece in liferent and certain others in fee. *Held* that the holograph writing was inconsistent with, and therefore impliedly revoked by the codicil, which was of later date.

Miss Lillias Smail died on 21st September 1885, leaving the following testamentary writings—1. A general disposition and settlement dated 29th May 1883, to which was appended a codicil,

written on the same paper, dated 3rd August 1885. 2. A holograph writing addressed to "my niece Margaret Smail," and bearing date 3rd September 1884.

By her disposition and settlement she conveyed her whole estate and effects, heritable and moveable, to her niece Margaret Smail, and her heirs and assignees, under burden of payment of her debts and various small legacies, and also under the condition that her niece Margaret Smail should "also make payment of any other legacies or bequests which I may think proper to leave by any writing under my hand, clearly indicative of my intention, although not formally executed." Margaret Smail was appointed sole executrix under this deed.

By the codicil dated 3rd August 1885 the testatrix, on the narrative that she had resolved to make sundry alterations on her settlement, recalled the appointment of Margaret Smail as her executor. She revoked the conveyance of her moveable means and estate to her niece, and appointed other parties to be her executors, and conveyed to them her whole moveable means, estate, and effects. The codicil proceeds further—"I authorise and direct my executors to implement and carry into effect any instructions or bequests which I may think proper to leave for them by any letter or document signed by me, although not legally tested; and in case there be a surplus of my moveable estate after meeting the debts and bequests herein and before written (excepting the legacy hereby revoked), I direct my executors to pay over the same to the said Margaret Smail, my niece; and, on the other hand, in the event of there being a shortcoming, I declare and provide that the same shall be a burden on my heritable estate conveyed to her, and be payable and paid by her accordingly."

The holograph writing was addressed "To my niece Margaret Smail," and referred *in gremio* to "my will." After providing for the disposal of sundry articles of furniture, trinkets, and books, it proceeds—"My house to be sold as soon as possible, and if there is any money over paying all expenses is to be added to whatever is recieved for the house, and depositted in the Agra Bank for a small income to you for life. at your death the the capital to be equally devided amongst your sisters for there families." This writing had been left by the deceased in a sealed packet in the custody of a friend six months before her death, with whom it remained till after that event, which occurred on 21st September 1885, and therefore it was clearly of date between the settlement of 29th May 1883 and the codicil of 3rd August 1885.

In these circumstances questions arose as to the validity of the holograph writing, and its effect on the distribution of the estate of the deceased if it were a valid and subsisting document, and a Special Case was presented to the Court to have these questions decided. No questions, however, were raised as to the provisions in the holograph writing for the disposal of the various articles of furniture, trinkets, and books.

The first parties thereto were the executors under the codicil of 3rd September 1885; the second party was Miss Margaret Smail, niece of the testatrix, and disponee under the settlement; and the third parties were Margaret Smail's surviving sisters and the families of two deceased sisters.

The questions submitted to the Court were—"(1) Is the holograph writing dated 3rd September 1884 revoked by the codicil, or is it a valid and subsisting testamentary document? (2) If the first part of the first question be answered in the negative, are the first parties bound to sell the said heritage, and to deposit the proceeds, along with the amount of the free moveable estate, in the Agra Bank on a receipt in favour of the second party in liferent, for her liferent use allenarly, and her sisters for their families in fee; or in what terms should the deposit-receipt be taken?"

The second party argued — The holograph writing was not a valid and subsisting document. Its terms were incompatible with the codicil of later date, and so it was impliedly revoked by that deed—*Bertram's Trustees* v. *Mathieson's Trustees*, March 10, 1888, 15 R. 572.

The third parties argued—No doubt it was difficult to reconcile the terms of the holograph writing with those of the codicil, but it was not impossible, and mere difficulty in reconciling them was not enough. The holograph writing had not been expressly revoked, and in the absence of impossibility of reconciling its terms with the codicil, it must be held that it was not impliedly revoked, and was therefore a valid and subsisting document.

At advising—

Lord President—In this case the trust-disposition and settlement by the testatrix was dated on the 29th of May 1883. It is a tested instrument, and therefore there is no question of its date. In like manner there is no question about the date of an attested codicil appended to the deed and written upon the same paper, and which is dated on the 3rd August 1885. Now, the holograph writing founded on by some of the parties, and which of course does not prove its own date, bears to be dated 3rd September 1884. Although the date of that writing cannot be proved by the writing itself, it is established, by a clear admission in the case stated, that the document must have been written some time between the trust-disposition and the codicil of 3rd August 1885. It is said that at the date of the deceased's death the holograph writing was in the possession of David Storrar, and that the deceased had been in the habit, when she went from home, of leaving a sealed packet with Mr Storrar, which was given back to her on her return home. Several months before her death, when she was leaving home, she gave a sealed packet to Mr Storrar to be retained till her return. On her return the packet was allowed to remain in Mr Storrar's custody, and at the date of her death it had been in his possession for about six months. Now, the death of the testator occurred on the 21st September 1885, and as the codicil is dated 3rd August 1885, there is a very short interval between the date of the codicil and of the death of the testatrix, and therefore the holograph writing must have been out of her possession and in David Storrar's hands for some months before her death, and consequently before the codicil of 3rd August 1885 was made.

On the face of the codicil itself it is quite plain that it was intended to operate as an alteration of the original settlement. The effect of

this original settlement was very much in favour of Miss Margaret Smail. The codicil is less favourable to her, but the intervening holograph writing, as we are I think entitled to call it, is still more unfavourable.

In these circumstances the question comes to be, whether the codicil necessarily from its terms operates as a revocation of the holograph writing executed in the interval between the original settlement and the codicil? It seems to me that the conclusion which we must adopt is that it does so operate. If the holograph writing was to receive effect, it would deprive Margaret Smail altogether of the heritable property, for if that holograph writing was to be brought into operation she would not have the disposal of that property at all, as the testatrix has there left a direction that it should be sold, and that Margaret Smail should have a liferent of the balance left after the payment of expenses.

Now, the codicil of 3rd August 1885 is quite inconsistent with that direction. That codicil assumes that Margaret Smail is to be proprietor of the heritable estate, and directs that certain things shall be payable out of the heritable estate. The two things are incompatible, and the natural conclusion is that the later deed must receive effect, operating as a revocation of the principal part of the holograph writing. I am therefore of opinion that we should answer the first branch of the first question in the affirmative.

Lord Mure—It appears to me that the holograph writing which was handed over to David Storrar is plainly dated before the codicil of 3rd August 1885. When I look at that codicil I cannot think it consistent with the holograph writing, because the material alteration in the settlement made in the holograph writing is completely superseded by the directions in the codicil. Miss Margaret Smail is left as executrix by the holograph writing, and is directed to sell the house, and after payment of expenses she is to have a liferent of the balance. In the codicil the moveable estate is conveyed to other executors; there is a revocation of her appointment as executrix, an appointment of new executors, and she remains as the disponee in the heritable estate. In the codicil the testatrix says—"I authorise and direct my executors to implement and carry into effect any instructions or bequests which I may think proper to leave for them by any letter or document signed by me although not legally tested: And in case there be a surplus of my moveable estate after meeting the debts and bequests herein and before written (excepting the legacy hereby revoked), I direct my executors to pay over the same to the said Margaret Smail, my niece, and, on the other hand, in the event of there being a shortcoming, I declare and provide that the same shall be a burden on my heritable estate conveyed to her, and be payable and paid by her accordingly." Now, I think that the holograph writing clashes with these directions in the codicil, and as the latter is of later date the holograph writing is impliedly revoked by it.

Lord Adam—We have here three deeds to construe—the original trust-disposition and settlement, the holograph writing, and the codicil. There is no doubt that the holograph writing is of earlier date than the codicil, and therefore as it is inconsistent with the provisions of that codicil, these provisions must prevail.

In my opinion the testatrix intended her whole estate, heritable and moveable, to be disposed of by the trust-disposition and settlement and codicil. These two deeds do dispose of all her estate, heritable and moveable. Therefore we cannot sustain the holograph writing because it is inconsistent with that view. By the trust-disposition and settlement the testatrix left the whole of her estate to Margaret Smail. As I read the codicil she did not alter her disposition of the heritable property to Margaret Smail. She altered her disposition of the moveable property and appointed other executors to carry out her intentions, but in this codicil, which is the last deed, she disposed of the whole of her moveable estate to the executors appointed, who were directed—[*His Lordship here read the terms of the codicil quoted above*]. Here there is a clear instruction to follow—to pay to Margaret Smail after meeting "the debts and bequests herein and before written," and nothing more. Margaret Smail is to get the surplus when the moveable estate is disposed of. The other side wish to incorporate something else into the clause, namely, after meeting the debts and bequests "herein and in another document before written," where there is an instruction to pay other debts and bequests, and to pay the surplus to her niece. The testatrix has in the codicil disposed of her whole moveable estate, and directed the surplus to be paid to Margaret Smail, and therefore Margaret Smail is to get the benefit of that, although her appointment as executrix is recalled. The reading we are asked to adopt is, that after meeting certain debts and bequests the moveable estate is to be paid to her for distribution in terms of the instructions in the holograph writing, and lastly that the surplus is to be paid to Margaret Smail for her own use. If the testatrix had wanted these things paid she would have directed her executors to pay them.

When we come to deal with the heritable estate it is clear that we cannot read the codicil without seeing that the disposition of the heritable property to Margaret Smail must stand, because the testatrix in her codicil directs—"And on the other hand, in the event of there being a shortcoming, I declare and provide that the same shall be a burden on my heritable estate conveyed to her, and be payable and paid by her accordingly." Here there is a burden laid on the heritable estate conveyed to Margaret Smail. If effect is to be given to the holograph writing there is a burden on nobody. Margaret Smail is there directed to sell the heritable estate, and to pay this and other debts, and the balance is to remain moveable estate. If we were to give effect to the holograph writing that would be the result, and quite contrary to the provisions of the codicil. The direction in the holograph writing to convert and deposit the balance in bank is quite opposed to the direction in the codicil that, in the event of there being a shortcoming, "the same shall be a burden on my heritable estate." The codicil clearly recognises that the property is to remain the property of

Margaret Small subject to the burden I have mentioned, and I humbly think that the codicil must receive effect.

Lord Shand was absent.

The Court answered the first branch of the first question in the affirmative.

Counsel for First and Third Parties—Macfarlane Agents—H. & H. Tod, W.S.

Counsel for the Second Party — Guthrie. Agents—Tait & Crichton, W.S.

Thursday, November 8.

SECOND DIVISION.

[Lord Lee, Ordinary.

HENDERSON *v.* HENDERSON.

Expenses—Husband and Wife—Divorce—Wife's Expenses of Reclaiming-note.

Held (*diss.* Lord Young) that a wife who had unsuccessfully reclaimed against a decree of divorce on the ground of adultery, and who had by her own earnings acquired separate estate to the extent of £500, was bound to pay her own expenses in both the Outer and the Inner House.

Upon 25th January 1888 Isabella Middler Burd or Henderson, wife of Andrew Henderson, blacksmith, Little Collieston, Slains, Aberdeenshire, brought an action of divorce against her husband on the ground of adultery, and upon 12th March 1888 the said Andrew Henderson brought an action of divorce against his said wife also on the ground of adultery. These actions were conjoined, and after hearing evidence the Lord Ordinary (Lee) upon 22nd June 1888 pronounced decree of divorce in both actions, and with regard to expenses found the wife entitled to the expenses incurred by her in the action at her instance, and *quoad ultra* found neither party entitled to expenses. The wife reclaimed to the Second Division, but unsuccessfully.

It was admitted that for some years the husband had absented himself from his wife, and had not contributed anything to her support; that the wife had maintained herself by carrying on business as a farmer and innkeeper, and that by her earnings she had amassed a sum of £500, which was her own separate estate.

Upon the question of expenses it was argued by the reclaimer—She was entitled, in accordance with a well-established rule, to her expenses in both Courts, even in the action in which she was defender. In the case of *Hoey*, June 6, 1884, 11 R. 905, the wife, although unsuccessful, was found entitled to the expenses of her reclaiming-note, and that too from a perfectly innocent husband. It was only where a reclaiming-note was manifestly hopeless that expenses were refused. Here the evidence was such as to justify a reclaiming-note.

Argued by the respondent—If the rule was well fixed, the exception was as well established, that a wife with estate of her own must litigate at her own expense, and this specially applied to the case of a guilty wife reclaiming with a judgment of the Lord Ordinary against her—Fraser on Husband and Wife, 1231, 1235.

At advising—

Lord Young — It is my opinion that the general rule is as stated by Mr Young, that where a husband raises an action of divorce against his wife he must pay not only his own expenses but hers also, even although her defence has been unsuccessful. That is the general rule, and it was stated with some emphasis by the Lord President in a recent case cited to us, where a wife had reclaimed against a judgment which was against her. She had unsuccessfully defended the action; she had unsuccessfully reclaimed; and yet she was held entitled to get her whole expenses in both Courts, and that too in a case where she alone had been the guilty party. I understand an exception will be allowed where a wife has separate estate — that is, where she has independent means, but I would be loth to bring under that exception, which only may and not necessarily must be acted upon, a case where the wife has maintained herself for so many years, and where all her separate estate is due to her own earnings and savings. If out of this little account of savings she were to pay her expenses in this action, it would leave her practically with nothing to live upon. I think that because of a balance in the bank in her favour from the fruits of her own industry we should not take this case out of the general rule. But I look also to the behaviour of the husband, who has never performed towards her the duty of a husband. I think he ought to be subjected to the whole expenses of this action, which will have the effect, not that she will get one farthing out of him, but that her earnings will be protected from his claims.

Lord Rutherfurd Clark—I have no doubt about the general rule. Even although guilty of adultery a wife is entitled to her expenses in the Outer House, and in the Inner House also if there are reasonable grounds for her reclaiming. The question here is, whether this case should be brought under the exception to this rule. The ground for so bringing it is that the wife has separate estate of her own to the extent of £500, and on that ground the Lord Ordinary did not find the husband liable to the wife for the expenses incurred by her in the Outer House. I am not disposed to hold that a wife when she has such estate of her own, and is guilty of adultery, should be allowed to throw all the expense of the action upon her husband. I am therefore for affirming the Lord Ordinary's interlocutor as regards the expenses in the Outer House, and for finding no expenses due to or by either party in the Inner House.

Lord Lee—I concur with Lord Rutherfurd Clark.

Lord Justice-Clerk — I concur with the majority of your Lordships. I think there is not much room here for sympathy with either party. The wife has separate estate, she is in

fault, and is therefore bound to pay her own expenses.

The Court adhered.

Counsel for the Reclaimer—A. J. Young—Salvesen. Agent — D. Howard Smith, Solicitor.

Counsel for the Respondent—Comrie Thomson—Rhind. Agent—William Officer, S.S.C.

Friday, November 9.

FIRST DIVISION.

[Exchequer Cause.

THE AUSTRALASIAN MORTGAGE AND AGENCY COMPANY (LIMITED) *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Act 1870 (33 *and* 34 *Vict. cap.* 97), *sec.* 48.—*Bill of Exchange—Clause of Exemption—Security —Renewal of Debenture—Coupon.*

By the Stamp Act 1870, sec. 48 (1) the term "bill of exchange" includes any document (except a bank note) entitling any person, whether named therein or not, to payment by any other person of any sum of money therein mentioned. The schedule to the Act charges a duty of 1d. on bills of exchange payable on demand, but exempts "(9) coupon or warrant for interest attached to and issued with any security." Where the term of payment of a debenture was by minute of renewal extended for a definite period, and additional coupons were issued relative to the interest for the extended period—*held* that these coupons not being issued with the security did not fall under the clause of exemptions, and that they were each chargeable with the stamp-duty of 1d.

This was a case stated by the Commissioners of Inland Revenue under sec. 19 of the Stamp Act of 1870 at the request of The Australasian Mortgage and Agency Company (Limited), to enable them to appeal to the Court of Exchequer against a determination of the Commissioners imposing a stamp-duty of 1d. upon a coupon issued by the said company.

By the Act there are charged the following stamp duties, as set forth in the schedule thereto, viz.—"bill of exchange, payable on demand, 1d." Section 48 (1) of the Act is as follows:—"The term 'bill of exchange,' for the purposes of this Act, includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank note), entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned."

Under the head "bill of exchange" in the schedule to the said Act appear certain exemptions, and the ninth of those exemptions is as follows:—"coupon or warrant for interest, attached to and issued with any security."

In May 1883 The Australasian Mortgage and Agency Company (Limited) borrowed from Ralph Erskine Scott, C.A., Edinburgh, the sum of £2000, and granted therefor a debenture in ordinary form. The loan was for five years, and it bore interest at 5 per cent. per annum.

The debenture was stamped with the *ad valorem* duty applicable to a mortgage, viz., £2, 10s. Unstamped coupons or warrants for interest payable each half-year during the currency of the debenture down to and including 15th May 1888 were attached to and issued with the debenture.

In May 1888 the term of payment was by consent of parties extended to 1893, in terms of the following minute of renewal endorsed on the debenture:—"It is hereby agreed that the term of payment of this debenture shall be extended from the fifteenth day of May Eighteen hundred and eighty-eight, being the date of payment within mentioned, to the fifteenth day of May Eighteen hundred and ninety-three, and coupons for interest at the rate of 4½ per centum per annum have been delivered to the said M/C trustees of Mr and Mrs John Bruce of Sumburgh, for the interest to become due at and prior to the date of payment hereby agreed on." The new set of coupons issued was attached to the debenture by being pasted thereto, after which the debenture as renewed, along with the coupons attached, were handed back to the holder.

In July 1888 the company presented to the Commissioners (having obtained it for the purpose from the holders thereof) the first of the new set of coupons in order to have their opinion if it was chargeable with stamp duty in pursuance of the Act of 1870. The document was in these terms—"No. 1. The Australasian Mortgage and Agency Company (Limited), £42, 10s., will pay to the bearer, at the Office of the Royal Bank of Scotland, Edinburgh or London, on surrender of this coupon, the sum of forty-two pounds ten shillings sterling, on the 11th day of November 1888, for interest due at that date on debenture No. 2711.—R. & E. Scott, *Secretaries.*"

The Commissioners expressed their opinion that it was a bill of exchange payable on demand, and that it fell to be stamped with the duty of 1d.

The company declared themselves dissatisfied with the determination of the Commissioners, on the ground that the coupon in question fell within the exemptions to sec. 48 of the Act of 1870, as being a "coupon or warrant for interest attached to and issued with any security," and was not liable to stamp duty.

The question for the opinion of the Court was —"Whether the said document was liable to the said duty of 1d. applicable to a bill of exchange payable on demand, or if not, whether it was liable to any duty, or whether it was exempt from duty as a coupon or warrant for interest attached to and issued with any security?"

Argued for the Australasian Company—The coupon in question fell under the exemptions to sec. 48; as it was not of the nature of a promissory-note it was not liable to stamp-duty. It contained no order to pay a sum, but simply a notice that upon presentation of the coupon the money would be paid. A promissory-note itself constituted the obligation, but here the coupon added nothing to the onerosity of the debenture; it was only a receipt. Its contents might have been inserted in the body of the debenture without affecting its character. It only added to the

debenture a stipulation that it (the coupon) was to be presented when the interest was demanded, and that the interest was to be payable to bearer. Coupons were not bills of exchange; this the statute recognised, and allowed them to escape not only the duty exigible on bills of exchange but even on receipts. That was the rule as to coupons issued with the debenture. With regard to the debenture itself the duty upon it was fixed without reference to the period for which the loan was to be taken; it was an *ad valorem* stamp, and when the parties extended the period of the debenture, what the Legislature intended was, that they were to be in the same position (except the payment of an agreement stamp upon the minute of renewal) as if the extended period had been specified in the original debenture. If that had been so no stamp would have been required for this coupon. The effect of the minute of renewal was to incorporate by implication the old obligation, and that being so these additional coupons really were by implication issued with the debenture, and so were not liable in duty.

Argued for the Commissioners of Revenue—Coupons were regarded by the Legislature as bills of exchange; this was implied by the Stamp Act of 1870. Each coupon related to a separate period, and was payable to bearer. There was nothing special about these coupons, they were in ordinary form, but they were not issued with the debenture. The security here was the debenture—not the debenture along with the renewal. In order to fall under the clause of exemptions it was necessary that the coupons should be "attached to and issued with" the security. The coupon in question was not issued until its currency had expired, and but for the renewal the loan would have been repaid.

At advising—

Lord Shand—The question for determination in this case is, whether a coupon or interest warrant for £42, 10s., issued by the Australasian Mortgage and Agency Company (Limited) on 14th May last, and payable on the 11th of the present month, is liable to the duty of 1d., as the Commissioners have held it to be, or is exempt from duty as maintained by the company.

There is no doubt that the document is a bill of exchange within the meaning of that term as defined by section 48 of the Stamp Act of 1870, and it is certainly liable in duty unless it falls under the 9th exemption in that part of the schedule of the Act which deals with bills of exchange and specifies the duty to which they are liable. The exemption is thus expressed—"coupon or warrant for interest attached to and issued with any security."

The Australasian Company on 2nd May 1883 issued a debenture for £2000, having a currency for five years, on which they undertook to pay interest half-yearly at 5 per cent. This document was impressed with a stamp for £2, 10s., being the stamp appropriate to a debenture for the amount of the loan, and attached to and issued with the document or security there were coupons or interest warrants for the ten half-yearly payments of interest to become due before the loan became repayable. These coupons were clearly exempt from all stamp-duty under the words of the exemption already quoted.

Immediately before the debenture became due it was arranged between the company and the creditor that in place of repayment of the money being made, the period of endurance of the loan should be extended for other five years, that the rate of interest for this extended time should be 4½ per cent., and that coupons for interest at that rate should be issued, payable half-yearly, as before. Accordingly a minute embodying this arrangement was endorsed on the debenture, having affixed to it an agreement stamp of 6d., and a new set of coupons was attached to the debenture "by being pasted thereto, and both debenture and coupons were thereupon delivered" to the creditors.

The appellants maintain that these coupons were exempt from duty under the statute because they were attached to and issued with the security, but I am of opinion with the Commissioners that this contention is unsound, because though the coupons were attached to the security they were not issued with it as the first set of coupons was, and it is a condition of the exemption allowed by the statute that the coupons shall be issued with the security.

When the debenture came to maturity the parties might have arranged that it should be given up and cancelled, and the money should be again lent to the company under the new arrangement on a new debenture, issued with its appropriate coupons attached to it. In that case there must have been a payment of a stamp as for a new debenture of £2, 10s., or the proper *ad valorem* amount, and of course the coupons issued with and attached to this debenture would have been exempt from duty.

But that was not the course which the parties took. The debenture was never given up by the creditor. On the contrary, under the arrangement made, the obligation of the company under the terms of that document still subsists, with this alteration on these terms that the period of the loan is extended and the rate of interest reduced. On the assumption that the transaction is not to be regarded as a new debenture, the document embodying the arrangement has been impressed with an agreement stamp of 6d. only. The form and scheme of this transaction is not, according to the view of the parties, a new loan and a new security or document of debt granted for it, but an extension of an existing loan on somewhat altered terms. The agreement expressly bears that "the terms of payment of this debenture shall be extended," and each coupon bears that the payment is made for interest due on debenture No. 2711, being the debenture due at Whitsunday 1888, the term of payment of which had been extended.

This being so, I think it follows that the coupon in question, though attached to the debenture by the company, was not issued with that document on security. The debenture was issued in May 1883. The new coupons were issued in May 1888. Nor can it be said that there was a second issue or re-issue of the debenture. That document was never given up to the company, for that would only have been on repayment of the amount, or in exchange for a new debenture, and so it could not be issued a second time. The debenture in its terms bore that the money should be repaid at Whitsunday 1888, or at such date as might "be mutually

agreed on by minute to be endorsed hereon," but this stipulation seems to be of no account in the present question. An agreement to extend the period of payment would be of equal effect though the debenture had no such clause, and would be equally effectual though written not on the debenture but on a separate paper.

It is not easy to understand why a coupon or warrant for interest which is by statute held to be a bill of exchange, and which in practice serves also as a receipt or discharge for money, should in any circumstances be free from stamp duty, while a receipt for interest on a heritable security must bear a stamp. But the exemption given is not universal but limited. The coupon must be attached to and issued with any security. The only explanation of this limitation which occurs to one is, that the privilege or exemption is only to be given where the coupons are issued with the original debenture which has paid debenture duty, and not to be given where, as here, no such duty has been paid, but the transaction stands on the debenture as originally issued, modified only in its terms by an agreement bearing an agreement stamp only.

On these grounds I am of opinion that the determination of the Commissioners should be affirmed

Lord Adam—I am of the same opinion. The document in question, which was read by Lord Shand, is an ordinary coupon, and there is no doubt that a coupon is just a bill of exchange, and that under the Stamp Act of 1870 it is liable to the duty of 1d. unless it can be shown that it belongs to one of the class of documents dealt with in the clause of exemptions appended to that statute. This then becomes the question which we have to deal with—Does this coupon fall under the clause of exemption? And the answer must depend upon the language of the clause—[*His Lordship here read the clause quoted above*]. Can it be said that this coupon was attached to and issued with any security? Now, the only two documents which have any bearing upon this question are the debenture and the minute of renewal. The only security for the £2000 is the debenture, and it is the existing security. It is the only "principal or primary security" for this money—[*His Lordship here read the terms of the minute of renewal quoted above*]. Now, this minute of renewal contains no obligation to repay, but only an extension of the time within which the £2000 is to be repaid. That brings us then to the further question—Was this coupon "attached to and issued with" the security? It certainly was attached to the security by a process of pasting, but it was not issued with it. For that purpose the debenture would require to have been given up to the company, and a new one would require to have been issued. It is clear therefore that this coupon was not "issued with" the security, and it is equally clear that under the Act of 1870, not being under the clause of exemptions, it must pay the stamp duty of 1d.

Lord Mure—Under the statute of 1870 the only occasion in which coupons are to escape the duty of 1d. payable on bills of exchange is when under the clause of exemptions they are "attached to and issued with any security." It cannot be said in the present case that they were "issued with" this debenture, because they were not in existence at the time this security was granted. They really were issued under an agreement to prolong the loan. If it had been the intention of the Legislature that coupons of the class now before us should escape the duty of 1d. payable by bills of exchange the words of the clause of exemption would have been, "coupon attached to and issued or re-issued with any security." In the absence of any such words I agree with your Lordships in thinking that this coupon does not fall under the clause of exemptions.

The Lord President, who was absent at the hearing, delivered no opinion.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—D.-F. Mackintosh, Q.C.—Lorimer. Agents—Menzies, Coventry, & Black, W.S.

Counsel for the Commissioners—The Lord Advocate, Q.C.—A. J. Young. Agent—The Solicitor of Inland Revenue.

Friday, November 9.

FIRST DIVISION.

[Exchequer Cause.

THE TEXAS LAND AND CATTLE COMPANY (LIMITED) *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Customs and Inland Revenue Act 1888 (51 *Vict. c.* 8)—*Stamp Act* 1870 (33 *and* 34 *Vict. c.* 97)—*Transfer of Debenture—Marketable Security.*

By the Stamp Act 1870 a marketable security is defined to mean "a security of such a description as to be capable of being sold in any stock market in the United Kingdom." The Customs and Inland Revenue Act 1888 provides, by sec. 13, that there shall be charged upon the transfer of any debenture (being a marketable security), where the transfer is on sale "the same *ad valorem* duties as are now charged under the Stamp Act 1870 upon a conveyance or transfer on sale of any property by relation to the amount or value of the consideration for the sale." Under the Stamp Act of 1870 the *ad valorem* duty for a transfer on sale is 10s. per £100. *Held* that the transfer of a debenture-bond of a land company incorporated under the Companies Acts was a marketable security within the meaning of the Stamp Act of 1870, and that the duty chargeable on the transfer of such a security was 10s. per £100.

In May 1887 the Texas Land and Cattle Company (Limited), under the powers of their articles of association, borrowed from the Rev. John Gillies, Arbroath, the sum of £200, which they bound themselves, in the debenture granted therefor, to repay in May 1890.

In May 1888 a transfer of the said debenture

was executed by the executors of the said Rev. John Gillies in favour of Miss Ellen Parkin, residing in Dundee.

In June 1888 the company forwarded the deed of transfer to the Commissioners of Inland Revenue in order to have their opinion as to the stamp-duty with which the instrument was chargeable.

Sec. 13 of the Act 51 Vict. c. 8, provides as follows:—"There shall be charged upon a transfer . . . of any debenture . . . being a marketable security . . . the following duties:—Where the transfer, assignment, disposition, or assignation is on sale, the same *ad valorem* duties as are now charged under the Stamp Act 1870 upon a conveyance or transfer on sale of any property by relation to the amount or value of the consideration for the sale."

The Stamp Act 1870 defines a "marketable security" as follows:—"'Marketable security' means a security of such a description as to be capable of being sold in any stock market in the United Kingdom." Under this Act the *ad valorem* duty for a transfer on sale is 10s. per £100. By the schedule of the said Act there are also charged the following stamp duties:—"(3) Transfer, assignment, disposition, or assignation of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment. For every £100, and also for any fractional part of £100 of the amount transferred, assigned, or disponed, 6d."

The Commissioners were of opinion that the bond or debenture transferred by the instrument was a "marketable security" under the definition above quoted, and that the instrument under the Act 51 Vict. c. 8, sec. 13, was chargeable with *ad valorem* conveyance on sale duty. They accordingly assessed the *ad valorem* conveyance on sale duty of £1 upon the transfer in respect of the consideration of £200, and the instrument being already stamped with the duty of 1s., they required payment of the further sum of 19s. The company thereupon paid the additional duty of 19s., and the instrument was duly stamped. They, however, declared themselves dissatisfied with the determination of the said Commissioners, on the ground that the bond and debenture transferred by the instrument in question was not a "marketable security," and that therefore the transfer was not chargeable under the Act 51 Vict. c. 8, with *ad valorem* conveyance on sale duty, but was chargeable, under the Stamp Act 1870 with the duty of 6d. per £100 or fraction thereof of the amount in the bond or debenture transferred, and that accordingly the instrument was already sufficiently stamped with the duty of 1s., being 6d. per cent. upon the amount in the bond or debenture transferred, viz., £200.

The company therefore demanded the present case.

The question for the opinion of the Court was —"Whether the said instrument is liable to be assessed and charged with the said *ad valorem* conveyance on sale stamp-duty charged under the Stamp Act 1870, or with the said *ad valorem* duty of 6d. per £100 or fraction thereof?"

Argued for the Company—The transfer was not a marketable security in the view of the Act of 1870. Such a security would not obtain a quotation on the Stock Exchange. A quotation contemplated a group or a class There could be no group or class in the case of a security like the present. It was a purely personal transaction, just as if the company had given its I O U. The Commissioners here had not supplied the grounds of their judgment; they might be in error, and their interpretation of the statute was strained, for it was anomalous to hold that an obligation which 2s. 6d. created and 6d. extinguished should require 10s. in order to transfer it.

Argued for the Commissioners—There was nothing in the nature of this security to prevent it being dealt with by a stockbroker. The word debenture in the Act meant a security granted by a public company as against a bond granted by a private individual, and the value of such a security depended on the stability of the company. In interpreting marketable security the word requiring to be construed was "capable." If it could have been shown that this deed was incapable of being sold on the Stock Exchange the case for the Commissioners would have been less favourable. A stock market was not necessarily, as urged by the other side, synonymous with a stock exchange, and there was nothing in the nature of this debenture to prevent it being dealt with in a stock market. Many stocks not quoted were constantly sold on 'Change. This was just a debenture by a trading company who were entitled to deal in such articles and the transfer of such a security fell to be charged on the scale adopted by the Commissioners.

At advising—

Lord Shand—The question in this case is, whether the transfer of a debenture of the Texas Land and Cattle Company (Limited) is chargeable with the stamp-duty applicable to an *ad valorem* conveyance on sale under section 13 of the Act 51 Vict. cap. 8, or is only chargeable with a duty of 6d. for every £100, and for any fractional part of £100 of the amount transferred, as a transfer or assignment of a debenture under the Stamp Act of 1870 (33 and 34 Vict. cap. 97), and relative schedule under the head "Mortgage Bond Debenture," &c., head 3? I am of opinion with the Commissioners that the instrument is chargeable with the higher duty under the Statute of 51 Victoria.

The decision of the question turns on the point whether the debenture in question is a "marketable security" within the meaning of the statutes. By the Act of 1870 a transfer of a debenture was liable only for the smaller duty of 6d. on each £100 or part of £100; but by the later Act it was provided (sec. 13) that in substitution of this duty there should be an *ad valorem* charge the same as is charged under the Act of 1870 on a transfer on sale of any property by relation to the amount or value of the consideration for the sale on a "transfer, assignment, disposition, or assignation, otherwise than on mortgage, of any mortgage, bond, debenture, or covenant (being a marketable security), or of any security for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company (being a marketable security)." If then the debenture in question be a "marketable security" within the meaning of the statutes,

the transfer of it on a sale is liable to *ad valorem* duty.

Now, the statute of 1870, sec. 2, assigns to the words "marketable security" a particular meaning. The words of the provision are—"Marketable security means a security of such a description as to be capable of being sold in any stock market in the United Kingdom." If the debenture assigned by the transfer in question falls within this definition or description of a marketable security, then the *ad valorem* duty is chargeable on the instrument of transfer.

The debenture is printed, and forms part of the case. The company registered as a limited company under the Companies Acts, has powrs under its articles of association to issue debentures under certain specified conditions, one of these being that a register of debentures shall be kept, in which entries shall be made of every debenture issued, and of all transfers of debentures, and another that the total amount shall not exceed the unpaid capital of the company, and the debenture itself, which bears to be No. 895, is in the terms in which such documents are frequently expressed. As authorised by the articles of association it contains an obligation by the company for the repayment of the sum of £200 lent, and periodical interest, and embodies a reference to the articles of association conferring a right on the debenture-holders to a proportional part with each other of the securities and assets of the company, and the free proceeds of the lands of the company in the event of these being sold.

The Commissioners, in the case stated under the appeal, have given no statement beyond a narration of the articles of association of the terms of the debenture and transfer, and no information as to whether the debentures of this company are *de facto* in use to be sold in any stock market in the United Kingdom. Their judgment is rested on the view that the debenture in question is a marketable security "under the definition above quoted."

For the appellants it was maintained that in order to be a marketable security within the meaning of the statutes (which are to be read as one statute) the security must either be one which has a quotation on the stock exchanges or stock markets, or at least must be one of a mass issued by a company as distinguished from a single deed or instrument such as the debenture in question, which might be the only debenture issued by the company.

It is clear that the term marketable security is used to designate a class or kind of securities. The words of the clause of definition are "a security of such a description." The words defining what the description embraces immediately follow, and the test provided by the statute is this—does the instrument fall within the description, what then is the description? such a description "as to be capable of being sold in any stock market in the United Kingdom." It must be observed on these words that it is not made the test of a security as being marketable (1) that it is a debenture, bond, or covenant of a company whose debentures, bonds, or covenants are in point of fact sold in a stock market, nor (2) that it is a debenture forming one of a class or series issued by a company. If the security be one of that general class of securities which is capable of being sold in stock markets, it is then a marketable security within the meaning of the statute. The test is whether the security is capable of being so sold. Now, in one sense every security might be included under this description, for I suppose any kind of security, if of value, may find a purchaser in the stock markets through the medium of agents or brokers. But it seems to be clear that the language of the statute is not to be interpreted so as to have this wide signification, for so to read it would be to include all securities of a class having any value, whereas the statute by the expression used professes and intends to include only securities of a particular description, viz., such as are capable of being sold in any stock market. It seems to me that the true interpretation of the clause must be to include as marketable securities all securities of such a description as to be capable, according to the use and practice of stock markets, of being there sold and bought. This will, on the one hand, exclude such securities as mortgages on land or proper heritable bonds, but, on the other hand, will include debentures of companies. If a holder of such a security as a debenture of a public company, which is the description of the security here in question, desire to sell it during its currency, while no doubt he might be able at times to procure a purchaser otherwise, he would, in the general case, resort to an agent or broker who transacts business on the stock markets, and so find a purchaser, and it is notorious that railway bonds and debentures are dealt in on the stock markets, for the quotations for many of these are daily published in the stock lists appearing in the newspapers. This is enough to show that a debenture of a company is not only in a wide but in a proper sense a security of such a description as to be capable of being sold in a stock market. It may be noticed that in section 69 of the statute of 1870, and the schedule under the head "Contract Note," the term marketable security is used with reference to the subject of a broker's or an agent's transactions, and it cannot, I should think, be doubted that debentures of railway or other companies bought or sold by a broker would be entered in his contract note in the same way as debenture stock or shares of a company. It may further be observed that if the provision of section 13 of the Act 51 Victoria is not to include such a debenture as is here in question as a marketable security by or on behalf of a corporation or company, it is not easy to give the words of the statute any practical effect, for by other provisions of the statutes the transfer of all shares and stocks of companies have been otherwise expressly made liable to *ad valorem* duties.

On the whole, I am of opinion that the determination of the Commissioners is right and should be affirmed, and that the transfer in question is liable to be assessed and charged with *ad valorem* conveyance on sale stamp-duty charged under the Stamp Act 1870.

Lord Adam—The materials for the decision of this question are contained within a very narrow compass. The security transferred was a debenture of the Texas Land Company, and what we have to decide is, whether such an instrument is a marketable security within the meaning of 33 and 34 Vict. cap. 97. If it is, the stamp-duty

chargeable is 10s. per cent.; if it is not, then the security escapes with 6d. per £100.

The Act supplies us with a definition of the words "marketable security"—[*His Lordship here read the clause quoted above*]—and the question comes to be, whether the transfer of this debenture bond was a security "capable of being sold in any stock market of the United Kingdom." Now, I can hardly imagine more comprehensive words. There must be some limitation contemplated by the Legislature, but I do not know where it is to be found. As regards the present case, however, there can be no doubt that this is a security which is saleable in a stock market. It is just the place to take such a security in order to sell it. The words of the clause "capable of being sold" point to a kind or description of security, and it certainly appears to me that the transfer of a debenture bond is a security which is capable of being sold in a stock market. I therefore think that this security falls to be dealt with under the Act 51 Vict. cap. 8, as liable for *ad valorem* conveyance on sale duty.

Lord Mure concurred.

The Lord President, who was absent at the hearing, did not deliver any opinion.

The Court affirmed the determination of the Commissioners.

Counsel for the Texas Company—Balfour, Q.C. —Lorimer. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Commissioners of Inland Revenue—The Lord Advocate, Q.C.—A. J. Young. Agent—D. Crole, Solicitor of Inland Revenue.

Friday, November 9.

FIRST DIVISION.

[Lord Lee, Ordinary.

MORLEY *v.* JACKSON AND OTHERS.

Jurisdiction — Arrestments ad fundandam jurisdictionem—*Question of Status—Amendment of Summons*—Forum Conveniens.

The child of a deceased person raised an action against his trustee, his widow, and his sister, concluding (1) for declarator of legitimacy on the ground of a putative marriage between the pursuer's parents; (2) for payment of legitim; (3) for payment of aliment in the event of decree not being obtained under the first two conclusions. The defenders were not resident within the jurisdiction of the Court, but it was averred that by arrestments *ad fundandam jurisdictionem*, jurisdiction had been constituted as regarded the trustee. By leave of the Lord Ordinary the pursuer amended her summons, and sued for decree under the summons, as the offspring of a legal marriage. *Held* that the principal question in the action being one of status, jurisdiction could not be founded by arrestments, and the action *dismissed*.

Opinions (*per* Lord Shand and Lord Adam) that the question of jurisdiction fell to be determined under the action as originally laid, and could not be affected by subsequent amendments; and further, that as the parties really interested as defenders were beyond the jurisdiction of the Court of Session, it was not *forum conveniens* to try the question with a party merely interested as trustee.

This action was raised by Agnes Mary Morley, against James Allen Jackson, as sole surviving trustee under the deed of settlement of the deceased Thomas Morley, Catherine Anderson or Morley, "widow of the deceased Thomas Morley," and Mary Ann Morley or Jackson, his sister. The pursuer concluded (1) for decree of declarator that she was the legitimate child of Thomas Morley; (2) for decree ordaining the defender Jackson to pay her legitim out of his estate; and (3) for decree ordaining the same defender to pay her an annual sum of aliment in the event of her not obtaining decree under the first two conclusions of the summons.

The pursuer was the daughter of Thomas Morley and Agnes Newberry or Morley, and in the action as brought, declarator of legitimacy was sought on the ground that there had been a putative marriage between her parents.

In support of the above conclusion the pursuer averred—"(Cond. 2) The late Mr Morley first married Helen Hunter, who belonged to Dumfries. She died without issue, and thereafter, in or about March 1868, he married the defender Catherine Anderson. He lived with her in lodgings, first at Newcastle-on-Tyne, and afterwards at Carlisle, until about 1873, when owing to disagreements between them they separated. They never lived together again, and they had no communication thereafter with each other. No children were born of the marriage with the said Catherine Anderson. After the separation Mr Morley returned to Scotland. (Cond. 3) Whilst living in Edinburgh in 1876, and in the beginning of 1877, Mr Morley courted Agnes Newberry, daughter of William Newberry, fishing-rod maker, Canongate, Edinburgh, with a view to marriage. He fraudulently represented himself as being free to marry, telling her that he was a widower, and she, being in complete ignorance that he had then a living wife, relying upon his representations, and *bona fide* believing that no impediment existed, agreed to marry him. Accordingly, after due proclamation of banns they were regularly married by the Reverend James Macnair, minister of the parish of Canongate, on 28th April 1877. A certificate of the proclamation of banns and of the marriage is produced. Thereafter they lived together as husband and wife at 27 Elder Street, Edinburgh, and on 22nd December 1877 the said Agnes Newberry or Morley gave birth to the pursuer. Mr Morley was father to the pursuer. On 2nd January 1878 he registered the pursuer's birth at the register of births for St Andrew's District, Edinburgh. The registration bears to be made by him as the father, and the pursuer is registered as a lawful child of his marriage with the said Agnes Newberry or Morley. An extract of the entry is produced. Mr Morley and the said Agnes Newberry or Morley con-

tinued to live together as husband and wife at various places in Edinburgh down till Mr Morley's death in 1877. During all that time the said Agnes Newberry or Morley was kept in entire ignorance of the fact that there was a surviving wife of a previous marriage. She became aware of that circumstance only after Mr Morley's death."

Thereafter by leave of the Lord Ordinary the summons was amended by deletion of the words in the designation of Catherine Anderson or Morley, "widow of the deceased Thomas Morley," and the ground of action was changed, the pursuer seeking decree on the ground that she was the offspring of a legal marriage between her parents. She now averred—"(Cond. 2) The late Mr Morley first married Helen Hunter, who belonged to Dumfries. After the marriage they lived for many years in Dumfries in a house of their own. Helen Hunter died on or about 25th February 1870 without leaving issue. The statement in the answer that Mr Morley married Catherine Anderson is denied. (Cond. 3) On 28th April 1877 Mr Morley married Agnes Newberry, daughter of William Newberry, fishing-rod maker, Canongate, Edinburgh. The ceremony of marriage was performed, after due proclamation of banns, by the the Reverend James Macnair, minister of the parish of Canongate. A certificate of the proclamation of banns and of the marriage is produced. Thereafter the parties lived together as husband and wife at 27 Elder Street, Edinburgh, and on 22nd December 1877 the said Agnes Newberry or Morley gave birth to the pursuer there. On 2nd January 1878 Mr Morley registered the pursuer's birth at the register of births for St Andrew's District, Edinburgh. An extract of the entry is produced and referred to. Mr Morley and the said Agnes Newberry or Morley took up house and continued to live together as husband and wife at various places in Edinburgh down till Mr Morley's death in 1887."

None of the defenders were resident in Scotland, and there was no averment that jurisdiction had been constituted as regarded Mrs Morley and Mrs Jackson, but with regard to Mr Jackson, the trustee, it was averred as follows:—"(Cond. 4) The late Mr Morley left considerable means, and the defender James Allen Jackson has entered upon the possession thereof, and has intromitted therewith. For many years prior to Mr Morley's death the defender Jackson, as general agent of the deceased, and also as the near relative of Mr Morley's only surviving sister and next-of-kin, the defender Mary Ann Morley or Jackson had the whole of the deceased's means and estate under his charge, and with deceased's consent administered the same. He also made large payments thereout when necessary and called on to do so by the deceased. Until after the present action had been raised, while alleging that he was acting as sole surviving trustee under a deed of settlement executed by Mr Morley, he, Jackson, refused to exhibit the deed to the pursuer's agent, or to give any information as to its provisions. Moreover he has refused to account to the pursuer for her interest in her late father's said means and estate. In these circumstances the present action has been rendered necessary." "(Cond. 5) The late Mr Morley at the time of his death, was tenant under formal missives of a house at 21 Salisbury Street, Edinburgh, and the defender Jackson, as trustee foresaid, is now the tenant thereof, and he has not only paid the rents formerly due, but he has also paid the rent due therefor at Martinmas 1887, and the taxes, rates, and others recently due in respect thereof. The said defender Jackson, or his firm of J. A. Jackson & Son, solicitors, 22 Parliament Street, Hull, are cautioners and full debtors for the rent of said house. The pursuer has also used an arrestment *ad fundandam jurisdictionem* against the said defender, conform to execution thereof, herewith produced and referred to, attaching furniture and effects belonging to him as trustee foresaid. Said furniture and others were bought by the defender Jackson, and paid for by him out of the funds and estate of the deceased Mr Morley in his hands."

The pursuers pleaded, *inter alia*—"(1) The pursuer, as the only lawful child of the late Mr Morley, is entitled to a share of his moveable estate, and the defender Mr Jackson, having intromitted therewith, is bound to account to her therefor. (2) Failing an accounting, the pursuer is entitled to decree of payment against the defender Mr Jackson, as concluded for in the second place. (3) In the event of the pursuer failing to obtain decree of count, reckoning, and payment as concluded for, she is entitled, as the child of the late Mr Morley, to aliment as concluded for. (4) *Separatim*, In the event of the defenders succeeding in establishing as valid the alleged marriage of the deceased with the defender Catherine Anderson, decree of declarator of legitimacy ought to be pronounced as concluded for."

The defenders pleaded, *inter alia*—"(1) No jurisdiction, in respect that (1) no funds belonging to the defenders or any of them were attached by the arrestment, and (2) that an arrestment *ad fundandam jurisdictionem* does not subject questions of status to the jurisdiction of the Court. (3) The deceased Mr Morley having been a domiciled Englishman, and the English law not recognising legitimacy by a putative marriage, the pursuer cannot obtain decree of declarator as concluded for.

The Lord Ordinary (Lee) on July 12, 1888, pronounced the following interlocutor:—"The Lord Ordinary allows the summons to be amended at the bar by the deletion of the words 'Widow of the said deceased Thomas Morley:' . . . Further, having heard counsel in the procedure roll, and considered the cause with the minute for the curator *ad litem*, before further advising allows to the pursuer and defender James Allen Jackson a proof of their respective averments in articles 4 and 5 of the condescendence and answers thereto, so far as relating to the jurisdiction as against the said defender.

The defenders reclaimed, and argued—No jurisdiction could be founded by arrestments to try questions of status, and the principal question here was of that kind; the action should therefore be dismissed—*Scruton* v. *Gray and Another*, Dec. 1, 1772, M. 4822. The action as originally laid very clearly involved a question of status, and it was with reference to that period that the question of jurisdiction must be determined. Even if jurisdiction had been founded against the trustee, this Court was not a *forum conveniens* to try the questions involved in the action, as

there was admittedly no jurisdiction over the two defenders really interested in the result of the case—*Brown's Trustees* v. *Palmer*, December 17, 1850, 9 S. 224.

The respondent argued—The arrestments used founded jurisdiction against Jackson. This was mainly a petitory action. The other conclusions were ancillary to the conclusions for payment.

At advising—

LORD MURE—The pursuer of this action sets forth in the summons that she is the daughter and only child of the deceased Thomas Morley, and concludes, first, for declarator of legitimacy; second, for count, reckoning, and payment; and third, for payment of a sum as aliment in the event of the pursuer not obtaining decree in terms of the two first conclusions of the summons. The parties called are Mr Jackson a trustee under two marriage-contracts of the pursuer's father in the English form, and other two, viz., Mrs Catherine Anderson or Morley, designed in the summons as it was originally brought as widow of the deceased Thomas Morley, the pursuer's father, and Mrs Mary Ann Morley or Jackson. These parties all are resident in England, and this Court plainly has no jurisdiction against them, unless something has been done to create jurisdiction in the manner competent. It is alleged that jurisdiction has been founded by arrestments *ad fundandam jurisdictionem* against Mr Jackson—it is alleged that such were used against him—but there is no allegation of the kind as to the other defenders. In these circumstances the defenders come forward and plead "no jurisdiction." Their first plea in law is—"No jurisdiction in respect that (1) no funds belonging to the defenders or any of them were attached by the arrestment, and (2) that an arrestment *ad fundandam jurisdictionem* does not subject questions of status to the jurisdiction of the Court." Now this plea is plainly good as regards the two defenders Mrs Morley and Mrs Jackson, as they are resident in England and no arrestments have been used against them. In a question with them clearly the jurisdiction of this Court cannot be maintained, and they are entitled to have the action dismissed as regards them on that ground.

The case of Jackson is rather different. Certain funds have been arrested and the pursuer says that she has thus constituted jurisdiction against him. It is with the view apparently of disposing of that question that the Lord Ordinary has pronounced the interlocutor reclaimed against, by which the Lord Ordinary "allows to the pursuer and to the defender James Allen Jackson, a proof of their respective averments in articles 4 and 5 of the condescendence and answers thereto, so far as relating to the jurisdiction as against the said defender." That applied to the question as to whether there had been arrestment of funds sufficient to constitute jurisdiction or not, and if we were dealing with a purely petitory action the course taken by the Lord Ordinary would have been the natural one to follow in view of the contradictory statements of the pursuer and defender as to the funds which have been arrested. This, however, is not an ordinary action of payment, but in substance and in its leading conclusion is an action of legitimacy to constitute status. That is the nature of the action, and the defenders have brought the interlocutor of the Lord Ordinary under review on the ground that his Lordship was mistaken in allowing proof, because no jurisdiction could have been founded by the arrestments, as the action was one for regulating status, and in such actions jurisdiction cannot be constituted by arrestments against parties. We have heard parties, and have been referred to certain cases, particularly the case of *Scruton* v. *Gray, &c.*, dated in 1772, M. 4822. Now, it appears to me that substantially the same question was raised and decided in that action as is before us here. The action was one for declarator of marriage, not of legitimacy, brought against a native of Ireland, who had been a student in Glasgow, and who was alleged to have entered into some arrangement and been married there. There was a conclusion for declarator of marriage, and a petitory conclusion for aliment in the event of the conclusion for declarator of marriage not being established. The objection was raised that jurisdiction could not be constituted by the arrestment of funds belonging to a foreigner in the hands of a person in Glasgow when the action raised a question of status, and the Court had that matter seriously under its consideration. The case was first argued before the Commissary, who repelled the objection. There was then a hearing in presence, when their Lordships unanimously came to the conclusion that jurisdiction could not be founded by arrestment in order to try a question of status. There is, I think, nothing in the circumstances of the present case to distinguish it from the principle of that case. That action was for declarator of marriage, and in the event of that declarator not being obtained, for aliment; this action is for declarator of legitimacy, and in the event of that not being obtained, for aliment. It therefore appears to me that there is no occasion to do as the Lord Ordinary has done, and I think, on the authority of the case I have mentioned, we ought to recal the Lord Ordinary's interlocutor and dismiss the action on the plea of no jurisdiction.

LORD SHAND—I have had no difficulty in coming to the same conclusion. As this action was laid and originally brought into Court I think it was scarcely maintained that there was jurisdiction, and at all events if it was to be decided on that footing, I should find that there was no jurisdiction, because the pursuer in the action as laid expressly set forth that her purpose was to have it decided that she was legitimate because of a putative marriage between Agnes Newberry, her mother, and the deceased. Now, that was stated, because the pursuer set forth that at the time of her mother's marriage to Morley he had been previously married to a lady in England, who still is living, and in the summons she was designed "widow of the deceased Thomas Morley," and in the narrative of facts for the pursuer it was set forth that Mr Morley, her father, had married in 1868 Catherine Anderson, and had lived with her as her husband for five years.

Another defender was the sister of Mr Morley, who was represented as being interested in respect of her legal rights on his estate, which she would lose in the event of the putative marriage being established.

In the case as so presented it is quite clear, in the first place, that this was an action for declarator in regard to status, and next, that the proper defenders were not the defender Jackson, who was a mere holder of funds, but the widow of the deceased and the sister of the deceased. The parties who were principally interested were, first, the person who had the status of widow of the deceased, and secondly, the person who had a right to share in his estate, as Lord Mure has pointed out. It was not suggested that there was jurisdiction against the widow or sister, and the only question was, whether jurisdiction had been constituted against Jackson by certain arrestments which have been used. That arrestments are of no avail in establishing jurisdiction in questions of status is certain; that there was no jurisdiction by residence is admitted, and therefore it is perfectly plain that the action as laid, served, and called was subject to the fatal plea that there was no jurisdiction. But it is said that after the defenders had appeared and pleaded no jurisdiction, the pursuer got rid of the force of that plea by extensive alterations and amendments, and made it a good action. I am of opinion that if an action is bad because there is no jurisdiction over the defenders when it is served, it cannot be made a good action by subsequent alterations. It must remain bad. It would indeed be an anomalous proceeding if, in an action where the Court had at first no jurisdiction, it being a declarator of legitimacy, it were possible to introduce amendments to convert it into an action for a pecuniary claim, and so make it one where the Court had jurisdiction. No doubt an extensive power of amendment is allowed by the Court of Session Act of 1868. It is permissible to make such amendments as will enable the real question between the parties to be tried where it has not been properly raised at first. Such an amendment, however, as the above would be quite beyond what was intended by the Act. The pursuer's contention appears to me to amount to an attempt to evade the real questions under the action by limiting it to the petitory conclusions.

I should also have thought that the pursuer could not effect her purpose under the petitory conclusions alone, but upon those as following upon the conclusions for declarator of legitimacy and payment of legitim. And it is only as having a declarator of status that she can maintain the other conclusions.

Jackson is called, and it is said there is jurisdiction against him. He has, however, no interest in the case. The real parties to the case are the person who claims to be the widow of the deceased and the sister of the deceased. There is no jurisdiction against them, and I am of opinion that the action cannot be sustained even against Jackson.

But even if there was jurisdiction against Jackson, I should have no difficulty in holding that, looking to the fact that the real defenders are out of the jurisdiction of the Court, the action would fall to be dismissed on the plea of *forum non conveniens*, as the proper parties to it are not here.

Lord Adam—I do not think that any alteration on the conclusions of the action as brought can alter the question of jurisdiction. Since the action was brought there has been a great change. When the action came into Court—when it was served and called—it was an action of declarator of legitimacy, and it was nothing else. The other conclusions were quite clearly ancillary to that. That was the time at which to consider the question of jurisdiction. It is obvious that if the Lord Ordinary had no jurisdiction then, he had no power to write any interlocutor in a cause where he had no jurisdiction. His only course was to dismiss the action. He had no power to allow amendments to be made on the summons, or to pronounce a binding order, and therefore the proper time to decide the question of jurisdiction was when the action was brought into Court. I am of opinion that there was no jurisdiction in this case as the action was brought.

But if we are to take the action as now laid, I am still of the opinion that there is no jurisdiction, because in its main conclusion it is an action of declarator of legitimacy, and that is the real character of the action. Now, that being so, on the authority of *Scruton* v. *Gray*, as Lord Mure has said, arrestments have no effect in founding jurisdiction in a question of status.

I agree with Lord Shand that if we had jurisdiction against Jackson, we have no jurisdiction over the parties really interested as defenders, namely, the widow and sister of the deceased Thomas Morley, and I think that this is not a *forum conveniens* to try the case with a party allowed to be merely interested as a trustee.

Lord Mure—I reserve my opinion on the last question. I did not consider it to have been raised, and I do not know what course the parties may take in the future.

The Lord President was absent.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action in respect of no jurisdiction.

Counsel for the Defenders (Reclaimers)—Balfour, Q.C.—Graham Murray. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Pursuer (Respondent)—Strachan—Wilson. Agent—Andrew Newlands, S.S.C.

Friday, November 9.

SECOND DIVISION.

[Sheriff of Aberdeen.

ROSS *v.* KEITH.

Reparation — Children Drowned in Pond in Private Ground—Reasonable Precautions for Safety of the Public.

Two children were drowned in a pond in private ground near a public thoroughfare. In an action by their father against the proprietor, it was proved that there was an entrance to the ground from the thoroughfare by a gate in the boundary wall, but that nearer the pond there was a paling with a gate, which had been left open by someone unknown, and it appeared that the children strayed by these means from the public road to the pond. *Held* that the death of the children was not attributable to the fault of the defender.

This was an action in the Sheriff Court of Aberdeenshire at the instance of David Ross, joiner, residing at Brickhouse, Pitmuxton, in the county of Aberdeen, against William Keith junior, granite merchant, King Street, Aberdeen, to recover damages for the loss of two children who were drowned in a pond situated upon the property of the defender. The pursuer averred that the children were drowned through the fault of the defender, in allowing this pond, which was unsafe and dangerous, to remain unfenced and unprotected, and in giving unrestricted access thereto without using effectual measures to prevent accidents to young children. Further, that many persons made a practice of visiting the ground in question.

The defender averred that the ground was properly fenced, as the place was private property, and not a place of public resort.

It appeared from the proof that the pond covered the area of a disused brickwork, and was within 25 yards of the Hardgate, a public thoroughfare leading to Aberdeen. The ground on which the pond was situated was the property of the defender, and it was only possible for the public to obtain access to it at one point. On the south the line of the Deeside Railway ran upon a steep embankment which was well fenced; on the east it was separated from the public road by a considerable tract of agricultural and cultivated ground; on the north it was enclosed by a substantial stonewall; and a similar wall in the Hardgate was the western boundary. In the last of these there was an opening 15 feet wide leading to a house belonging to the defender built on a platform or area of ground overlooking the pond at the steepest part of the bank. This area was surrounded by a paling, partly four-barred and partly three-barred, in good condition, and forming a sufficient fence. The paling was formerly continuous, but the tenants of the house had for their convenience placed in it a gate 4½ feet wide which was secured by a loop of rope fastened to the gate and passed over an upright bar of the paling. From the gate there was a footpath on the top of the bank of the pond. The ground was sometimes resorted to by children and others, but whenever trespassers were observed they were turned away by the defender's tenants, who had instructions to do so.

On the day in question, Mrs Ross, the wife of the pursuer, had gone into Aberdeen, leaving her five children at home, the eldest of whom was Dorothea Ann, 8½ years old, and the youngest, Violet, 2½ years old. The children went along the Hardgate, and passed through the opening in the wall, through the gate in the paling which was open, and down to the pond. There was no evidence to show by whom the gate had been left open. The bank at this point was nearly perpendicular, and the water was 5 feet deep. While playing upon the bank, the youngest of the children fell in and was drowned, and the eldest was also drowned in an attempt to save her.

The Sheriff-Substitute (Brown) found that the children were drowned through the fault of the defender in not shutting off the opening in the Hardgate from the public, and in allowing a gate to be made in the said paling without providing appliances for its being kept shut when not in use.

On appeal the Sheriff (Smith) recalled this interlocutor, and assoilzied the defender from the conclusions of the action.

"*Note.*—In my opinion there was no liability on the defender. It has been decided that when a proprietor brings on his land an accumulation of water he is bound to keep it there and prevent it from doing injury to his neighbour, but it has never been held that a proprietor is also bound to keep the public from getting to it. If this had been an unenclosed piece of ground on which the public might have strayed from the highway, and it had come to be used as a place of resort for young children, it would have been the duty of the proprietor to take some measures for their protection by fencing the source of danger, but in point of fact the ground was completely fenced all round against the public, and any person who succeeded in reaching the pond must be considered as either a licensee or trespasser to whom the proprietor is under no obligation. No doubt there were openings in the fence, but none which were not necessary to enable the proprietor to make use of his property. On this particular occasion the children coming along the road had found their way first to the front of the house, then to the garden by an inner gate which happened to be open, and finally to the pond, where two of them unfortunately fell in and were drowned. I fail to see that the proprietor was in any way responsible for the accident. It was not with his consent that the children were there at all. He had imagined that his fence was sufficiently strong for the purpose, and he was right in that belief, for if the garden gate had not been left open they might not have got through. The primary fault, if any, was thus with the tenant and not the defender. The case seems to be an attempt to create a liability not *ex delicto* but *ex domino*—to make a man responsible in virtue of the ownership of the property and not because he had done wrong to another—a species of liability which the law of Scotland does not recognise. I therefore come to the conclusion that the action is altogether unfounded, and I assoilzie the defender with costs."

The pursuer appealed to the Court of Session, and argued—This was a dangerous place, and the defender should have had a gate upon the opening in the wall from the Hardgate, and also a gate in the paling that would have kept shut when not used—*M'Feat* v. *Rankin's Trustees*, June 17, 1879, 6 R. 1043; *Beveridge* v. *Kinnear & Company*, December 21, 1883, 11 R. 387. The defender should have anticipated danger to children, and taken proper means to prevent any injury happening to them. The place was near a public thoroughfare, and was itself frequented by the public; a special duty was thus laid upon the defender — *Balfour & Baird* v. *Brown*, December 5, 1857, 20 D. 238; *Forbes* v. *Aberdeen Harbour Commissioners*, January 24, 1888, 15 R. 323; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Galloway* v. *King*, June 11, 1872, 10 Macph. 788; *Clark* v. *Chambers*, April 15, 1878, L.R. 3 Q.B.D. 327.

Argued for the defender—The place was fully fenced. This was private property, and there were fences round it to warn the public that they were excluded therefrom, and that they would enter it at their own risk. There was no obliga-

tion upon a proprietor in whose land a dangerous place was situated to have such fences that no child could get over them. It was enough to have them as a warning to trespassers. All the cases referred to were instances of dangerous places adjacent to the public road, and into which any person might stray while going about his ordinary business. The children had lost their lives though their own fault—*Murray* v. *Lanarkshire Road Trustees*, June 12, 1888, 15 R. 737.

At advising—

Lord Justice-Clerk—The pursuer in this case sues for damages for the loss of his two children, who were drowned by falling into a pool of water in a disused clay-field belonging to the defender. There is a question whether this piece of ground with the pond in it was a place of public resort, or at least a place where the presence of the public was tolerated. I do not think that this was a place of public resort. It appears to me to be the effect of the evidence that the defender, both by himself and by his servants, did all that could reasonably be expected of him to prevent people from frequenting this ground. The import of that evidence is that people, and particularly children, were driven off by the defenders' servants, and that even at the time when they most frequently came, namely, during frost, when people will trespass over any ground in order to get to a sheet of ice. No doubt people did come at times, children particularly, but so far as the evidence goes they came from all quarters, and over all obstacles that might be put in their way. There is evidence of this now in the case of the two poor children who were so unfortunately drowned. They had been seen only the day before clambering over a high stone wall to get to this very piece of water. I cannot hold that the proprietor or his tenant was bound to do more than use all reasonable endeavours to prevent children getting to the pond, and to show that they did not intend to allow people to enter the ground. The question is, seeing that children did in fact come there sometimes, whether all reasonable care was taken to warn them not to do so, and by fencing off the dangerous locality to prevent them from straying into it.

I think it may be taken that the faults which the pursuer says are imputable to the defender in this matter are three in number. The first is that the fence separating this ground from the public road, which was a stone wall, had an opening in it which was not secured against the entrance of the public by any gate. In the second place, it is stated that the fence which enclosed the portion of the field containing the pond as well as a house in the occupation of a tenant of the proprietor—a stob and rail fence—had a gate in it which could easily be opened by anyone, even by a young child. Third, it is made matter of complaint that there was no special protection by fencing of the dangerous portion of the pond, where the bank was abrupt and the water deep.

As regards the first of these alleged faults, it appears that the opening was made in the stone wall so as to give an entrance to a house which had been built on the ground inside the stone wall. It was an opening for the convenience of the inhabitants of that house, the tenants of the defender, and I think there was no obligation upon the defender to place, and that it would have been contrary to reason and practice to require him to place, any gate or fence at the wall to close this opening. It was just a *cul de sac* road, leading off the public road, for the benefit of the inhabitants of the house, and for nothing else. A private house standing in its own grounds may have a gate at the entrance to the avenue, but that is from a desire for privacy, and not from any regard to the safety of the public, and that there must be a gate across the entrance to the road leading to a house like that here in question is a proposition which in my opinion cannot be maintained. I am of course here assuming that there is no dangerous place along the road near the house, and accessible by the opening in the wall at the house, which is insufficiently fenced against members of the public who may happen to come in at the opening, and that brings me to the second question.

That question relates to the fencing of the ground containing the pond. Now, there was a fence separating off that ground, and the question is, whether this fence was not, unless disregarded, a sufficient protection of the ground fenced off on the assumption that it was dangerous. Originally it appears to have been a continuous fence, but one of the former tenants, who had a cabbage yard in the ground beyond the fence, inserted a small wicket gate into it—probably a hurdle gate—with a hinge of rope at one side, and on the other a loop passing over the nearest stob of the fence. Was that a sufficient fencing off of the dangerous piece of ground? In my opinion it was quite sufficient. I do not see what other fence could have been put up, unless it is contended that it was the duty of the defender to put up an impassable fence—that is to say, one which children could not get beyond either by climbing over or creeping between the bars. I cannot hold that it is the duty of the proprietor to make his ground practically impregnable to children. I am unable to hold that there is any duty on him to do more than indicate to the public when they are passing beyond what is intended for their use, and a stob-and-rail fence is in my opinion quite sufficient for that purpose. To hold that every piece of ground which contains some place or something that might be dangerous to children must be so fenced that children can enter only by what is practically a mode of siege would be to lay an intolerable burden on proprietors. That is my view of the case, on the footing that the fence had remained as it originally was, a continuous fence. Does the fact that a wicket gate was made in it make any difference? In my opinion it does not. I think children of eight, or even younger, can be instructed not to go through such gates leading to dangerous places, but even if they cannot be so instructed, it would in my opinion be to lay too heavy a burden on proprietors to hold that they must so fence that children cannot get in. It is hard no doubt upon poor people who cannot afford to hire persons to look after their children and to keep them out of danger that their little ones are exposed to more risk than those of others, but I cannot see that the burden of protecting

such children should on that account be laid on the neighbouring proprietors, and as my brother Lord Young remarked in the course of the discussion, it is wonderful how few children meet with accidents of this sort notwithstanding the absence of protection. I cannot hold that the existence of this gate, whether it was opened by these children themselves or was left open by other children who had gone in before them, is a ground for making the defender liable as being in fault.

That leaves only the third objection, that there was no special fence at the pond itself. If the opinion that I have already given that the fence was a sufficient warning to the public not to enter be sound, the proprietor was entitled to assume that the public would not disregard his warning, and consequently he was not bound to erect any special fence round the pond itself. No doubt there have been cases in which it has been held that the proprietors or tenants of dangerous places, such as quarries, are bound to erect fences so that persons may not unwittingly fall into any dangerous place, and so be injured or even killed. But then I think these cases proceed upon the principle that such places must be protected, because persons in the exercise of their lawful calling, or in the use of the public highway, have to go so near that a slight deviation in the dark would lead them into the danger unless the spot is properly fenced. That, I think, is the principle of the case of *Black* where there was a pit only some four yards from the public road, at a point where the road forked off in two directions, and there was no fence or anything to warn the public of the proximity of the danger. That is a very different case from the present. This hole into which these children fell is not a place of public resort; it is not on the road to any place, or dangerously near the road to any place, and as I have already said, the public were in the day time sufficiently warned by the stob-and-rail fence not to go there, and there is no suggestion that people were in the habit of going near the pond at night. It is said, however, that such a place, because it is dangerous, must be child-proof, so that children should be unable to creep through or climb over, even although they can only get at it by passing fences. I cannot assent to such a doctrine. The question is whether the place was reasonably safe—whether such precautions were taken as are in accordance with the rules of common sense, and I think it would not be in accordance with the rules of common sense to require the approach to all places like this to be made child-proof.

There is another class of cases from which the present is easily distinguishable. I mean cases in which articles are left in such a position as to be a source of danger if interfered with, and so as to be a temptation to children or idle persons to interfere with them. If children by touching an article which is lying in a place they are in the habit of frequenting, and to which they have easy access, may bring down a heavy weight on their heads, or cause a dangerous explosion, it may well be that the proprietor should be held liable for having left this source of danger exposed. Similarly there is the sort of combination of circumstances which occurred in the case of *Beveridge* v. *Kinnear*, where the flap-door of one floor of a warehouse was knocked on to the street by a bale of goods which was being lowered into a cart from a higher floor, and killed a man in the cart. There the Court held—and in my opinion most properly held—that it was the duty of the proprietor of the flat from which the door fell to have the door fastened in such a way as to meet all reasonable contingencies, of which the lowering of goods from the flat above was one, and that as he had failed in this duty he was liable in damages for the accident. Cases like these seem to me easily distinguishable from the present.

On these grounds I have come to the conclusion that the judgment of the Sheriff is right, and ought to be adhered to.

Lord Young—I am of the same opinion, and substantially upon the same grounds. We have to consider in this case whether the pursuer has proved any fault upon the part of the defender or his servants, for whom he is responsible, and I am of opinion that he has not done so. This is not a case of an existing danger which people may come upon unawares and so receive injuries. The typical case of such a danger is an unfenced pit in a field where people might easily stray and be injured; in such a case it might be a reasonable duty upon the proprietor to see that the source of danger is removed. But a pond of water is quite a manifest thing; its dangers are as manifest as could be those of a river, but the statement of law that any proprietor through whose grounds a river runs, would be bound to fence that river in such a way as to make it impossible for children who played upon its banks to get into danger would be manifestly extravagant. There is nothing that the public desires so much as free access to river banks, and they would resent bitterly any fencing which kept them from these banks, although no doubt children do sometimes get drowned when playing beside rivers.

The accident in this case occurred in broad day-light, and these children had not strayed unwittingly to the danger, but they went determined to make their way to this piece of water. Even if this piece of water had been in quite an open piece of ground, I do not think that the proprietor would have been responsible for the children being drowned. The danger of going near the water was obvious to everyone, and even if it had been shown that there was an invitation to children to come and play by this pond, I do not think that that would afford ground for suggesting liability on the proprietor. What about the lochs near Edinburgh. Is St Margaret's fenced, or Dunsappie, or Duddingston? and yet I think both children and grown-up people have been drowned in Duddingston. Some people even trespass over a proprietor's grounds in order to get to some ornamental piece of water, but it could not be said that the proprietor of the ground over whose lands they thus trespassed was liable for any damage that happened to them. If my view of the law is right, then there was no case here to be sent to trial at all, and if it be wrong, then we must hold that every piece of water, even the sea, must be fenced where children go to play, and where they might fall in and be drowned.

Lord Lee—I think it well settled that the

mere property of a subject from which damage arises is not sufficient by itself to render the proprietor responsible for the damage. There must be negligence on the part of the proprietor. He must have failed to perform some duty which the circumstances imposed upon him and the neglect of which led to the accident. If one digs a pit on his property close beside a public road he may be liable for the damage suffered by another who falls into it, on the ground that such use of his property in the circumstances imposed on him an obligation to use reasonable precautions against an obvious danger to the public using the road. But the mere existence upon a man's private property of a pit, a pond, or a precipice, will not create liability; and I do not think that the case of *Black* v. *Cadell* has ever been regarded as establishing any doctrine to the contrary. The question then here is, whether the defender was guilty of any negligence? On that question (which is a question of fact) I concur in the opinion that the evidence does not shew that the accident to these poor children occurred through any fault of his. It does not shew that the place was insufficiently enclosed or that the pursuer's children fell into the water through any neglect for which the defender is responsible. I think he cannot be held responsible on account of a gate having been left open by some-one in the absence of proof that he is answerable for the negligence of the person who so left it. The case is essentially different both from the case of *M'Martin* v. *Hannay*, 10 Macph. 411, and from that of *M'Feat* v. *Rankin's Trustees*.

The Court pronounced this interlocutor:—

"Find in fact (1) that on 13th July 1887, Dorothea Ann, and Violet, children of the pursuer, aged respectively 8½ and 4½ years, were drowned in a pond on the defender's property at Pitmuxton, covering the area of a disused brickwork; (2) that the pond was not a place of public resort, and that it was sufficiently fenced off from the public road: Find in law that the death of the said children is not attributable to any fault on the part of the defender: Therefore dismiss the appeal, affirm the interlocutor of the Sheriff appealed against," &c.

Counsel for the Appellant—Watt—Menzies. Agent—Andrew Urquhart, S.S.C.

Counsel for the Respondent—Salvesen. Agent—Alexander Morison, S.S.C.

Tuesday, November 13.

FIRST DIVISION.

YOUNG AND OTHERS, PETITIONERS.

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 3—*Trustee—Appointment of New Trustee*—Nobile officium.

Where in a sequestration under the Act 33 Geo. III. cap. 74, the bankrupt, the trustee, and the commissioners were all dead—neither the bankrupt nor the trustee having been discharged—and there remained, more than eighty years after the sequestration, certain funds to be distributed, the Court, on the petition of the representatives of one of the commissioners, in the exercise of its *nobile officium*, remitted to the Lord Ordinary on the Bills to appoint a meeting of creditors to be held for the election of a new trustee and new commissioners.

By the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 3, it is, *inter alia*, enacted that all proceedings occurring on or after the date of the Act coming into operation in sequestrations which have been awarded before it under former Acts, "shall, if and as soon as an interlocutor to that effect pronounced by the Lord Ordinary shall become final, or if and so soon as an interlocutor to that effect shall be pronounced by the Court, be regulated by this Act."

The estates of Robert Murray, Tain, were sequestrated in 1808 under the Act 33 Geo. III. cap. 74, and Alexander Stronach was appointed trustee. The estate was distributed, and certain dividends paid, and in 1826 there remained in bank £230 to meet contingencies and a balance due to the trustee. That sum was thereafter allowed to remain in bank, and apparently neither the bankrupt nor the trustee were ever discharged. The bankrupt, the trustee, and the commissioners being all dead, the representative of one of the commissioners, with concurrence of the trustee's testamentary trustees, presented a petition for revival of the sequestration in order to have the balance of the estate, now amounting to £1362, 10s., distributed.

The petitioners stated that they were in doubt whether in the circumstances the provisions of section 74 of the Bankruptcy Act relative to the election of new trustees in sequestrations were applicable to the present case. If that procedure were to be followed it would be necessary for the new trustee when elected to convene a second meeting of creditors to elect commissioners in terms of section 75 of the statute. The petitioners suggested that it would be a more convenient course were the Court, in exercise of its *nobile officium*, to remit to the Lord Ordinary officiating on the Bills, or to the Sheriff of Inverness, Elgin, and Nairn, at Elgin, to appoint a meeting of creditors to be held in Elgin for the purpose of electing simultaneously a new trustee and new commissioners.

Authorities—*Thomson*, December 17, 1863, 2 Macph. 325; *Gentles*, November 22, 1870, 9 Macph. 176.

Evidence having been produced that the representatives of the bankrupt alive and in this country had been communicated with, and had resolved not to sist themselves *hoc statu*, the Court pronounced this interlocutor:—

"Order and direct that the future proceedings in the process of sequestration of the estates of the late Robert Murray, sometime corn-dealer at Hartfield, near Tain, shall, from and after this date, be regulated by the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), and Acts explaining and amending the same: Further, remit to the Lord Ordinary officiating on the Bills to appoint a meeting of the creditors of the said Robert Murray, to be held at such time and place as his Lordship may fix, to elect

a trustee or trustees in succession and commissioners on the said sequestrated estates, with the whole powers conferred by the said statutes, and to appoint said meeting to be advertised in the *Edinburgh Gazette*, and with power to remit to the Sheriff of the sheriffdom of Inverness, Elgin, and Nairn, at Elgin, to proceed further in said sequestration in manner mentioned in the statutes; and direct that the expense of this petition and of the proceedings to follow thereon shall form a first charge upon the funds of the estate."

Counsel for the Petitioner—M'Lennan. Agent—Thomas Liddle, S.S.C.

Thursday, November 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MUNRO *v.* M'GEOGHS.

Lease—Defective Possession—Retention of Rent—Abatement—Liquid and Illiquid.

In an action for payment of rent it is a relevant answer to support a claim for abatement that the tenant has never got entire possession of the subjects let.

In an action by a landlord to recover arrears of rent from two of his tenants, the latter answered that they were entitled to an abatement, averring, *inter alia*, that certain farm buildings had not been handed over to them in a tenantable condition as required by the lease. *Held* (following the case of *Muir* v. *M'Intyres*, February 4, 1877, 14 R. 470) that the averments of the tenant were relevant to support a claim for abatement.

This action was raised by Hugh Munro, heir of entail in possession of the estate of Barnaline, Argyllshire, against two of his tenants, William and James M'Geogh, to recover £64, 11s. 8d. alleged to be due to him as arrears of rent of the farm they occupied.

The pursuer averred that the farm was let at a rent of £125, of which £64, 11s. 8d., the sum sued for, remained unpaid, and denied that the defenders' counter claim for abatement was well founded.

The defenders in answer admitted that the sum sued for had been retained by them from the rent of the farm, but averred that they were entitled to abatement of rent in respect of the pursuer's failure to implement his part of the agreement with the defenders to an extent exceeding the sums retained by them. In particular, they averred that under the lease the pursuer was, *inter alia*, bound to put the buildings on the farm in good tenantable order before handing them over to the defenders, and to furnish the defenders with wood for fences, but that he had failed to do either of these things, and had thereby caused them loss to an extent exceeding the amount of the rent retained by them.

The pursuer pleaded, *inter alia*—"(2) The defenders' claim being merely one of damage and illiquid, cannot be set off against the pursuer's claim for rent. (3) The defences being irrelevant and insufficient, and unfounded in fact, the pursuer is entitled to decree as craved."

The defenders pleaded, *inter alia*—"(3) The pursuer having failed to implement his agreement with the defenders to put the buildings of the farm in repair and supply wood for fencing, whereby the defenders were deprived of the beneficial use and enjoyment of the subjects let to an extent exceeding the sums retained by them from their rent and now sued for, the defenders are entitled to retain said sums, and are now entitled to be assoilzied from the conclusions of the summons."

The Lord Ordinary (KINNEAR) on 26th July 1888, before answer, allowed a proof of averments, to proceed on a day to be afterwards fixed.

"*Note.* — The pursuer maintains that he is entitled to decree without inquiry into the disputed matters of fact, on the ground that a tenant is not entitled to retain rent on account of an illiquid claim of damages. But the defender is in possession under missives of lease by which it is stipulated that the barn, byre, and stable shall be handed over to him in tenantable repair. These buildings are portions of the subject let, and are indispensable for the beneficial occupation of the farm. If the defenders' averments are true in fact, he has not received full possession, and it follows that the landlord's claim is not liquid because he has not delivered the subjects in the state agreed upon. The case appears to me to be distinguishable from those in which it has been held that a liquid claim for rent cannot be met by an illiquid claim of damages for breach of a collateral obligation, and to fall within the rule laid down in *Graham* v. *Gordon*, 5 D. 1211, which has been followed in subsequent cases. The facts might probably be ascertained more economically than by a proof, but the pursuer declines in the meantime to consent to a reference or remit."

The pursuer reclaimed, and argued—If the tenant had any counter claim to the claim for rent it was one of damages merely. Such an illiquid claim could not be set off against a claim for rent. The averments of the tenant were not such as to constitute defective possession.

Authorities—*Macrae* v. *Macpherson*, December 19, 1843, 6 D. 302; *Dods* v. *Fortune*, February 4, 1854, 16 D. 478; *Graham* v. *Gordon*, June 16, 1843, 5 D. 1207; *Muir* v. *M'Intyres*, February 4, 1887, 14 R. 470.

The defenders were not called on.

At advising—

LORD PRESIDENT—I do not think that there can be the smallest doubt that there is here a relevant defence stated to the landlord's demand for rent, on the ground that the tenant has never been put into possession of certain of the subjects let to him, and that therefore he is entitled to an abatement of the rent corresponding to the amount of possession, which has not been delivered to him.

That doctrine has been recognised in a variety of cases, and it admits of no doubt at all as a doctrine of law. The principle was very well stated by Lord Fullerton in the case of *Graham* v. *Gordon*. His Lordship there says—"Rent is

not liquid in the sense that a sum due by bond is. It is a matter of contract in consideration of something to be done. It is paid for possession of the subject let. If the tenant says he has not got entire possession, that is a good answer to the claim for rent." That principle has been affirmed over and over again, and very emphatically in the case of *Muir* v. *M'Intyres* decided only last year, where a claim for abatement was rested upon the ground of the accidental destruction by fire of a part of the subjects let. The difficulty the Court had to deal with was that there was no fault on the part of either landlord or tenant, and the landlord very plausibly maintained that as the loss of possession was due to a mere accident, he was still entitled to the fulfilment of the entire contract of lease. It was held that the accidental destruction of a part of the subjects let put the case in the same position as if possession of part of the subjects had not been delivered. The case of *Muir* v. *M'Intyres* is in fact *a fortiori* of the present, and of every case where a landlord has not given full possession of the subjects let. The Lord Ordinary has stated his ground of judgment quite clearly and distinctly, and I have no doubt that it is sound.

Lord Mure and Lord Adam concurred.

Lord Shand was absent

The Court remitted to the Lord Ordinary to allow the defenders a proof of their averments in support of their claim for abatement of rent, and to allow to the pursuer a conjunct probation.

Counsel for the Pursuer (Reclaimer)—Graham Murray — Shennan. Agents — Gill & Pringle, W.S.

Counsel for the Defenders (Respondents)—H. Johnston. Agent—Peter Adair, S.S.C.

Saturday, November 17.

SECOND DIVISION.

WATSON *v.* CALLENDAR COAL COMPANY.

Poor's Roll — Appeal from Sheriff Court, and Reporters divided in Opinion.

A pursuer in a Sheriff Court action for damages for personal injury appealed to the Court of Session against a judgment of a Sheriff, affirming the judgment of his Substitute, and assoilzieing the defenders. The pursuer applied for the benefit of the poor's roll, and the reporters on the *probabilis causa* were equally divided in opinion. The Court (following the case of *Carr, &c.* v. *North British Railway Company*, November 1, 1885, 13 R. 113) *refused* the application.

Samuel Watson, surfaceman, Kerse Lane, Falkirk, raised an action in the Sheriff Court at Falkirk against the Callendar Coal Company, Falkirk, concluding for a sum in name of damages for personal injury alleged to have been sustained by him from the fault of the defenders.

The Sheriff-Substitute (Scott Moncrieff), after proof, assoilzied the defenders, and his judgment was affirmed by the Sheriff (Muirhead).

The pursuer appealed, and applied for admission to the poor's roll. A remit was made to the reporters in the *probabilis causa*, who reported that they were equally divided in opinion. It was stated that of the reporters there were one counsel and one agent on each side.

The pursuer moved the Court to admit. He admitted that the circumstances of the case were identical with those of *Carr, &c.* v. *North British Railway Company*, November 1, 1885, 13 R. 113, in which the First Division refused to admit, but argued that the case of *Marshall* v. *North British Railwoy Company*, July 13, 1881, 8 R. 939, was in his favour and that it was in the discretion of the Court to grant the application.

The defenders argued that the question was no longer open, and that the Court were bound to follow the unanimous judgment of the First Division in the case of *Carr* v. *North British Railway Company, supra.*

Lord Justice-Clerk—I think we must refuse this application.

Lord Rutherfurd Clark—I am of opinion that we are bound to plead the decision of the First Division in the case of *Carr*, in which the circumstances were precisely similar to those in the present case, unless we are to send this case to the whole Court to discuss, which I think unnecessary.

Lord Lee concurred

The Court refused the application.

Counsel for Applicant — Macnair. Agent—J. D. Turnbull, S.S.C.

Counsel for the Respondent—Dickson. Agents —Peddie & Ivory, W.S.

Saturday, November 17.

FIRST DIVISION.

[Sheriff of the Lothians.

NICOL *v.* JOHNSTON.

Process—Sheriff—Failure to Lodge Defences—Prorogation — Discretion of Sheriff — Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 6—*Sheriff Court Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 48.

The Statute of 1853, sec. 6, provides—"When any condescendence or defences . . . or other paper shall not be given in within the periods prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons, as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just." . . .

In an action in the Sheriff Court the Sheriff-Substitute decerned against the defender in respect his defences were not timeously lodged. On appeal the Sheriff, after

hearing parties, recalled this interlocutor, and allowed the defences to be received on payment of ten shillings of expenses. In an appeal to the Court of Session, *held* that the Sheriff had exercised a discretion conferred upon him by the statute of 1853, sec. 6, of which he had not been deprived by the statute of 1876, and that the Court would not inquire whether or not the Sheriff had exercised aright his statutory discretion.

The Sheriff Court Act 1853, sec. 6, provides that "When any condescendence or defences . . . or other paper shall not be given in within the period prescribed or allowed by this Act, the Sheriff shall dismiss the action, or decern in terms of the summons as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just." . . .

The Sheriff Court Act 1876 alters in certain ways the periods prescribed for the lodging of written pleadings, and sec. 48 thereof repeals sec. 15 of the Sheriff Court Act 1853, which provides for the dismissal of actions not prosecuted within a certain time.

On 15th September 1888 James Nicol, Edinburgh, raised an action in the Sheriff Court of the Lothians and Peebles at Edinburgh, against Robert Fleming Johnston, W.S., Edinburgh. Defences were due on 2nd October, on which date the Sheriff-Substitute, on the motion of the defenders, adjourned the diet for lodging defences for seven days, and granted leave to appeal.

On 19th October the Sheriff, having heard parties, recalled this interlocutor, and remitted to the Sheriff-Substitute to proceed with the cause. On 23rd October the Sheriff-Substitute, in respect defences were not timeously lodged, held the defender as confessed, and decerned against him in terms of the prayer of the petition.

The defender appealed to the Sheriff, who on 31st October pronounced the following interlocutor:—"The Sheriff having heard the agent for the appellant (defender) and the pursuer, on the appeal for the defender, Recals the interlocutor of the Sheriff-Substitute, dated 23rd October 1888, and allows the defences to be received on payment by the defender to the pursuer of the sum of ten shillings sterling, and remits to the Sheriff-Substitute to proceed with the cause."

The pursuer appealed to the Court of Session, and argued—The last day on which the defences were due was the 2nd October. Though this was the first Court day after the serving of the petition, the *inducia* for defences had expired, so a further prorogation for eight days was incompetent. As to the interlocutor of 31st October, the Sheriff was wrong in allowing the defences to be received on payment of a fine of 10s.; either no penalty should have been imposed, or one of £2 should have been exacted in terms of sec. 14, sub-sec. 1 of the Act of 1876. The Act of 1876 took away the discretion which the Sheriff had under the Act of 1853, sec. 6, for the periods for lodging pleadings, to which that discretion applied, had been altered by the former Act—*M'Gibbon* v. *Thomson*, July 14, 1877, 4 R. 1085; Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), secs. 14, 16 and 20.

Argued for the respondent—The interlocutor of the Sheriff-Substitute of 2nd October was admittedly pronounced in error and could not be defended. The case depended upon the provisions of the Act of 1853, which being not expressly repealed by the Act of 1876 remained, except when altered, in force. By sec. 6 of the Act of 1853 the Sheriff was vested with a discretion which he had exercised, and the Court would not interfere—*Bainbridge* v. *Bainbridge*, January 18, 1879, 6 R. 541.

At advising—

Lord President—The sixth section of the Sheriff Courts Act of 1853 provides—[*His Lordship here read the clause quoted above*]. Now, there can be no doubt that under this section the Sheriff is vested with a wide discretion as to prorogating the periods for lodging papers in the cause, provided the party in default offers a reasonable excuse for his delay. If this Act, then, is still in operation, and is applicable to the interlocutor of 31st October, it is clear that the Sheriff has exercised his discretion, and has allowed the defender to tender his defences on payment of a penalty of ten shillings.

It is urged, however, by the appellant that the provisions of sec. 6 apply only to the failure to lodge papers at the times specified in the Act of 1853, and that as these times have been altered by the Act of 1876, this clause can in no way regulate the procedure which ought to have been followed in the present case. The question, therefore, comes to be, whether the Act of 1876 does repeal the Act of 1853. Now, the 48th section of the Act of 1876 expressly repeals sec. 15 of the Act of 1853, and in so far also as the latter Act alters the former, it thereby repeals the earlier statute. To this, but to no further extent, the Act of 1876 can be said to repeal the Act of 1853. The discretion conferred upon the Sheriff by the earlier statute accordingly remains, and in the exercise of that discretion the interlocutor of 31st October was pronounced by the Sheriff. As to whether the Sheriff exercised his discretion rightly, that is a matter into which we shall never inquire. I am therefore for refusing this appeal.

Lord Mure and Lord Wellwood concurred.

Lord Shand and Lord Adam were absent from illness.

The Court refused the appeal.

Counsel and Agent for Appellant—Party.

Counsel for Respondent — C. S. Dickson Agent—Robert A. Robertson, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, November 21.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee.)

MUIR *v.* CAMPBELL (P.-F. OF J.P. COURT OF RENFREW).

Justiciary Cases — Public-House — Selling or Giving Out Liquor—Complaint—Relevancy—Locus—Summary Procedure Act 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 5—*Public-Houses Acts Amendment* (*Scotland*) *Act* 1862 (25 *and* 26 *Vict. cap.* 35).

A complaint charging the offence of selling or giving out liquors in breach of certificate ought to specify the name of the person to whom the liquors were sold or given out, or to set forth that they were sold or given out to some person to the prosecutor unknown.

Circumstances in which a conviction obtained upon a complaint which failed so to specify *sustained*, the accused having suffered no prejudice from the omission.

The words "*at* his licensed premises at," &c., is a sufficient specification of the *locus* in such a complaint.

This was an appeal on case stated under the Summary Prosecutions Appeals Act 1875 (38 and 39 Vict. cap. 62) against a conviction obtained in the Justice of Peace Court for the county of Renfrew held at Paisley. The case stated by the Justices was as follows, viz.—"This is a cause in which the said William Muir was tried in the said Justice of Peace Court, on 1st June 1888, before Thomas Glen Coats and George Seton Veitch, two of Her Majesty's Justices of the Peace for said county, on a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881 at the instance of the said Procurator-Fiscal for an offence against the laws and regulations for public-houses in Scotland, in so far as on the 6th day of May 1888 'he did, at his licensed premises at Peesweep Inn aforesaid, sell or give out liquors on Sunday in breach of the terms and conditions of his certificate." The accused objected to the relevancy of the complaint, in respect (1) that it did not specify the particular statute and section of the statute which it was alleged he had contravened; (2) that the *locus* 'at' his licensed premises was insufficiently described; and (3) that it did not state the name of the person to whom it was alleged the liquors were sold or given out. These objections having been repelled, the accused pleaded not guilty, and evidence in support of the complaint and in exculpation having been led, the Justices held it proved that on the afternoon of the Sunday in question Felix Mulholland, farm labourer, Stanley Muir, in the county of Renfrew, while walking along the public road leading to Johnstone in company with his son David Mulholland, a labourer residing in Paisley, halted at the gable of the Peesweep Inn (which is licensed as a public-house only), where the accused was at the time standing. Mulholland took something out of one of his pockets and handed it to the accused. Mulholland then walked slowly westwards, while the accused went into the inn, where he remained for a few minutes, when he came out and followed Mulholland. Having overtaken him the two returned and walked eastwards till they had repassed the inn by about 400 yards, where on the public road the accused handed Mulholland something which he put into his breast-pocket, and the two then parted, Mulholland proceeding eastwards and the accused returning towards his inn. Two police-constables (Donald Sinclair and John Collie), who had seen the manœuvre, followed Mulholland, but having been observed by the accused, he (the accused) shouted to Mulholland, and drew his attention to the constables by pointing towards them with his stick, whereupon Mulholland took from his said breast-pocket something clear in appearance and threw it into a peat field. The two constables, who had witnessed this from a distance of 400 yards or thereby, proceeded to the spot, and there found a glass bottle (produced in Court with its contents), containing two gills or thereby of whisky, of which they took possession. The constables were 200 yards distant from Mulholland when the 'clear something' was thrown away by him, and the point at which the 'something' was thrown away and where the bottle was found was 800 yards distant from the inn. The Justices convicted the accused of the offence of which he was charged, and fined him in the penalty of £5, with £3 of expenses, and failing payment they adjudged him to be imprisoned for one calendar month."

The questions of law for the opinion of the Court were:—"(1) Was the complaint on which the trial proceeded relevant? and (2) was the accused legally convicted?"

Argued for the appellant on the first question for the opinion of the Court—The objections to relevancy set forth in the case, with the exception of the first which was not now insisted in, ought to have been sustained. The *locus* set forth was not one in which the offence could possibly have been committed. There could not be a breach of certificate *at* licensed premises. Such a breach could only be committed *within* such premises. The name of the person to whom the liquor was alleged to have been sold was not specified. In a complaint of this nature, the accused was entitled to have notice of the person in connection with whom he was charged, or if that person were unknown to the prosecutor, that ought to have been set forth in the complaint. The prosecutor was bound to do all he could to guarantee that the accused should not be charged again for the same offence—*Lauder* v. *M'Dougall*, February 19, 1887, 24 S.L.R. 352.

Argued upon the second question—What was proved was not the offence charged, but the offence of hawking liquors. Three kinds of offences might be committed under the Public Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. c. 35)—(1) Breach of certificate by selling liquors within licensed premises at such times or to such persons as are not embraced in the certificate; (2) shebeening by selling in premises which are not licensed; (3) hawking, by selling in public places. The form of the certificate was that set forth in Schedule A, No. 2 of the statute of 1862, and the prohibition contained in it with reference to selling or giving out liquors on Sunday is as follows, viz, "And do not open his house for the

sale of any liquors, or permit or suffer any drinking therein, or on the premises thereto belonging, or sell or give out the same, or any other goods or commodities, on Sunday." A breach of that certificate could not be committed except by an act done within the premises. Such an act as that disclosed on the facts in this case fell under the category of "hawking," which was thus defined—"The word 'hawking' shall mean and include trafficking in or about the streets, highways, or other places, or in or from any boat or other vessel upon the water." In the case of *Hamilton* v. *Inglis*, 22nd May 1879, 4 Coup. 244, the Court laid down the principles which distinguish the offence of hawking from that of shebeening. These principles applied with equal force to the present case. This was not such an objection as could be cured by amendment. It was a serious objection to relevancy—*Stevenson* v. *M'Levy*, February 21, 1879, 6 R. (J.C.) 33.

The Court called upon counsel for the respondent to address himself only to the third objection to relevancy set forth in the case.

Argued for the respondent—The case of *Lauder* did not rule the present case. The ground on which the Court proceeded in that case was that there was no *locus* set forth. The form of the complaint in this case is in accordance with practice—*Fitzsimmons* v. *Linton and M'Dougall*, July 18, 1861, 23 D. 1301; *Greenhill* v. *Stirling*, March 19, 1885, 12 R. (J.C.) 37. Further, if there were an irregularity here it was one which was provided for by the Summary Procedure Act 1864 (27 and 28 Vict. cap. 53), sec. 5, which excluded objections to a complaint for alleged defects in substance or form, and allowed requisite amendments to be made. In this case the person to whom the liquor was sold was unknown to the prosecutor, and no injustice was done to the accused by omitting the words "to some person to the prosecutor unknown," for the accused called, as a witness for the defence, the person to whom it has been found the liquor was sold. In any event the conviction ought not to be quashed. The case ought to be remitted to the inferior Court with directions to amend the complaint and proceed of new under the Summary Prosecutions Appeals Act 1874 (38 and 39 Vict. cap. 62), sec. 3, sub-sec. 9, as was done in the case of *Baird* v. *Rose*, September 27, 1865, 5 Irv. 200.

At advising—

Lord Justice-Clerk — Three objections are stated to this conviction. In the first place, it is said that the words "at the premises" used in specifying the *locus* are vague and insufficient. The objection was not pressed very strongly, and I am not surprised. I think these words constitute a perfectly good specification. The form of words "at or near," with which we are familiar in High Court indictments, shows that the words "at the premises" do not mean, as was argued, "near the premises." The second objection is a more serious one. It is that there is no specification of the person to whom the liquor is said to have been supplied in contravention of the certificate. We are told that the fact here is that the prosecutor did not know who the person was, and that it was only from his appearing in exculpation that he came to know who he was. In these circumstances all that could have been said in the complaint would have been "to some person to the prosecutor unknown." I think the complaint should have stated that, because it is of importance that the prosecutor should be tied up to this, that if he presents a case inconsistent with his not having known who the person was he should not be entitled to obtain a conviction, because he is bound to give reasonable notice. It is quite true that there does seem to have been a practice of not inserting in complaints of this nature the names of the persons with whom the trafficking, &c., are alleged to have taken place. Cases have been cited, going a considerable distance back in time, in which the complaint was so framed, and in both the cases of *Lauder* and *Hamilton*, cited by Mr Salvesen, cases keenly contested on other points, the prosecutor did not give the names of the persons to whom the liquor was alleged to have been sold. I consider that to be very bad practice indeed. I think where the name is known it ought to be given. But in this case I think we are entitled to take into consideration the fact that the prosecutor was not able to give that information, and to consider whether the words "to some person to the prosecutor unknown" are of such importance as to make it our duty to quash the conviction for the want of them. I think they are not. I think they are words of form, and that we might if necessary order the complaint to be amended by their insertion. But I do not see that there is any necessity for ordering such an amendment in this case.

The third objection is made upon the merits. These are somewhat extraordinary—[*His Lordship here narrated the facts set forth in the case*]. On these facts the Justices found that the appellant received a bottle from the man Mulholland for the purpose of filling it in his public-house with whisky, and selling the whisky to him, and that he did so. I hold that to be a distinct breach of his certificate. Mr Salvesen says that the moment the whisky came outside the door of the public-house it became whisky in the possession of a hawker, who was liable to punishment for hawking liquor, but not as a holder of a certificate at all. I must say that argument seems to me to be entirely untenable. This is the offence of giving out liquor on Sunday in breach of a certificate, or it is no offence at all. I think the conviction must be sustained.

Lord Rutherfurd Clark—I think the objection to the relevancy, in so far as it fails to give the name, an objection of some importance. But it is quite plain that in this case the appellant has not in any way suffered by that omission. He knew who the person was, for he produced him as a witness in his favour, and since that is so, I should be extremely reluctant, on such a technical objection, to allow the appellant to escape from the consequences of his offence. I rather take it that we may hold that the police did not know the person to whom the whisky was given. That almost appeared upon the face of the case, and it is so stated by the prosecutor. In these circumstances I am not in this particular case disposed to quash the conviction because the words "to some person to the prosecutor unknown" are not inserted in the charge. At the same time I may say that I concur in thinking that in all cases where it is possible to specify the

name of the person supplied that should be done.

On the question upon the merits I confess I have not much difficulty. We have the choice of three alternatives. The case is either a breach of certificate, or hawking, or no offence. Given these three choices I have no hesitation in saying that it is a breach of the certificate. It is certainly not hawking, and it would be an unfortunate thing if it were no offence.

Lord Lee—I agree that the only point of difficulty or importance is that raised upon the relevancy. The only essential thing in a charge of breach of certificate is that it should be sufficiently stated that liquor has been given out on a Sunday in breach of the certificate. But I agree that notice must be given, if it can be given, of the persons to whom the liquor has been given out. But the rule as to notice is a rule not essential to relevancy. It is a rule of procedure founded upon the administration of justice fairly to the accused party, and accordingly the only effect of not giving notice is to put it upon the prosecutor to say that the name is not known to him, and the only effect of that is that the prosecutor is not entitled at the trial to proceed to prove that the liquor was sold or given out to some particular individual. In the present case the name was not known to the prosecutor. The trafficking was done secretly, and was observed from a distance by the police. In these circumstances I do not think that the accused was deprived of any information which would have been of advantage to him by the omission of the words "to some person to the prosecutor unknown." I therefore concur in the judgment proposed by your Lordship.

The Court found that the complaint was relevant, and that the accused was legally convicted.

Counsel for the Procurator-Fiscal — James Clark. Agent—Party.

Counsel for the Appellant—Salvesen. Agents—Sturrock & Graham, W.S.

Wednesday, November 21.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee.)

DUNCAN *v.* LANG.

Justiciary Cases—Public-House—Contravention of Hotel Certificate—Alternative Complaint and General Conviction—Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35).

George Duncan, hotel-keeper, Crown Hotel, Alloa, was charged in the Police Court at Alloa with a contravention of the terms of his certificate, which was in form of Schedule A of the Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. cap. 35), in so far as he "did keep open house or sell or give out" liquors after ten o'clock at night, and was convicted by the magistrate "of the offence charged." *Held* (following the case of *Murray* v. *M'Dougall*, February 7, 1883, 5 Coup. 215) that the charge was alternative, and conviction *suspended.*

Counsel for the Appellant—R. L. Orr. Agents—Irons, Roberts, & Company, S.S.C.

Thursday, November 22.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee.)

KIDGER *v.* M'PHEE.

Justiciary Cases — Police — Affixing Bills to Building without Authority—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap.* 273), *secs.* 149, 131, *and* 132—*Exclusion of Review except by Circuit Court—Suspension—Competency.*

The Glasgow Police Act 1866, by sec. 149, imposes a penalty on "every person who is guilty of any of the following disorderly acts or omissions . . . in any street, . . . namely," *inter alia* (sub-section 28), "who affixes, without the consent of the proprietor and occupier, to any building any bill or notice."

The occupier of a building was charged under this section with affixing, "without the consent of the proprietor," certain bills to the wall of the building occupied by him, and was convicted. In a suspension the Court *held* that the section did not apply to the case of the occupier or owner of a building placing bills upon it, but only to third parties, and that the complaint and whole proceedings were outwith the statute and illegal, and *quashed* the conviction.

The procedure and conviction being *ex facie* illegal, an objection to the competency of the suspension, founded on sections 131 and 132 of the Act, which provide for the exclusion of review except by the next Circuit Court, *repelled.*

The Glasgow Police Act 1866 (29 and 30 Vict. c. 273), sec. 149, enacts that "Every person who is guilty of any of the following disorderly acts or omissions on any turnpike road, or in any public or private street, or court, or on the outside of any building adjoining the same, or in any common stair, shall, in respect thereof, be liable to a penalty not exceeding the respective amounts, or to imprisonment for a period not exceeding the respective periods hereinafter mentioned" . . . (Sub-section 28) "Every person who . . . affixes, or causes to be affixed, . . . without the consent of the proprietor and occupier, to any other building, or to any wall, fence, or hoarding, any bill or other notice . . . shall, in respect thereof, be liable to a penalty not exceeding forty shillings, or in default of payment to imprisonment for fourteen days."

Section 131 of the said Act provides, *inter alia*, . . . "No proceeding or trial before the magistrate, and no order or sentence of the magistrate thereon, or the extract thereof, shall be . . . subject to suspension, or to any other form of review, unless in manner and on some one or more of the grounds hereinafter mentioned." Section 132—"Any person who feels aggrieved by any order or sentence of the magistrate may within fourteen days after its date appeal to the Court of Justiciary at the next Circuit Court to be held at Glasgow, in the manner and under the rules, limitations, and conditions contained in the Act for Abolishing Heritable Jurisdictions (20 Geo. II. cap. 43), on the ground of corruption, malice, or oppression on the part of the magistrate, wilful deviation in point of form

from the statutory enactments, incompetency or defect of jurisdiction, but on no other ground."

John Kidger, designing himself as a "fancy letter writer," was charged before the Police Court, Glasgow, with a contravention of the Glasgow Police Act 1866, sec. 149, sub-sec. 28, in so far as he did on the 19th day of October 1888 affix, or cause to be affixed, to the wall of a building or part of a building occupied by him in West Nile Street aforesaid, three or thereby bills or other notices without the consent of M'Dougall & Hamilton, house factors, No. 109 West George Street, Glasgow, proprietors of said building or part of a building.

Kidger objected to the relevancy of the complaint on the ground that the sub-section libelled was not directed against either proprietor or occupier, which latter he was, but against third parties.

The Magistrate repelled the objection, and thereafter, on the evidence adduced, found "the charge of having caused to be affixed the bills as libelled proven, convicted Kidger of the offence libelled," and fined him ten shillings and sixpence, with the alternative of seven days' imprisonment.

Kidger presented a bill of suspension, in which he averred that the complaint was irrelevant on the ground above specified, and pleaded —"(1) The complaint on which conviction of the complainer proceeded is irrelevant, in respect (1) that the sub-section or clause founded on does not apply to him; (2) that he is tenant and occupier of the subjects referred to; (3) that the bills or notices referred to are notices relating to the complainer's business or samples of the work done by him therein; and (4) that no offence whatever, either under statute or at common law, is disclosed in the complaint."

The respondent, the Procurator-Fiscal, objected to the competency of the suspension, on the ground that review by the High Court of Justiciary was excluded by sections 131 and 132 of the Glasgow Police Act 1866.

He argued—The objection here was to relevancy. It was so stated by the suspender. Review, if competent at all, could only be by the Circuit Court. The case was not like those of which *Marr* v. *M'Arthur*, March 28, 1878, 5 R. (J.C.) 38, 4 Coup. 53, was a type, where the proceedings of the Inferior Court were *funditus* null, the complaint and proceedings being plainly outwith the statutory authority under which it acted. It was in such cases only that the Court would interfere—*Walker* v. *Lang*, November 25, 1867, 5 Irv. 506, and 40 Scot. Jur. 89; *Mackenzie* v. *Lang*, November 9, 1874, 2 R. (J.C.) 1; *De Belmont* v. *Lang*, June 28, 1871, 2 Coup. 95, and 43 Scot. Jur. 572; *O'Brien* v. *M'Phee*, October 30, 1880, 8 R. (J.C.) 8. On the merits, the sub-section founded on made it a condition of lease that the consent of both the proprietor and occupier should be obtained to affix bills to a building. The charge relevantly stated that the consent of one of these, the proprietor, had not been obtained. It was beside the question to say that the person here charged was the occupier; the statute made no exception in his favour. If this were not the meaning of the statute the clause would have run, "without the consent of the owner or occupier." But assuming that the clause applied only to third persons not being occupiers or proprietors, the question who was an occupier was always a question of circumstances, and it was perfectly open to read this complaint as setting forth that the suspender was an occupier for a limited purpose, which gave him no right to affix bills to the premises in the manner alleged. The letting of premises as a shop would not justify their use as a place for sticking bills. In such circumstances the use of the premises being beyond the implied authority of the occupier, was struck at by the Act unless the consent of the proprietor had been obtained.

The suspender argued—(1) No offence was charged. The terms of the complaint excluded any offence, for in charging an offence said to have been committed without the consent of the proprietor and occupier it at the same time stated that the accused himself was the occupier. (2) The statute applied only to third persons not being either owner or occupier. The words "every person" in the statute must receive a reasonable interpretation *secundum subjectam materiam*—Maxwell on the Interpretation of Statutes, p. 75. In the introductory clause of the section the various acts detailed in the sub-sections were spoken of as "disorderly acts," which indicated that the object of the provision was to prevent strangers from placing bills upon buildings without full authority. If the provision applied to third persons only, then there was no offence libelled, and the proceedings were *funditus* null. In these circumstances it was within the powers and was the practice of the High Court to give redress—*Marr* v. *M'Arthur*, *supra*; *Wemyss* v. *Black*, March 19, 1881, 8 R. (J.C.) 25; *Stirling* v. *Murray*, June 13, 1883, 10 R. (J.C.) 59; *Bell* v. *M'Phee*, July 18, 1883, 10 R. (J.C.) 78; *Craig* v. *M'Phee*, March 14, 1883, 10 R. (J.C.) 51; *Collins* v. *Lang*, November 3, 1887, 15 R. (J.C.) 7, 1 White, 482.

At advising—

Lord Justice-Clerk—The Act of Parliament under which this prosecution was raised is an Act of Parliament for the purpose of the "better regulation and government" of the city of Glasgow in the matter of police, and a very large number of offences are contained in that Act. Under sec. 149 the Act prescribes—[*His Lordship here read the clause and sub-section quoted above*]. Now, I think it would be inconsistent with the construction of the Act to read any of the detailed offences in the sub-sections in section 149 except in relation to the opening part of the section which describes the intention of the section. The whole of those things which are described in the sub-sections are plainly acts of a public nature, interfering with public rights, public amenity, and public decency. If the sub-section and that part of it which refers to the consent of the proprietor and occupier can be read consistently with its being a question between the police and a person who has no right at all to interfere with the building in any way, I think that is the natural and common sense reading of the clause, and it would be a strained reading of the clause to hold that it applied to the settling by the magistrate of questions which might arise between proprietor and tenant—questions which are amply provided for by the general law of the land, and

which have nothing whatever to do with questions of police. I take it that the words "proprietor and occupier" are inserted because a third person who interferes with any building by affixing a notice to it is doing a disorderly act if he does it without the consent of both these persons. It is disorderly towards the proprietor, because he has a right to prevent his property from being disfigured, and it is disorderly towards the occupier because it is out of the question, even if the proprietor allowed it, that anyone should post up bills upon it without the occupier's consent. I am accordingly of opinion that this clause is not one under which an occupier can be charged for putting up a notice on his premises without the consent of the proprietor.

The only remaining question is, whether this suspension is incompetent in respect of the restrictive provision as regards appeal or review contained in the Glasgow Police Act? That turns upon the question whether the complaint is in its essence a bad complaint, rendering all the proceedings following upon it lawless proceedings. It is quite clear that if all that had been wrong was some matter of detail, such as a defect in specification, then the clause would have applied, and the only course open would have been an appeal to the Circuit Court of Justiciary. But this Court has always held that it is entitled to interfere to prevent the carrying out of a judgment which follows upon proceedings which are in themselves lawless proceedings. As I consider that what is set forth in this complaint is not an offence at all under the Act of Parliament, and that therefore the complaint sets forth nothing which in law could have justified a conviction even if set forth with perfect accuracy, I am of opinion that we can interfere with this conviction and that it ought to be quashed. In coming to this conclusion I go upon the same grounds as were expressed by Lord Young in *Collins* v. *Lang*—"Now, it has been frequently decided in this Court, without referring to Acts of Parliament or any provisions that may be referred to as to the method of review, that if the procedure and conviction upon a complaint are *ex facie* illegal, remedy may be given by way of suspension." We are not proceeding to review this judgment, but to give redress against proceedings which from their commencement were entirely illegal.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court quashed the conviction.

Counsel for Suspender—Rhind. Agent—W. Officer, S.S.C.

Counsel for Respondent—D.-F. Mackintosh—Ure. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, November 15.

FIRST DIVISION.

[Lord Lee, Ordinary.

WHYTE *v.* MURRAY.

Bankruptcy—Trustee—Discharge—Radical Right of Bankrupt in Estate after Discharge without Composition—Title to Sue.

Where a bankrupt has been discharged without being re-invested in his estate, and the trustee under his sequestration has also been discharged, the radical right of the bankrupt in his estate revives, so as to give him a title to sue an action for recovery of funds belonging to his estate.

Succession — Assignation — Marriage-Contract—Power of Division, Exercise of.

By a marriage-contract the wife conveyed, *inter alia*, to herself in liferent, and failing her to her husband in liferent, exclusive of the *jus mariti*, and in any case to the children of the marriage in fee, certain bank shares, subject to a power in the husband to divide the provisions made for them among the children. There were three daughters and one son. By his settlement the husband conveyed his whole estate to trustees to pay certain special legacies to the daughters, and "the whole residue and remainder of my estate, heritable and moveable, for behoof of my son," declaring that he had made this division in virtue of the powers in the marriage-contract. The husband predeceased the wife, who thereafter executed a transfer of the bank shares to herself in liferent, and the children equally among them in fee. The son conveyed to a creditor his whole interest in the residue of his father's estate. In a question between the son and an assignee of the creditor—*held* that the latter had no right to the bank shares, in respect that they had never formed part of the residue of the father's estate.

This action was raised by George Whyte against the Commercial Bank of Scotland (Limited) and David Hill Murray. The pursuer, *inter alia*, sought for decree of declarator that he had a right to one-fourth part of 12½ shares of Commercial Bank stock, and one-half share of the stock of the same bank, and that the defender Murray had no interest in the same.

By contract of marriage entered into between Gerge Whyte senior, the pursuer's father, and Mrs Isabella Mess or Whyte, the parents of the pursuer, the latter, in consideration of certain provisions granted by the former, disponed and made over, *inter alia*, certain shares of Commercial Bank stock, including those now sued for, "to herself in liferent, but exclusive of the *jus mariti*, and failing her by death to the said George Whyte in liferent, and in either case to the children of the marriage, equally among them if more than one, in fee, subject to the power of division and other conditions" mentioned in the contract. The

power of division was in these terms—"In case there be more than one child of this marriage the said George Whyte shall have the power, and failing his dying without his exercising it, the said Isabella Mess shall have the power while she remains his widow at any time of his or her life, or on deathbed to divide the provisions hereby made for children in such manner as he and, failing him, she may direct by any writing under his or her hand, and failing any such division the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share."

There were four children of the marriage—the pursuer, an only son, and three daughters—who were all alive, and had attained majority at the date of the action.

George Whyte senior died in 1869.

By trust-disposition and settlement George Whyte senior conveyed his whole estate, heritable and moveable, for certain purposes, *inter alia*—(1) He provided that a liferent of the whole of his estate should be paid to his wife; (2) he made certain special provisions in favour of his daughters; (3) he directed the trustees to hold "the whole residue and remainder of my heritable and moveable estate for behoof of my son George Whyte and the heirs of his body." These provisions were not to vest in the children till they attained majority, and till after the death of the survivor of himself and his wife. It was further declared that these provisions should "be in full of all that they can ask or demand by and through my decease out of my real or personal estate or out of the foresaid sum of £1100 or other parts of my said wife's fortune which may be found standing in her name at the time of my death in name of legitim, portion natural, executry, or otherwise, or by virtue of my said contract of marriage; and I declare that I have made the division above written among my children in terms and in virtue of the powers conferred upon me by said contract of marriage."

By transfer, dated 10th and 11th May 1870, Mrs Whyte, "in implement of the transfer already granted by her in her marriage-contract," transferred and made over to herself in liferent and her children equally in fee, the shares of Commercial Bank Stock conveyed by her in that contract. The children thereby accepted of the assignation so made subject to this condition, that the acceptance of the transfer was not to affect the rights of the children *inter se* under the marriage-contract of their parents and the trust settlement of their father.

By bond, dated 10th February 1876, the pursuer conveyed, in security of the sum of £2000, All and whole the residue and remainder of the heritable and moveable estate of the said deceased George Whyte provided to him by his father's settlement.

The pursuer's estate was sequestrated under the Bankruptcy Act 1856, and J. A. Robertson, C.A., was appointed trustee on 21st June 1882.

Mr Robertson was also trustee on the sequestrated estate of Adam Henderson, to whom had been transmitted the right conveyed by the bond and assignation in security granted by the pursuer. As trustee on Henderson's estate, and with consent of himself as trustee on the pursuer's estate, Mr Robertson exposed for sale under articles of roup dated 18th September 1883, the whole right of succession of George Whyte under his father's settlement, and these articles of roup contained the following clause—"*Sexto*, the exposer submits herewith, and which is referred to as relative hereto, and signed by the exposer, a rental of the lands and others, which he alleges falls under the conveyance of residue in favour of the said George Whyte, with the value of Commercial Bank Stock, which he also alleges falls under said conveyance, and also a note of bonds and burdens affecting the said subjects, but the offerers must be held to have satisfied themselves not only as to the said rental, but as to the rights of the exposer to the said subjects and others, and also to the amount of the said burdens and deductions, the exposer not holding himself bound or responsible for the accuracy of the rental, or the note of bonds and burdens affecting the said subjects, nor warranting his right and title to the said subjects and others. . . . Value of 2½ Commercial Bank shares, £693, 15s."

Under the articles of roup the defender David Hill Murray purchased the pursuer's right of succession under his father's settlement, and following upon the sale, Mr Robertson as trustee for Henderson, with consent of himself as trustee in the pursuer's sequestration, granted an assignation to Murray, dated 13th November 1883, conveying to him the pursuer's right of succession under the settlement of his father, together with the residue and remainder of the heritable and moveable estate provided to the pursuer under that settlement, and his whole right and interest as trustee foresaid, of whatever kind and description under the said trust-disposition and settlement in virtue of the bond granted by the pursuer, and subsequent transmissions of the same. No mention was made in this assignation of any conveyance of the bank shares in question.

The pursuer was discharged without composition on 18th March 1884, and the trustee Mr Robertson on 4th November 1887.

The defender Murray pleaded, *inter alia*—"(1) No title to sue. (5) The said deed of settlement having declared that the provision of residue thereby made in the pursuer's favour was in full of all his rights under the marriage-contract, the pursuer is barred from claiming the bank stock in question as falling under that contract. (6) The pursuer having assigned his reversionary interest in his father's trust-estate in security of advances made to him, and the said bank stock having by the provisions of the deed of settlement been dealt with as forming part of the trust-estate, the defender, as now in right of the reversionary interest, is entitled thereto, and to be assoilzied with expenses. (7) In any event, the said bank stock having vested in the pursuer on the death of his father, passed to the trustee on his sequestrated estate, and the defender as assignee of the trustee is entitled thereto, and to be assoilzied with expenses."

The Lord Ordinary (Lee) on 13th July 1888 pronounced the following interlocutor:—"Finds that the bank shares referred to in the summons formed no part of the estate of the deceased Mr George Whyte: Finds therefore that the assignation founded on by the defender Mr

David Hill Murray is insufficient to support his claim to the said shares, and that he has no title to oppose the conclusions of the summons: Therefore repels the defences for the said David Hill Murray, and decerns and declares in terms of the first and third conclusions of the summons, but without prejudice to any claims upon said shares, so far as belonging to the pursuer, competent to the defenders the Commercial Bank, or to creditors upon the pursuer's sequestrated estate: Finds the defender David Hill Murray liable to the pursuer in the expenses of process, &c.

"*Opinion.*—The pursuer's claim in this case relates to (1) a fourth part of certain shares in the stock of the Commercial Bank, which belonged originally to his mother, and were, along with sundry other properties belonging to her, conveyed by her antenuptial contract with George Whyte to herself in liferent, but 'exclusive of the *jus mariti*, and failing her by death, to the said George Whyte in liferent, and in either case to the children of the marriage, equally among them if more than one, in fee, subject to the powers of division and other conditions' therein mentioned; and (2) to a half share of £100 in the converted stock of the Commercial Bank (Limited), which was purchased in 1881 by the pursuer or on his credit in order to make up, with the shares above referred to, the total amount of thirteen shares now standing registered in the books of the bank as belonging to 'Isabella Mess or Whyte in liferent, for her liferent use allenarly, and to the children of the marriage between her and the said George Whyte (named) in fee.'

"The power of division above referred to was in the following terms:—'And it is further declared that in case there be more than one child of this marriage, the said George Whyte shall have the power, and failing his dying without exercising it, the said Isabella Mess shall have the power, while she remains his widow, at any time of his or her life, or on deathbed, to divide the provisions hereby made for children in such manner as he and, failing him, she may direct, by any writing under his or her hand, and failing any such division, the said provisions shall divide equally among the children, male and female, the issue of a child dying before receiving its provisions having right to the parent's share.'

"The marriage was dissolved by the death of George Whyte in 1869. There were four children (the pursuer and his three sisters), and in 1870 a transfer of the original shares was effected in favour of the widow, 'for her liferent use allenarly,' and to the children *nominatim* in fee, but subject to a declaration that the acceptance of the transfer was 'not to affect the rights and interests of the children of the said deceased George Whyte *inter se*,' under the marriage-contract, and a trust-settlement left by George Whyte.

"The first question raised by the defences for Mr D. Hill Murray is, whether he has shown any title to dispute with the pursuer his right to the shares so standing in name of Mrs Whyte for her liferent use allenarly, and the children of the marriage in fee.

"This question involves a somewhat minute examination of Mr Murray's title and of the deeds to which it refers, but I think it must be answered in the negative.

"The title of the defender Mr Murray is founded on a sale and assignation of the residue of Mr George Whyte senior's estates in 1883 by Mr J. A. Robertson as trustee for the creditors of a Mr Henderson, and Mr Henderson's right is founded on a bond and assignation by the pursuer, of date 10th February 1876 in favour of one James Robertson, banker in Huntly.

"The assignation to Mr James Robertson, banker in Huntly, is limited to 'the residue and remainder of the heritable and moveable estates of the said deceased George Whyte (the father) provided to me (the pursuer) by the trust settlement of the said deceased George Whyte, and of all my right and interest of whatever kind and description under the same.'

"Now, George Whyte's trust-disposition and settlement conveyed to his trustees nothing but the estates therein referred to as his own. These are, in the first place, the lands of Meethill and the other heritable subjects therein described, and also generally his whole estates and effects, heritable and moveable. The deed contains a clause showing that the lands of Meethill had been acquired by the employment of a sum of £1100, which is mentioned as forming 'a part of my wife's fortune settled by our antenuptial contract of marriage' (clause fourth). It contains a direction for payment of a provision of £1000 to each of his daughters, and it provides lastly that the whole residue of his estates, after satisfying his widow's liferent and the other special provisions, should be held for his son the pursuer. As to the vesting of these provisions the deed bears—'And it is hereby specially declared that the foresaid special provisions in favour of my children, as well as the provisions of residue, shall vest in the parties entitled thereto, if sons, on their attaining the age of twenty-one, or if daughters on their attaining said age or being married, whichever shall first happen, but in no case till after the death of the survivor of me and my said wife, or her entering into another marriage, and upon the arrival of the respective periods of vesting of said special provisions in favour of my children and residue, my said trustees shall either pay said provisions or secure the same in manner above mentioned, and shall pay, deliver, or convey the said residue.' But it conveys no estate remaining vested in his wife.

"The deed also contains a clause by which Mr Whyte exercised his power of division as follows:—'And I declare that the provisions above written in favour of my said children shall be in full of all that they can ask or demand by and through my decease out of my real and personal estate or out of the foresaid sum of £1100 or other parts of my said wife's fortune which may be found standing in her name at the time of my death in name of legitim, portion natural, executry, or otherwise, or by virtue of my said contract of marriage; and I declare that I have made the division above written among my children in terms and by virtue of the powers conferred upon me by said contract of marriage.'

"It is said that this division includes a right to the bank shares as part of the residue. But I think that this is a mistake. The marriage contract contains a clause declaring that 'for all the purposes of this contract the capital of the

sums, and the value of the subjects above conveyed by the said Isabella Mess or Whyte to the extent of her interest therein, shall be held to be £1300, be the same more or less.' The contract also contained the following clause:—'Further, the said Isabella Mess hereby dispones, assigns, transfers, and makes over to herself, exclusive of the *jus mariti*, and to her heirs, executors, and assignees whomsoever, all and whatever other estates and effects, real and personal, now belonging to her, or to which she may succeed during the subsistence of the marriage, and particularly, without prejudice to the said generality . . . and for effecting the purposes of this contract, the said George White hereby renounces his *jus mariti* over the subjects and sums of money above conveyed by the said Isabella Mess, exclusive of the *jus mariti*."

"The effect of these clauses, in my opinion, was that the power of division contained in the marriage-contract was limited to the £1300, of which £1100 had been paid over, and the other £200 remained a burden merely on the widow's rights.

"The bank shares, in my opinion, never became a part of the property of the pursuer's father, and formed no part of his residue. They remained vested in the wife, until, by the transfer effected in 1870, her right was limited to a 'liferent allenarly,' and the fee was given to the children.

"Considering the terms of the marriage-contract, I see no reason to doubt that this transfer, after the death of George Whyte senior, was effectual to make them the property of the children, subject to their mother's liferent.

"So stood the title when the pursuer became bankrupt and was sequestrated in 1882. He was discharged on 18th March 1884; but as his discharge was obtained without composition, the sequestration was not thereby ended, and he was not re-invested in his estates. His mother died in January 1887, but as she had previously renounced by the terms of the transfer all but a liferent allenarly in the bank shares, I do not see that this event affected the already vested rights of the children as in right of the bank shares in fee. I think that she had full power on the death of her husband to restrict her right to the bank shares to a mere liferent, and thus to accelerate the vesting of the fee. But the right so vested was a right derived from her.

"Mr Murray's title, therefore, in my opinion, includes no right to these bank shares, for nothing but the residue of the father's estate was conveyed by the bond and assignation to Mr James Robertson, which forms the basis of his right. The fact that Mr J. A. Robertson, as trustee on the pursuer's sequestrated estates, consented in the articles of roup to his own act in selling that residue as trustee on Henderson's estate, seems to be of no effect in enlarging the subject of the conveyance. The same may be said of the consent of the Commercial Bank, who only consented for any interest they had under the bond in favour of James Robertson, banker, Huntly.

"It was contended that because the articles of roup (art. 6) mentioned the bank shares as 'alleged' by Henderson's trustee to fall also under the conveyance to Robertson, therefore the sale and assignation following thereupon must be held to have included these shares. But the terms in which this allegation was made and qualified are sufficient to shew that the measure of the defender's right must be ascertained by reference to the original deeds. The exposer expressly declines to warrant his right and title to the said subjects, and requires purchasers to satisfy themselves.

"I am therefore of opinion that the defender Mr Murray has shown no title to defend.

"It was argued for him that at all events the pursuer had no title to sue, because if the shares were not carried by the sale they must have belonged to the pursuer to the extent of one-fourth part at the date of his sequestration, and must therefore now belong either to his trustee, or if the trustee is *functus* by reason of his discharge, to his creditors in the still unfinished sequestration. My opinion is that this is a matter with which the defender Murray has no concern. The trustee and creditors in the pursuer's sequestration will no doubt attend to their own interest if they have any.

"I am therefore of opinion that, so far as Mr Murray's defence is concerned, the pursuer is entitled to decree in terms of the first and third conclusions of the summons, not only as regards the half share the price of which was paid by him or debited to hjs account, but also as regards the other twelve and one half shares.

"With regard to the defence of the Commercial Bank, my opinion is that decree in terms of these conclusions will not prejudice any right of lien which they may have. But it can do no harm to make the decree expressly bear to be without prejudice to any claims competent either to the bank or to the other creditors of the pursuer at the date of his sequestration.

"As the second conclusion of the summons appears to ask more than a transfer of the pursuer's shares into his own name, I think that the Commercial Bank have a right to be heard further upon that, and upon the effect of their ranking in the sequestration. This, however, is a point which may stand over until it be seen whether my judgment on the first conclusion of the summons becomes final."

Before the case came up for hearing on the reclaiming-note a petition had been presented to the Court for revival of the pursuer's sequestration.

The defender David Murray reclaimed, and argued—The pursuer had no title to sue. The shares in question, if recovered, could only benefit his creditors, as he had been discharged without composition, and so not re-invested in his estate. These shares were vested in him on the dissolution of the marriage at the latest, and so had passed to his trustee—*Romanes* v. *Riddell*, January 13, 1865, 3 Macph. 348. There was clearly no abandonment here, as a petition for revival of the pursuer's sequestration was before the Court. The case of *Fleming* v. *Walker's Trustees*, November 16, 1876, 4 R. 112, was therefore inapplicable. It was hardly fair to the defender that he should have to argue this question first with the pursuer and afterwards with the creditors. On the merits—In his trust-disposition and settlement George Whyte senior had properly exercised the power of division conferred upon him in the marriage-contract — *Smith* v. *Milne*, June 6,

1826, 4 S. 679; *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230. The shares in question therefore fell into the residue of George Whyte senior's estate, and so were part of the right of succession conveyed by the pursuer under the bond of 1876, and purchased by the defender under the articles of roup and sale in 1883. At all events they were vested in the pursuer at the time of his sequestration, passed to his trustee, and were included in the assignation consented to by the trustee in favour of the defender.

The pursuer (respondent) argued—The pursuer had a title to sue. There was no existing sequestration or trustee. The pursuer's radical right in his estate had therefore revived. Further, the trustee had clearly abandoned any claim to the shares in question—*Fleming* v. *Walker's Trustees*, *supra*. The pursuer had a title to sue were it only for the benefit of his creditors. On the merits—There was no proper exercise of his power of division in the settlement of George Whyte senior. These shares were never part of the residue of his estate, and were therefore not conveyed under the bond of 1876 or purchased by the defender. Under the articles of roup and assignation following thereon, the defender acquired no more than had been conveyed by the pursuer under that bond. On the death of George Whyte senior the fee of these shares remained in his wife, and were not vested in the pursuer. They could never therefore have passed to the trustee in his sequestration, nor have been transferred by him by his consent to the assignation in favour of the defender.

At advising—

Lord President—When Mr George Whyte senior and his wife married, the lady was possessed of some fortune, embracing certain shares in the Commercial Bank of Scotland. The form of marriage-contract which was entered into by the spouses was not a conveyance in trust, but was a direct conveyance whereby the lady, in respect of certain obligations by her husband which are of no materiality, dispones, *inter alia*, these shares "to herself in liferent, but exclusive of the *jus mariti*, and failing her by death, to the said George Whyte in liferent, and in either case to the children of the marriage equally among them, if more than one, in fee, subject to the powers of division and other conditions hereinafter mentioned." I think there is no doubt that the effect of that conveyance was to leave the fee of the bank shares in the lady herself, and to create a prospective right of liferent in the husband, and to settle them subject to that right of liferent upon the children of the marriage in fee. The fee of the shares remained in Mrs Whyte down to 1870, when she conveyed them to herself in liferent for her liferent use allenarly, and to her then existing children in fee. Such is the history of the shares, there has been no change since that date, and the lady dying in 1887, the liferent then came to an end, and they now belong to the children in fee.

The defender Murray has now advanced a claim to the shares, and has intimated it to the Commercial Bank, and accordingly it has been thought necessary by the pursuer to raise an action to have it declared that he has no right to the shares.

The first objection which the defender takes is that the pursuer has no title to sue. I think that objection is ill-founded, and I regret that the Lord Ordinary did not think fit to dispose of it. The pursuer was no doubt sequestrated, and he has not been discharged on a composition or re-invested in his estates. His estates have been ingathered and divided so far as the trustee and creditors desired to do so, and the trustee has been discharged. It is now said that the pursuer's right may still be realised for the benefit of his creditors, and that is true; but at the same time it does not affect his title to sue. No one but the pursuer has at present a title to sue this action. His title is his radical right to the estate, which revives by the trustee's discharge. The discharge of the trustee puts an end to the adjudication in his favour, which transferred to him the estate of every description which belonged to the bankrupt. The trustee's title, then, being at an end, the only person having a right to sue such an action as the present is the bankrupt. No doubt the creditors have claims which are still unsatisfied, but their remedy is to revive the sequestration or proceed against the bankrupt in some other way to make these good. The bankrupt's right has revived and will avail as a title to the shares, except in so far as it may be subject to meet the still outstanding debts of creditors. Accordingly I am for repelling the objection to the pursuer's title to sue.

Upon the merits, although the case has at first sight an appearance of complication, I have not much difficulty in adopting the Lord Ordinary's view. The defender is in right to the subject of a security which is constituted by a deed granted in 1876, by which Mr George Whyte, the pursuer, acknowledged to have borrowed a sum of £2000, and granted, *inter alia*, in security "the residue and remainder of the heritable and moveable estate of the said deceased George Whyte" (who was his father), "provided to me by the said trust-disposition and deed of settlement, and all my right and interest of whatever kind or description in the same." It appears to me that there can be only one construction of these words which I have read. What is conveyed in security by the borrower is his interest, whatever that was, in the residue and remainder of the heritable estate belonging to his father. Of course that must mean the residue and remainder in so far as it was settled upon him, but that residue and remainder could not comprehend what was vested in another. It could not therefore comprehend the bank stock, of which Mrs Whyte the pursuer's mother was undivested owner.

It would be doing violence to the terms of the settlement of Mr Whyte senior if the Court were to hold that it comprehended estate belonging to someone else It is vain to appeal to the authority of the cases of *Smith* and of *Mackie*. In the former case the old lady who was held to have exercised the power of division had no estate of her own, and could only exercise the power of division which was given to her by her husband's will. It was not possible for her to do anything else, for she had no estate to deal with, and when she made a will she could not be supposed to be doing anything else than exercising the power of division. That judgment proceeded upon reasonable and intelligible grounds, but where a person is engaged in disposing of his own

estate by will, and is possessed of a power o dividing his wife's estate, he must exercise that power in a very different way than by leaving the residue and remainder of his estate in general terms to his son, as is done here. No doubt Mr Whyte senior says at the end of the deed that he has exercised the power which was given to him by his wife. The simple answer to that is that he has not exercised it, and that upon no reasonable construction of the deed can it be held that he has exercised such a power. That being the foundation of Mr Murray's title, it being under that conveyance of residue that he lays claim to the bank stock in question, I do not think the bank stock is carried as part of the security held by the creditor. The transmissions are of no consequence until we come to the assignation by Mr Robertson dated 13th November 1883, proceeding upon the narrative of certain articles of roup and sale of the interest of a person named Henderson in the bond in question, which had came to vest in him. Mr Robertson was trustee upon Mr Henderson's sequestrated estate, and in that capacity he brought the bankrupt's right under the bond and disposition to sale, and the defender purchased it. It is said that by the articles of roup a right to the bank stock was included in the subjects exposed. But all that we find in the articles is that the trustee in bringing the subjects to sale says that he thinks the bank stock is included, but he declines to warrant it, and when he makes the conveyance he takes care not to insert the bank stock. All that he conveys is the interest of George Whyte junior in his father's estate. But he has acquired that already under his own title. Nor does it make any difference whatever that this assignation by Henderson's trustee is assented to by George Whyte's trustee. No doubt he did assent to it, but that did not enlarge the subject assigned. The assent given was merely to the effect that the security should be transmitted to the purchaser. I am of opinion that Mr Murray's claim to this bank stock cannot be maintained, and that the defences should be repelled.

Lord Mure—I am of the same opinion. It is quite plain that under the terms of the conveyance of 1883, which is the foundation of Murray's title, there was no conveyance of these bank shares; they were never part of the residue of George Whyte senior's estate. That estate never included these shares. They belonged to his wife, and remained hers till the day of her death, or at all events were never any part of the residue of his estate, and there appear to me to be no possible grounds on which Murray can maintain that he took a portion of these bank shares.

I had a difficulty at first, because the Lord Ordinary has not disposed of the objection that the pursuer had no title to sue. Obviously, from what your Lordship has suggested, Whyte has a good title in the Commercial Bank shares, and it remains for us to repel the plea of no title to sue. No doubt the title to these shares was carried to the trustee under Whyte's sequestration, but the trustee has been discharged. The right must be in somebody. The radical right is in George Whyte, and I think that when the trustee was discharged the right of George Whyte revived.

Lord Adam—I confess that from the time that we were put in possession of the facts of this case I have thought it a simple one. The title of the reclaimer Mr David Hill Murray rests upon an assignation to a bond and disposition by George Whyte, by which he conveyed in security of a sum of £2000 "the residue and remainder of the heritable and moveable estate" as provided to him by the trust-settlement of his father. And the question is, whether the bank shares in question ever were part of the residue of Mr George Whyte senior's estate? I think not. I think they remained part of his wife's estate. And even if he had disposed of them in his trust-settlement, I do not think that would have been a good conveyance of them. Any intention so to do would have been of no avail unless it was shown that the true character of them was other than I have stated. Accordingly, I do not think that the reclaimer has by the assignation any title to these shares.

But it is said that Mr Robertson, as trustee upon the bankrupt George Whyte's estate, consented in selling the residue to the inclusion of the bank shares in the residue, the title to them at that date being in the bankrupt. But even if the title was in the bankrupt, I do not think that the consent in question would have made Mr Murray's title any higher than it stood under the assignation. I therefore agree in the result to which the Lord Ordinary has come.

But I concur with your Lordship in thinking that the Lord Ordinary's interlocutor is defective, for his Lordship ought to have dealt also with the pursuer's title to sue. I have no doubt of that title. The only reason on which it is contended that he had no title is that the bank shares in question passed to the trustee upon the pursuer's sequestrated estates and to his creditors. If there had been an existing trustee he would have been here to vindicate his rights. But the trustee having been discharged the pursuer's radical right revives, and is a sufficient title to him to vindicate the right to these shares either for himself or for his creditors. Even if there had been a trustee, and he had declined to come forward, the bankrupt himself might have came forward to assert his right, and might have insisted—on certain terms as to caution—in pursuing an action of this kind.

Lord Shand was absent.

The Court repelled the objections to the pursuer's title to sue, and *quoad ultra* adhered.

Counsel for the Defender (Reclaimer)—Sol.-Gen. Darling—Sym. Agent—D. Hill Murray, S.S.C.

Counsel for the Pursuer (Respondent)—Gloag—Watt. Agent—Andrew Urquhart, S.S.C.

Tuesday, November 20.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE SCOTTISH PROVIDENT INSTITUTION *v.* WALKER AND OTHERS.

Contract— Foreign — Assignation — Locus contractus.

A domiciled Scotsman borrowed money from a money-lender in England. In security he delivered a promissory-note and a policy of insurance on his life effected with a Scottish insurance company. At his death in June 1887 the loan was only partially repaid, and in August the lender notified to the insurance company that the policy of insurance had been assigned to him. In December the estate of the deceased was sequestrated, and a trustee appointed thereon. In a multiplepoinding the Court ranked the lender preferably to the trustee for the debt still due, in respect that the loan was negotiated in England, by the law of which, as the parties admitted, deposit of the policy operated as an equitable mortgage in favour of the lender, and notification thereof by the lender to the insurance company, before the bankruptcy of the borrower, conferred on him such a preferable right.

Bankruptcy—Bankruptcy (*Scotland*) *Act* 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 110—*Prior Debt —Security.*

The Bankruptcy (Scotland) Act 1856, sec. 110, provides—"When the sequestration of the estates of a deceased debtor is dated within seven months after his death . . . any preference or security acquired for a prior debt by any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death . . . shall . . . be of no effect in competition with the trustee."

Held that the terms of the section did not apply to the present case, the security having been acquired, not by an act of the deceased debtor, but by an act of the creditors making effectual a security which had been already validly constituted.

This was an action of multiplepoinding and exoneration raised by the Scottish Provident Institution to determine in whom lay the right to a sum of £200 contained in a policy of insurance on the life of Andrew Allan Walker deceased.

In March 1886 Andrew Allan Walker, who was a schoolmaster at Westruther, in the county of Berwick, after sundry negotiations with Messrs Cohen & Company, a firm of money-lenders in Newcastle-on-Tyne, obtained from them an advance of £100, in return for which he gave them his promissory-note, dated at Newcastle, for the amount, and deposited with them the policy of insurance on his life already mentioned. The transaction was finally concluded at a meeting between Mr Walker and a partner of the lenders' firm in their office at Newcastle-on-Tyne.

Mr Walker died on 16th June 1887, leaving £87 of his debt to the firm still unpaid.

On 1st August 1887 Messrs Cohen & Company wrote to the manager of the Scottish Provident Institution as follows:—"We beg to give you notice that Mr Andrew Allan Walker of Westruther has assigned his policy (No. 47,293 in the Scottish Provident Association) over to us as security for an advance of £100. We understand that he has since died. Please note and oblige." And again in August 3rd they wrote in these terms:—"In reply to your favour, we beg to say that we have this policy in our possession, and have had since the date of its assignment, viz., the 10th day of April 1886."

On 5th November 1887 certain creditors of the deceased Mr Walker presented a petition to the Lord Ordinary on the Bills craving sequestration of his estate as a deceased debtor, and sequestration was awarded on 19th December 1887. George Logan Broomfield was appointed trustee in the sequestration, and as such claimed the whole of the fund *in medio.*

Messrs Cohen & Company claimed to be ranked and preferred for £87, founding upon the deposit of the policy in their hands, and pleading—"(2) *Separatim*, the claimants' rights under the contract between them and the said Andrew Allan Walker fall to be determined by the law of England, and the claimants having by said law a valid lien over said policy for payment of the debt due to them, they are entitled to be ranked and preferred in terms of their claim."

The Lord Ordinary (M'Laren) on 3rd March 1888 pronounced the following judgment:—"This multiplepoinding was instituted by the Scottish Provident Institution to determine which party is in right of the sum payable under a life policy issued by the Institution. At the time when the action was raised it appears that the company were ignorant of the fact that the assured had died insolvent, but they had been made aware of claims at the instance of two persons who founded upon assignments of the policy, and the action was brought to determine the question of preference as between these claimants. One of the parties—Broomfield—has not appeared. The other assignee Mr Cohen has appeared, and in response to an intimation made to the representatives of the assured, the trustee for his creditors has also appeared. The question now raised is between the trustee for the assured's creditors and Mr Cohen, founding on his assignment to the policy.

"It appears that some considerable time before his death, Walker, the assured, had obtained a small advance—£100—from Mr Cohen, for which he gave his promissory-note, and at the same time deposited the policy of assurance as a collateral security. The assignment of the policy supposed to be effected in this way was not intimated at the time. It is further said that there was also an informal letter of assignment which has since been lost, but the contents of which, it is thought, may be proved. The question that arises first in order is, whether a good assignment can be made of the creditor's right under the policy of assurance by deposit of the deed, or by an informal letter of the kind referred to. The next question would be (as between the trustee for creditors and the assignee), whether the criterion of preference is the date of assignment or the date of the intimation of the assignment, and I rather think that these are the only two questions necessary to be considered. I do

not conceive that it lies within my jurisdiction to determine the validity of a security created by the deposit of a document under the law of England. But it is within the scope of my jurisdiction to find out by what legal system the rights of parties are to be determined. It appears to me to be reasonably clear that the validity of the assignment must be determined by the law of the country within which the assignment was made. Here the policy is issued by a company having its domicile in Scotland, and by the company's obligation a right of credit is created capable of assignment. We have nothing to consider under the law of Scotland, so far as I can see, except to see that a valid right of credit is created by the policy in the form recognised by our law. But that right of credit follows the domicile of the creditor wherever he goes, and is capable of being assigned or dealt with by him in any manner which the law recognises. The assignment of the right of credit in the policy is a new contract, distinct as regards its nature, mode of constitution, and the law that regulates it, from the contract constituted by the policy itself. And the validity of the assignment will in general be determined by the *lex loci contractus*—that is, according to the law of the country in which the transference is made or the security given.

"In this case the policy was made over to a creditor in England, and it appears to me that the contract falls to be determined by the law of England. We should certainly not recognise an assignment to an English policy by way of deposit made in Scotland. That would not be recognised by us, because the assignment was not made in the way required by our law. And I think, conversely, where the assignment is made between parties dealing with reference to the law of England, that we ought to recognise the assignment, provided it is in accordance with the requirements of that law. Subject to any inquiry that may be demanded as to what is the law of England on the point, these considerations will dispose of the first question.

"But the question that arises in bankruptcy depends upon different considerations. The authority of a trustee or creditors' representative in bankruptcy is in general recognised by foreign countries, but any question of competing right between the trustee and a creditor claiming upon a preferable security must apparently be determined by the law of the country in which the competition arises. Such at least was the opinion of Lord Deas in *Donaldson* v. *Findlay, Bannatyne, & Company*. Now, if that criterion be applied to the present case, the facts are these —The assignment, which in the present question I assume to be valid, was not intimated at the time but was intimated after the death of Mr Walker, the assured party, and undoubtedly before his estate had been brought under the judicial administration of the sequestration. The question is whether such intimation gave the creditor an effectual security. Reference was made to the Statute of 1696, and to the 110th section of the Bankruptcy Act of 1856, which extends the provisions of that statute to estates of deceased debtors. But it appears to me that neither of these statutes has any application to a case like the present, because they deal only with securities which are considered to be objectionable on the ground of being originally granted in satisfaction or security of a prior debt. And where such is the character of the security given, it is necessary in the case of real property that the security should be completed sixty days before the granter's insolvency. So the Statute of 1696 says in express terms, and the analogue of that provision with reference to such a subject as a policy would be that it ought to be intimated sixty days before the sequestration, or sixty days before the death of a deceased debtor. But where a security is originally granted, not for a prior debt, but for an immediate advance, no statutory provision of this or any other country, I should imagine, would cut down such a transaction. There would be an end to all mercantile dealings if a security for money instantly advanced were liable to be cut down by the operation of a retrospective law. Such a rule would be in the highest degree unjust, because it would ignore the fact that while the bankrupt has given security his estate has at the same time received the benefit of the advance.

"Now, in the present case, according to Mr Cohen's claim, which I assume for the purpose of the present judgment to be correct in its statement of facts, the assignment of the policy was for an immediate advance of £100, and therefore it does not come within the scope of the statutes referred to at all. No doubt if it had not been perfected by intimation to the company before the bankruptcy it would have been objectionable on another ground—that is to say, there would have been no constitution of a real right in the assignee until after bankruptcy, and the creditor would only be entitled to claim his dividend. But we are not in that class of cases, because the intimation was made in August, and sequestration was not applied for till November.

"The result of the consideration of the various questions argued is, that provided it can be established either that the mere deposit of the policy is a good security by the law of England when followed by intimation, or provided the terms of the relative letter can be proved and shown to be a good security by the law of England, then that security being followed by timeous intimation entitles Mr Cohen to a preference over the trustee in bankruptcy.

"I think that is the only deliverance I can give at this stage of the case."

The Lord Ordinary (M'Laren) subsequently on 27th June 1888 pronounced the following interlocutor:—"Directs a case to be submitted to English counsel for his opinion on the first of the two questions stated in the Lord Ordinary's judgment delivered on 3rd March last: Appoints a draft case to be prepared and lodged in process, in order that the same may be adjusted at the sight of the Court, and *quoad ultra* continues the cause, and grants leave to reclaim."

The trustee (G. L. Broomfield) reclaimed, but when the case came up for hearing in the Inner House their Lordships postponed consideration of the reclaiming-note to allow parties to ascertain and make matter of admission the effect by the law of England of the deposit of the policy of insurance with Messrs Cohen & Company in security of their loan to the deceased.

A joint minute of admissions was thereafter

put in, to the effect "that by the law of England—where the law of England applies—the deposit by the party insured of a policy of life insurance in security of a loan of money advanced on the faith of such deposit operates as an equitable mortgage in favour of the lender, and if followed by notice to the insurance company prior to notice of the bankruptcy of the party insured to said company, confers upon the lender, while the policy remains in his hands, a preferable right to the contents of the policy to the extent of the unpaid portion of the loan in competition with the trustee in bankruptcy of the party insured."

The reclaimer argued—The whole transaction between Walker and Cohen & Company was one of loan. The debtor was a domiciled Scotsman; the transaction originated in Scotland, and the place of performance was the domicile of the debtor. Therefore the legal effect of the transaction must be decided by Scots law. The place of signing the promissory-note was merely an accidental circumstance—Story's Conflict of Laws, sec. 242. By Scots law a debt or claim could not be transferred by mere delivery, but required an assignation duly intimated — *Strachan* v. *M'Dougal*, June 19, 1835, 13 S. 954; *United Kingdom Life Assurance Company* v. *Dixon*, July 7, 1838, 16 S. 1277. The property in a Scotch policy of insurance could not be transferred by mere deposit; writing was necessary—25 and 26 Vict. c. 85; 30 and 31 Vict. c. 144. The security here was not completed till after Walker's death, and it was cut down by the provisions of the 110th section of the Bankruptcy Act 1856 (19 and 20 Vict. cap. 79).

The respondents argued—The transaction was English. It was completed there, and was to be discharged there. The law of England therefore, as the *lex loci contractus*, must decide the rights of parties—Story's Conflict of Laws, secs. 395-399. Messrs Cohen & Company's right was validly completed by intimation—*Wallace* v. *Davies*, May 27, 1853, 15 D. 688. The security granted was not for a prior debt. The deposit was in security of an immediate advance, and it only required an act of the creditor to make the policy a valid security for the debt. The 110th section of the Bankruptcy Act therefore did not apply—Bell's Comm. (7th edition), ii. 211 (5th edition), ii. 226; *Taylor* v. *Farrie*, 1855, 17 D. 639; *Miller's Trustees* v. *Shield*, March 19, 1862, 24 D. 821; *Renton* v. *Dickison*, June 15, 1880, 7 R. 951.

At advising—

Lord President—We have no judgment of the Lord Ordinary in the interlocutor under review, but we have the Lord Ordinary's view expressed in a note dated 3rd March last, and the opinions there expressed appear to me to be very sound. When the case was previously before us we found that the Lord Ordinary had directed a case to be submitted to English counsel to ascertain the law of England to be applied if it should be found to be the law by which this case was to be determined. Since that time, however, on the suggestion of the Court, the parties have ascertained the English law bearing on the questions in the case, and have made it matter of admission, and so we are now in a position to dispose of the merits of the case.

The claimants Cohen & Company are money-lenders in Newcastle-on-Tyne, and they advanced to Mr Walker, now deceased, a sum of £100 on the faith of his promissory-note. In return they received not only the promissory-note of the deceased, but a policy of insurance on his life, effected with the company who are the real raisers of the action, for a sum of £200. The transaction took place in England, and the constitution of the creditor's right must be determined by the law of the country where the transaction took place—that is, by the law of England. Now, by English law, as is clear from the admissions of the parties, "the deposit by the party insured of a policy of life assurance in security of a loan of money advanced on the faith of such deposit, operates as an equitable mortgage in favour of the lender, and if followed by notice to the insurance company prior to notice of the bankrupty of the party insured to said company, confers upon the lender, while the policy remains in his hands, a preferable right to the contents of the policy to the extent of the unpaid portion of the loan in competition with the trustee in bankruptcy of the party insured."

Now, applying the law so stated to the circumstances of this case, it is to be observed that the holders of the policy—Cohen & Company—made intimation to the insurance company on 1st August 1887, after the death of Mr Walker. The notice is in these terms—"We beg to give you notice that Mr Andrew Allan Walker of Westruther has assigned his policy (No. 47,293 in the Scottish Provident Association) over to us as security for an advance of £100. We understand that he has since died." Again on 3rd August another letter was sent by them saying—"We beg to say that we have this policy in our possession, and have had since the date of its assignment, viz., the 10th day of April 1886." Now, the sequestration of Walker's estate as a deceased debtor was awarded on the 19th of December following. The question therefore comes to be, applying the law of England as ascertained by the minute of admissions, whether that intimation of the right of the depositee is not sufficient to operate in his favour so as to confer upon him a preferable right to the contents of the policy in competition with the trustee in Walker's sequestration. It must be held to have so operated. The intimation puts the holder of the policy in the same position as he would have held if a Scotch deed of assignation had been intimated by him on the same date. The intimation completes the title of the holder of the policy, and puts the receiver of the intimation in the position of holding for the assignee.

It is further maintained, however, that the 110th section of the Bankruptcy Act applies, and that this must be taken to be a security for a prior debt. But the security for a prior debt in the contemplation of the 110th section is a security acquired by act or deed of the deceased debtor, but the act in this case was one by a creditor making effectual an already validly constituted security. I am therefore of opinion that the claimants Cohen & Company are entitled to prevail.

Lord Mure—I am of the same opinion. We have now a clear admission of the English law bearing on the case which was not before us at the last hearing. There is also evidence of the

deposition of the policy, and of the notice given to the insurance company, no doubt after the death of Mr Walker but before his bankruptcy.

With regard to the provision in the Bankruptcy Act, sec. 110, I agree with your Lordship that the completion of the security in this case does not fall within the meaning of that section.

LORD TRAYNER concurred.

LORD SHAND and LORD ADAM were absent.

The Court ranked and preferred Messrs Cohen & Company in terms of their claim.

Counsel for the Claimant (Reclaimer)—Readman. Agents—Romanes & Simson, W.S.

Counsel for the Claimants (Respondents)—Salvesen. Agents — Boyd, Jameson & Kelly, W.S.

Friday, November 23.

FIRST DIVISION.

[Sheriff of Forfarshire.

SIMPSON *v.* JACK.

Bankruptcy—Poinding—Warrant to Sell—Cessio—*Personal Diligence Act* 1838 (1 *and* 2 *Vict. cap.* 114), *sec.* 26.

A debtor who had been rendered notour bankrupt by the expiry of a charge under a decree, and whose goods had been poinded under the decree, presented a petition for the benefit of *cessio*. *Held* that the existence of the petition for *cessio* formed no bar to the poinding creditor obtaining warrant to sell.

Bankruptcy—Cessio—*Minister — Attachment of Stipend.*

A minister whose stipend was £100 per annum became notour bankrupt and applied for *cessio*. His debts amounted to £1100. *Held* (following *Scott* v. *Macdonald*, 1 Sh. App. 363) that he was entitled to the benefit of *cessio* on his assigning to his creditors £20 out of his stipend annually.

Sheriff—Judgment — Appeal — Extract — Sheriff Courts Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 32.

The Sheriff Courts Act 1876 provides (section 32) "that no extract of any such interlocutor . . . shall be issued before the expiration of fourteen days from the date thereof unless the Sheriff-Substitute or Sheriff who pronounced the same shall allow the extract to be sooner issued."

An interlocutor pronounced in a Sheriff Court process allowed "extract of this decree to go out upon caution being found." *Held* that the effect of these words in the interlocutor was not to restrict the time for appealing, but to direct that there was to be no extract until caution was found.

On 31st May 1888 Miss Maggie Simpson, Dundee, obtained in the Sheriff Court of Forfar a decree in absence against the Rev. James C. Jack, minister of the parish of Kingoldrum, for payment of a sum of £1000 as *solatium* and damages in respect of the defender's breach of his promise of marriage to the pursuer. The decree contained in common form a warrant to charge the defender for payment within seven days under pain of poinding.

Simpson having charged the defender, proceeded to poind on 23rd June, which poinding was on the 27th June reported to the Sheriff for a warrant of sale of the poinded effects.

On 6th July the first order was pronounced by the Sheriff in a petition by Mr Jack for the benefit of *cessio*. In this petition for *cessio* Mr Jack stated that in consequence of the expired charge on Simpson's decree he was notour bankrupt, and that he was willing to surrender his whole estate to his creditors.

On 9th July 1888 Mr Jack lodged in the poinding a caveat, praying to be heard before warrant to sell should be granted, and the Sheriff-Substitute heard parties thereon, and on Simpson's motion for warrant to sell.

On 16th July the Sheriff-Substitute (ROBERTSON) pronounced in the poinding an interlocutor, by which he refused *in hoc statu* warrant to sell.

"*Note.*—This poinding of the Rev. Mr Jack's effects was reported on the 27th June. A warrant to sell would have been granted thereafter as a matter of course, but since that date Mr Jack has been declared to be notour bankrupt, and has applied for *cessio*. This makes his estate litigious, and equalises all diligences within sixty days prior to the bankruptcy, and within four months thereafter. The trustee in the *cessio* will use diligence for behoof of all the creditors, so that the poinding creditor will gain nothing by selling the effects now. The trustee will sell to greater advantage, and with less expense to all concerned. I decided the same point a few years ago, and Lord Trayner, who was then Sheriff-Principal, affirmed the judgment."

On 24th July Mr Jack was examined in the process of *cessio*. No creditor appeared but Simpson, who was represented by her agent. From the deposition and state of affairs it appeared that Mr Jack was assistant and successor in the parish of Kingoldrum, and that on the death or retirement of the incumbent he would receive the whole emoluments; that the living was a small one, being worth, including an allowance from the Smaller Livings Fund of the church, £172, 12s. 5d., of which Mr Jack was receiving £91, with the manse and glebe, the latter of which was worth about £10 per annum. His emoluments thus amounted to about £100 a-year in all. He had several other creditors besides Miss Simpson. He was unmarried. His assets (including the household furniture in the manse poinded at Miss Simpson's instance, and valued at £41, 19s. 6d.) amounted to £73, 16s. 6d., while his liabilities, including the £1009, 12s. due to her, were £1114, 12s.

On 31st July the Sheriff-Substitute pronounced in the *cessio* the following interlocutor:—"Finds him entitled to the benefit of

the process of *cessio bonorum*, and he having taken the statutory deposition, grants the benefit of the process of *cessio bonorum*, and decerns, assigns, and adjudges the pursuer's moveable property to and in favour of James Forrest junior, solicitor, Kirriemuir, as trustee for behoof of the pursuer's whole creditors, without prejudice to the pursuer granting a disposition *omnium bonorum* if required: Finds the pursuer entitled to expenses as prayed for, of which allows an account to be given in, and remits the same when lodged to the Auditor of Court to tax and report: Further appoints the trustee, before acting, to find caution to the extent of £100 sterling, in terms of the statute and relative Act of Sederunt, and directs the moneys coming into the trustee's hands to be lodged in the National Bank at Kirriemuir, &c.

"*Note.*—I was asked to make it a condition of *cessio* being granted that the reverend petitioner should hand over a certain proportion of his stipend to his creditors. I can see no authority for this in the Cessio Acts. Mr Goudy, in his book on Bankruptcy, p. 451, seems to think that there is no way of recovering such estate for the benefit of creditors in *cessio* under the Debtors Act. And I certainly was not referred to any case where this had been done.

"Under the older bankruptcy law there is a case where a clergyman's stipend was conveyed to his creditors after leaving him £95, 6s. 1d. as *beneficium competentiæ—A B* v. *Sloan*, 3 S. 195—and possibly, if I were to convert this *cessio* into a sequestration under the 11th section of 44 and 45 Vict. c. 22, the trustee might attach part of the reverend petitioner's salary. This step would entail considerable expense to the creditors, and might not avail them after all, for in the case *Barron* v. *Mitchell*, 8 R. 933, it is evident, from a perusal of the Lord Ordinary's interlocutor, that they would be met with a difficulty, and looking to the small sum, if any, that would be left after leaving the petitioner a competent livelihood, I am unwilling to take this step. For if the Court in 1824 thought a clergyman could not live decently under £95, 6s. 1d. a-year, probably now that the expense of living has increased, a larger sum would be allowed. If so, there would be little or nothing over for the creditors. The petitioner is only an assistant and successor in the parish, and his whole present means are required to keep him decently in his clerical position.

"Should he apply for his discharge hereafter it will be open for his creditors to object."

Miss Simpson took an appeal from both these interlocutors to the Sheriff (Comrie Thomson), who in both cases dismissed the appeal.

In disposing of the appeal from the Sheriff-Substitute's interlocutor of 16th July, refusing a warrant to sell the pointed effects, the Sheriff appended to his interlocutor the following note: —"I express no opinion as to the effect of a decree of *cessio* in equalising diligences. The question raised here is within the discretion of the Sheriff, and he does not seem to be entirely deprived of the power of exercising that discretion by the terms of the 26th section of the Personal Diligence Act. The only interest opposed to the course which has been followed is that of the poinder, who has a completed diligence. But her rights, including her claim for expenses, are sufficiently secured by the provisions of the statutes."

In dealing with the appeal from the Sheriff-Substitute's interlocutor of 31st July, which granted Mr Jack the benefit of *cessio*, the Sheriff added this note to his interlocutor: — "I am of opinion that it is not competent at this stage of process of *cessio* to entertain the proposal that as a condition of granting the benefit of that process the petitioner should hand over a certain proportion of his stipend to his creditors. I do not say whether his refusal to do so may be a good ground for refusing or delaying his discharge; that matter will come up in due time, unless what seems eminently desirable happens, namely, a settlement of the case."

Miss Simpson appealed both these interlocutors of the Sheriff to the Court of Session.

Argued for the appellant—*In the poinding*—The Sheriff-Substitute was in error in refusing a warrant to sell the pointed effects, and so all that followed upon his interlocutor of 16th July was irregular. No "lawful cause," as required by section 26 of the Personal Diligence Act, had been shown why this sale should not have been proceeded with. A *cessio* was not a "lawful cause" for refusing a warrant of sale. For "lawful cause"—Mackay's Practice, vol. ii. p. 211. Even if the Sheriff had under the Personal Diligence Act a discretion, yet it must not be arbitrarily exercised—*Clark* v. *Hinde, Milne, & Company*, December 18, 1884, 12 R. 347; Bell's Comm. (5th ed.) p. 596. The appellant's interest was in the present case paramount, and she ought to be allowed to carry out her diligence. The debtor became notour bankrupt on the 20th of June 1888, because at that date there was insolvency concurring with a duly executed charge for payment along with an execution of poinding of the debtor's moveables. Both at the date of the debtor's insolvency and at the present time the appellant was the only person interested in the diligence, as no other creditor had done diligence—Bankruptcy and Cessio Act 1881 (44 and 45 Vict. c. 22), sec. 11. *In the process of cessio*—For the law as to *cessio*, which has not undergone any change, see 2 Bell's Comm. p. 595; as to the arrestability of clergymen's stipends—Connal on Teinds, ii. p. 99. In the case of *Scott* v. *M'Donald*, 1 Sh. App. 362, a clergyman had to assign half of his salary as a condition of obtaining the benefit of *cessio* — Dove Wilson's Sheriff Court Practice, p. 673, and *Learmonth* v. *Paterson*, January 21, 1858, 20 D. 418. In the case of *Davidson*, March 1818, F.C., an officer had to give up one-half of his pension as the condition of his obtaining *cessio*—see also Shand's Practice, p. 820. In the present case the respondent was abusing the process of *cessio*. He allowed decree in absence to pass, and then claimed a *cessio* in order to get the damages assessed. The Court should refuse *cessio*, or grant it conditionally on the respondent assigning a portion of his stipend to his creditors. The appeal to the Sheriff was competent, as the clause of extract in the interlocutor of 31st July was not intended to preclude appeal.

Argued for the respondent—*In the poinding*—The appeal of the interlocutor of 16th July refusing a warrant of sale was incompetent,

in respect that there was no final judgment. Section 26 of the Personal Diligence Act merely put a ministerial duty on the Sheriff; here there was merely a ministerial duty of sale. Notour bankruptcy did not terminate a poinding, it merely let all the creditors share in the benefit of the existing diligence, and the purpose of a *cessio* was to give the bankrupt immunity from diligence. No doubt there was a material difference between a trustee in a *cessio* and a trustee in a sequestration, for the latter was in a position to equalise all diligences. *In the cessio*—The interlocutor of 31st July 1888 was not appealable, because an appeal was not taken before the decree was extracted—Sheriff Courts Act 1876 (39 and 40 Vict. c. 70), sec. 26, sub-sec. 4, secs. 32 and 33, and the case of *Tennents* v. *Romanes*, June 22, 1881, 8 R. 824. The extract allowed by the Sheriff was reasonable, and an opportunity of appeal was allowed to the appellant, but was not taken advantage of. The object of the Sheriff Court Act of 1868 was to shorten the time for appeal.

At advising—

Lord President—This diligence of poinding proceeded upon an extract decree for the sum of £1000. The charge following thereon was dated 13th June, and it expired on the 20th of the same month, and Mr Jack, the defender, accordingly became notour bankrupt. His creditor then proceeded to execute a poinding, and a certificate of execution was returned to the Sheriff in common form, and was reported by the sheriff-officer on 27th June. Thereafter the Sheriff-Substitute appointed parties' procurators to be heard on a motion for a warrant to sell, which was the next step which would follow as a matter of course, unless any reason was adduced for suspending that warrant. After hearing the creditor and the debtor, the Sheriff-Substitute *in hoc statu* refused a warrant to sell, and the reason he assigned for doing so is put in his note thus—[*His Lordship here read the Sheriff-Substitute's note quoted above*, p. 76]. Now, I think that that judgment proceeded upon a mistake as to the effect of a decree of *cessio*. It is very true that a debtor who applies for *cessio* must have been previously made notour bankrupt, and that this has the effect, which the Sheriff-Substitute very properly states, of equalising diligence done within sixty days prior to the bankruptcy, and within four months thereafter. But I do not understand what the Sheriff-Substitute means when he says, "the trustee in the *cessio* will use diligence for behoof of all the creditors." All that the trustee in a *cessio* has to do is to realise the estate and to distribute it. His position is not the same as that of a trustee in a sequestration, and there is nothing in the appointment of a trustee in a *cessio* which to my mind can in any way prevent a poinding creditor from going on with his diligence. I am therefore of opinion that the Sheriff-Substitute had no ground whatever for refusing this warrant to sell. It is seen now, by the expiry of the four months, that no other creditor is going to claim to share with the poinding creditor in the produce of the sale, and in that case the effect of course must be that the poinding creditor will obtain payment of her debt so far as the proceeds of the sale will go in extinction of her debt. I think therefore that the interlocutor refusing *in hoc statu* a warrant of sale is not justified by anything which has occurred, and I am just as little disposed to agree in the view of the Sheriff, who says—"The question raised here is within the discretion of the Sheriff, and he does not seem to be entirely deprived of the power of exercising that discretion by the terms of the 26th section of the Personal Diligence Act." I do not think he is, and if any good cause could have been shown for stopping the issue of this warrant of sale, of course it was in the discretion and in the power either of the Sheriff-Substitute or of the Sheriff so to act. But there is no reason of this kind suggested; there is nothing, in short, to debar this poinding creditor from going on in the exercise of her undoubted right, and from bringing the poinded goods to a sale.

As to the process of *cessio*, the first question which we have to determine is, whether any appeal was competent from the Sheriff-Substitute's interlocutor of 31st July 1888? The respondent says that the appeal to the Sheriff was incompetent, because the Sheriff-Substitute's decree had been extracted prior to the taking of the appeal to the Sheriff.

The question therefore comes to be, was this extract justified by the terms of the interlocutor, and particularly by the part of it which deals with extracting? The Sheriff-Substitute appended these words to the end of his interlocutor—"And allows extract of this decree to go out upon caution being found." Now, the respondent construes these words as meaning that the moment caution is found extract may be obtained; whereas, if the cause had been allowed to take its ordinary course there could have been no extract for fourteen days, and in support of this contention sec. 32 of the Sheriff Court Act of 1876 was cited, which provides that extract shall not issue for fourteen days unless the Sheriff-Substitute shall allow the extract to be issued sooner. Now, it appears to me that what this section means is, that the Sheriff may, upon special cause shown, shorten the time for taking an appeal by allowing extract within the fourteen days, but that he must specify the time in his interlocutor. To maintain that the present interlocutor means, "if you find caution to-day you may extract to-day, therefore that appeal shall not be competent to-morrow," is a somewhat startling suggestion, and to adopt such a reading of this interlocutor would undoubtedly result in injustice. But I do not think that this was the Sheriff-Substitute's intention, nor do I think that the words of this interlocutor, fairly construed, bear the meaning that extract is to go out within any less time than an extract usually does; but only that the Sheriff intended to affirm emphatically that there was to be no extract until caution was found. I do not construe these words as meaning that extract is to be allowed to go out the moment caution is found. In the present case extract was taken on the 1st August, the day after the interlocutor bears to be signed, and it appears to me that that extract was in the circumstances altogether unjustifiable.

That being so, there is nothing now left in this *cessio* except to determine how much, if any, of the pursuer's stipend as assistant and successor in the parish of Kingoldrum ought to be assigned to his creditors as the con-

dition of his obtaining *cessio*.

Now, the emoluments of this gentleman are very small. I do not think that they can be taken as being more than £100, and certainly that sum does not leave him much room for assigning anything to his creditors consistently with his living at all in the manner becoming a parish minister.

Looking to what has been done in previous cases, I do not think that he can assign more than £20 out of the £100, leaving £80 at the disposal of the minister. I think therefore that we should remit to the Sheriff in order that he may give effect to this, and find the petitioner entitled to the benefit of *cessio* on his assigning to his creditors £20 of his salary. Nor do I see any reason for saying that this is a proceeding in any way incompetent in a process of *cessio*. There is direct and clear authority in the judgment of the House of Lords in the case of *Scott* v. *M'Donald*, 1 Sh. App., and there are other authorities of an analogous kind, all of which go to show that though a person's means are derived from the emoluments of an office, or from an annuity, he is not thereby exempt from the claims of his creditors, but that some reasonable proportion of his means must be assigned to them as the condition of his obtaining the benefit of *cessio*.

That was what the Court did in the case of *Scott*, and we shall in the present case adopt the course which was there followed. The Sheriff-Substitute seems to think that the recent Cessio Acts have to a certain extent altered the law in this matter, but I can only say that I have not heard anything cited from these Acts which can in any way bear out the suggestion.

Lord Mure concurred.

Lord Shand—I agree with what your Lordship proposes in both cases.

Upon the 16th of July, when this poinding was sisted by the interlocutor of the Sheriff-Substitute of that date, the appellant had presented a report of the poinding which had followed upon a decree of the Court containing a warrant to poind. The appellant craved a warrant of sale, but this the Sheriff-Substitute refused, assigning as a reason that the respondent had applied for the benefit of a *cessio*. In the case of such applications the debtor is generally notour bankrupt, but if he is not the process of *cessio* makes him so. But in such cases the poinding creditor is entitled to go on with his diligence unless something illegal is being done in the course of it. The rights of the other creditors are fully preserved, as even in the event of a sale of the poinded effects they are entitled to step in and claim a share in the proceeds.

But the mere circumstance that the debtor had applied for *cessio* did not entitle the Sheriff to interrupt the diligence of the poinding creditor, for there was nothing here of the nature of a competition of diligence, but merely a conveyance by the debtor of his property to a trustee for behoof of his creditors. Nor was any good reason assigned by the Sheriff-Substitute for stopping the creditor in the carrying out of her diligence. Nor could the debtor assign any lawful cause why this should be done. Nor do I agree with the reasons assigned by the Sheriff for affirming the Sheriff-Substitute's interlocutor of 16th July. He may have a discretion, but no good reason was suggested why that discretion should be exercised on the present occasion.

As regards the *cessio*, we are asked to construe the clause at the end of the interlocutor of 31st July, which allows extract of the decree to go out upon caution being found. Now, I agree with what your Lordship has said, that an interlocutor allowing extract of the decree before the usual period must be rigidly construed, and I also agree with the interpretation which your Lordship has put upon this clause, and think that what the Sheriff-Substitute really meant by these words was that caution was to be found before this decree was extracted. I also agree with your Lordship as to the competency of dealing with a salary or stipend in a process of *cessio*, and I think that the respondent here should be ordained to assign £20 per annum of his stipend to his creditors as the condition of his obtaining the benefit of *cessio*. I do not think that a gentleman in a position of this kind should be left in possession of an income utterly unfit to maintain the office he holds, and I therefore think that at present, and looking to the amount of his emoluments, a larger sum should not be demanded from him. When, however, the respondent comes to ask his discharge another and a different question may arise, because he has prospects, and it might fairly be urged then that a larger sum should be provided in view of his income being certainly increased in the event of his surviving the present incumbent.

Lord Adam was absent from illness.

The Court sustained the appeals, and remitted to the Sheriff-Substitute to grant warrant of sale in the poinding, and to grant *cessio* on condition of the respondent assigning to his trustee £20 per annum of his stipend.

Counsel for the Appellant—Galbraith Miller. Agent—R. D. Ker, W.S.

Counsel for the Respondent — Sir Charles Pearson—Law. Agents—Reid & Guild, W.S.

Saturday, November 24.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TROTTER *v.* HAPPER.

Reparation—Breach of Promise of Marriage—Proof before Lord Ordinary — Jury Trial —Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 28—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 49—*Evidence* (*Scotland*) *Act* 1866 (29 *and* 30 *Vict. c.* 112), *sec.* 4.

The Judicature Act 1825, sec. 28, provided *inter alia*, that all actions for damages on account of breach of promise of marriage or on account of seduction should be held as causes appropriated to jury trial. The Court of Session Act 1850, sec. 49, limited the class of cases appropriated to jury trial to actions for libel, or for nuisance, or pro-

perly in substance actions of damages. The Evidence (Scotland) Act 1866, sec. 4, provides that if both parties consent, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof by evidence led before himself in any cause in dependence before him notwithstanding the provision of the Judicature Act 1825 and the Evidence (Scotland) Act 1866.

In an action of damages for breach of promise of marriage and seduction and aliment, the Lord Ordinary allowed the parties a proof of their averments, and to the pursuer a conjunct probation; but the Court (*diss.* Lord Shand) in respect that the pursuer did not consent to this mode of proof, and that no special cause was shown, remitted the cause to the Lord Ordinary for jury trial.

Jane Trotter, daughter of William Trotter, Greenlaw, Berwickshire, raised an action of damages for breach of promise of marriage and seduction against George Happer, tailor there, concluding for payment of £300. The summons also contained a conclusion for aliment at the rate of £8 sterling per annum for a period of thirteen years. The defender denied that he ever made any promise of marriage to the pursuer; he admitted that he had connection with her, and he offered to aliment her child at the rate and for the period allowed in the Sheriff Court of Berwickshire.

The Lord Ordinary (Fraser) on 18th October 1888 allowed the parties a proof of their averments and to the pursuer a conjunct probation.

The pursuer reclaimed, and argued that by the Evidence (Scotland) Act 1866, sec. 4, she was, in the absence of any consent to a proof, or of any special cause being shown, entitled to have the case sent to a jury.

The defender argued that owing to the rank of life of the parties neither was able to afford a jury trial, and that that was a sufficient special cause; besides, there was in such cases less likelihood of a miscarriage of justice if the case was tried by proof before the Lord Ordinary.

At advising—

Lord President — I am afraid that we have no alternative open to us but to follow the Act of Parliament. The Judicature Act 1825 appointed this class of case to jury trial, and so for a long period it was impossible that they could be tried in any other way. The Act of 1850 first made some slight relaxation of this rule with regard to certain enumerated cases; and now we have the Act of 1866. It relaxes the rule still further, and provides that if both parties consent, or if special cause is shown, it shall be competent to the Lord Ordinary to take the proof in the manner provided by the first section of the statute. But the condition of the competency of a proof before the Lord Ordinary in such cases is (1) consent of both parties, or (2) special cause shown. Now, the only special cause shown here is, what was suggested by the respondent, that this class of case was not suited to jury trial, but that to my mind is a general and not a special cause. A special cause would be one which was peculiar to the case before us, and nothing of that nature was even attempted to be shown. I think therefore that we are bound by the statute, and that this interlocutor should be recalled and the case sent back to the Lord Ordinary for jury trial.

Lord Mure—Until 1866 such a case as this could not have been tried otherwise than by a jury, but with the Evidence Act of that year a change was made in the law; and with the consent of parties, or upon special cause shown, the case might be tried by a proof before the Lord Ordinary. In the present case there is no consent of parties, and I agree with your Lordship that no special cause has been shown, so that we have no alternative but to remit the cause to the Lord Ordinary to be tried by a jury.

Lord Shand — I have great difficulty in differing in this case from the Lord Ordinary. The statute says that upon special cause shown the case may be tried otherwise than by a jury, and the specialty here is, that besides this being an action of damages for seduction there is also a conclusion for aliment. If the rule be adopted that such cases are only to be tried by a jury we shall be flooded with cases of this kind which should undoubtedly be disposed of in the Sheriff Court. Looking to the rank in life of these parties as set out on record, I should be disposed to hold that quite a sufficient cause has been shown for trying this question by means of a proof before the Lord Ordinary. I am therefore for adhering to this interlocutor.

Lord Adam—If this question was open I should be prepared to send the case to be tried by proof before the Lord Ordinary, but I fear we are not free in the matter, but are tied down by the statute. The pursuer is entitled to have her case tried by a jury unless special cause can be shown to the contrary. It has been urged that the eloquence of counsel appealing to the feelings of a jury often results in a miscarriage of justice. But the result of such an argument, if given effect to, is, that no cases of this kind should ever go before a jury. But the statute says exactly the opposite. It was further urged that the position in life of these parties rendered such a mode of trial undesirable, but I can see nothing in this record to exclude the pursuer from the right which the statute gives her.

The Court recalled the interlocutor and remitted to the Lord Ordinary to proceed with the adjustment of issues and the trial of the cause by jury.

Counsel for the Pursuer (Reclaimer)—C. N. Johnston. Agent—Andrew Wallace, Solicitor.

Counsel for the Defender (Respondent)—Gunn. Agents—Whigham & Cowan, S.S.C.

Thursday, November 15.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BEGG *v.* BEGG.

Husband and Wife—Decree of Divorce—Reduction—Relevancy.

A wife who had been divorced for adultery raised an action for reduction of the decree, on the grounds (1) that the material evidence against her was perjured, and (2) that it had been obtained by subornation of perjury committed by an agent of the husband. The Court, *reserving* opinions on the first ground, *allowed* proof before answer of the averments with regard to the subornation of certain witnesses.

In 1886 Charles Begg, M.B., residing at Hankow, China, brought an action of divorce for adultery against his wife Rachael Isabella Lockhart or Menzies or Begg. Upon 25th February 1887 decree of divorce was pronounced by the Second Division of the Court of Session.

Upon 15th December 1887 the defender raised an action for reduction of the said decree, on the ground that it was obtained by an agent of the husband having suborned the witnesses to depone falsely.

The pursuer in the reduction produced the following affidavits of two of the husband's witnesses in the action of divorce:—

"*At Edinburgh, the 14th day of June* 1887 *years*,—In presence of John Walcot, Esquire, one of Her Majesty's Justices of the Peace for the county of Edinburgh; appeared Elizabeth Fairbairn, servant, No. 9 Rankeillor Street, Edinburgh, who, being solemnly sworn, depones—I was a witness at the trial of *Begg* against *Begg*, in which Mrs Begg was divorced from her husband, and I have now to state, with reference to the evidence which I then gave, that the greater part of it was untrue. In particular, I never heard Mr Phelps call Mrs Begg 'Tui,' always Mrs Begg, nor have I ever seen Mr Phelps in Mrs Begg's bedroom, either dressed or without his coat or boots, as I said in the Court. I never heard Mrs Begg call Mr Phelps 'Sam dear' or 'Sam darling', and I never lay awake to listen if he went downstairs after he had come up to bed. After he went into his room he closed his door, and I have never heard him go downstairs until the following morning at breakfast time. I have never seen Mrs Begg iron Mr Phelps' cuffs or collars or shirt. I have never seen Mr Phelps in Mrs Begg's room while she was doing her hair or washing her hands, nor have I ever seen him in Mrs Begg's room after I came in with the children. The statements I made to the above effect at the trial were untrue. All which is truth as the deponent shall answer to God."

"*At Edinburgh, the 17th day of June* 1887 *years*,—In presence of John Walcot, Esquire, one of the Magistrates and a Justice of the Peace for the city of Edinburgh; appeared Christina Ramsay Fairbairn, presently working in the brickworks at Portobello, and formerly a domestic servant, who being solemnly sworn, depones—I gave evidence at the proof in the action of divorce by Mr Charles Begg against his wife on 15th July last. I have been very miserable ever since, seeing that a number of the statements which I made then were untrue, and I have since been, and now am, anxious to make what amends I can for the harm I then did. The whole of the statements which I made as to the alleged intimacy between Mr Phelps and Mrs Begg are not true. In particular, I have never seen Mrs Begg and Mr Phelps kissing one another, and I never heard either of them call the other 'darling.' What I stated about Mr Phelps taking off his boots in Mrs Begg's house when there was supper was untrue. I have never known them to be in the bedroom together alone with the door shut, and it is not the case that I found the bed disarranged. I never shut the kitchen-door because of anything I saw pass between Mrs Begg and Mr Phelps. Mrs Begg never stated to me that Phelps was her step-brother, nor did she ever say to me that if ever a divorce was brought against her she would be able to work for herself. I never saw Mrs Begg arm-in-arm with Phelps at Portobello Railway Station. I am very sorry for the harm I have done, but I was led into saying the untruths at the trial, and am prepared now to state in any court the true facts of the case. All which is truth, as I shall answer to God."

The averments on which the pursuer in the action of reduction relied appear from the following opinion of the Lord Ordinary, who found the averments irrelevant and dismissed the action.

"*Opinion.*—The object of the present action is to reduce a decree *in foro* pronounced in the Court of Session, on the ground that the witnesses were perjured and were suborned.

"To aver that the witnesses in a cause were perjured is not sufficient in an action of reduction. In almost every case that is tried there is conflicting evidence. Much of it is undoubtedly false, and it is for the judge or the jury to find out on which side the truth lies. Therefore, an allegation that the successful party obtained a verdict or decree in consequence of perjured evidence is irrelevant as a ground of reduction. But the pursuer goes further than an allegation of perjury, and states that the evidence given against her was suborned by a person acting on the defender's behalf, and she maintains that her averments on this head ought to be allowed to be proved. There can be no doubt that subornation of perjury is a ground of reduction, even of a decree *in foro* of the Court of Session. In the case of *Lockyer* v. *Ferryman*, June 28, 1876, 3 R. 896, the Lord Justice-Clerk stated the law as follows—'I entertain no doubt that an allegation relevantly made, that a decree was obtained by the successful party having induced or bribed the witnesses to depone falsely, is, like any other fraud, sufficient to rescind or subvert a decree so obtained. If a man obtains a decree by bribing the judge or by personating the creditor in a debt, the judgment so obtained must yield to a proof of the facts.' And in the case of *Forster* v. *Grigor or Forster*, January 21, 1871, 9 Macph. 448, Lord Cowan expressed himself as follows—'There is an essential distinction between an allegation of subornation of perjury and one merely of perjury. If subornation of perjury by the party successful in the action were here alleged, the conduct of the party would be fraudulent; and inasmuch as a party cannot benefit by his own fault or fraud,

that would form a relevant ground of reduction of a decree alleged to have been obtained by such means.' In both of these cases the allegations upon which the decrees were sought to be set aside were found to be irrelevant or insufficient, and the question' now comes to be, whether there is to be found in the present record any relevant statement, such as is necessary to support a charge of the commission of a crime—Hume, i. 381.

"The pursuer's allegations consist of an attack upon the credibility of five witnesses who were examined against her. In the first place, she avers that Christina Ramsay Fairbairn gave false evidence when she said that she had seen the pursuer kiss the man with whom she is said to have committed adultery, and that she had seen other familiarities between the parties; and it is averred that such evidence 'formed a material part of the evidence adduced by her in said action.' The advising by the Judges in the Inner House has not been reported, and the Lord Ordinary has no means of knowing what view they took of this girl's evidence; but, in so far as regards his own opinion, it was so little material that he discarded it altogether, not because he did not think the girl a credible witness, but because it was a point in the case which was capable of corroboration, and was not corroborated, and also because the witness and the pursuer parted upon unfriendly terms. The pursuer next attacks the witness Elizabeth Fairbairn, and avers that she spoke falsely when she said that she had been a witness of familiarities between the pursuer and the man. The truth or falsehood of her evidence was a matter for the Court to judge of, and the pursuer, knowing this, makes the averment that the two girls gave this false evidence 'on the suggestion, or at the instigation of a private detective named Alexander Macdonald, who was employed by the defender to concoct and procure evidence against the pursuer;' and it is said that he enforced these suggestions by 'various threats against them, alleging that he would "jail" them if they did not say that the particulars he mentioned were true, and urged them at all events to say that they heard those particulars stated.' Now, the precise meaning of this threat is not very obvious, and if the threat was issued, it seems to have been very senseless. How persons could have been induced to swear falsely by a threat to 'jail' them (meaning, it is supposed, to put them in prison) if they did not swear falsely, is really very difficult to comprehend when an appeal to the parents, the neighbours, and the police was quite open. There is here a want, as there was in the case of *Lockyer* v. *Ferryman*, and in the case of *Forster* v. *Grigor or Forster*, of any specification of the suggestions which the private detective made, or the time or place when he made them, and without such specification the averments are irrelevant.

"Lastly, in regard to this matter of subornation, the pursuer charges Frederick Reid and his wife Mrs Reid as giving false evidence, which is just a reiteration of what was formerly maintained by her after her proof was led; and then comes this general averment—'The pursuer further believes and avers that the said detective also visited these witnesses, and profiting by their animosity to the pursuer, induced them to give the said evidence against her.' This vague and general averment is plainly irrelevant.

"But not contented with the allegations of subornation the pursuer in this record goes over points of law which were decided by the Court. She complains that a motion made by her in the course of the proof to be allowed to lead additional evidence for the purpose of proving that Christina Ramsay Fairbairn had made a statement inconsistent with her evidence after that evidence had been given was refused. The judgment of the Court upon this point is reported (*Begg* v. *Begg*, February 25, 1887, 14 R. 497), where it was held 'that it is incompetent to recal a witness to be examined as to statements alleged to have been made by him since he was examined as a witness in contradiction of the evidence he then gave.' The pursuer's point simply comes to this (if there be anything in it), that the Court gave an erroneous judgment on a point of law.

"Then it is complained that the witness Miss Martha Somerville gave evidence which 'was disregarded by the Lord Ordinary and the Court, on the ground that a lady friend of the pursuer and the said witness had written a letter to Miss Somerville prior to her examination as a witness which, it is believed, affected her evidence.' The Lord Ordinary and the Court had a perfect right to disregard her evidence if they thought it was affected by the circumstance stated, but it is not correct to say that it was entirely disregarded by the Lord Ordinary and the Court, for the Lord Ordinary, at all events, founded upon Martha Somerville's evidence as a ground for disregarding that of Christina Ramsay Fairbairn.

"It is also further averred that 'the Lord Ordinary and the Court, in pronouncing the decrees sought to be reduced, proceeded upon the evidence of Donald Fraser, now an innkeeper, and formerly a sergeant of police at Portobello, who deponed that in the summer of 1883, *i.e.*, from April till August, he often saw the pursuer and Mr Phelps together and alone and in suspicious circumstances and at untimely hours at and in the neighbourhood of Portobello. The fact is that the pursuer had never met or seen Mr Phelps prior to the month of October 1883, and that Mr Phelps had not been in Portobello until September of that year.' Be it so. The Court had the right to give what weight they thought was justly due to the evidence of this witness. The Lord Ordinary who saw him, and heard him deliver his evidence, believed him to be an honest man, and in every way a credible witness, only he made a mistake as to the time, and this mistake the Lord Ordinary pointed out in his opinion. The pursuer has reproduced the circumstance once again. It was only a very small matter to which Fraser's evidence applied, and cannot in any way be said to have been material.

"This case is therefore one that ought to be stopped at the outset. Instead of a final decree of the Court putting an end to strife it would, if such an action as this were entertained, be not the ending but the beginning of strife."

The pursuer reclaimed.

The case was continued to allow her to amend her averments of subornation of perjury with the view of making them more specific.

The pursuer lodged proposed amendments, stating in full the evidence summarised in the affidavits above mentioned. She stated the particulars in which she alleged this evidence to be false and perjured, and averred that in each particular it, along with the evidence of a Mr and Mrs Reid, was procured by subornation of perjury on the part of the defender, or of his agent Alexander Macdonald, a private detective acting on his instructions, and who, she averred, was employed by the defender to get up the case against her, and was supplied by the defender with funds for that purpose.

When the case was again called, the pursuer argued—The averments were now relevant. They gave sufficient notice to the other side of what the pursuer intended to prove, and that was all she was called upon to do. The allegations need not be as specific as in a criminal indictment. The pursuer by these averments had gone further than merely making allegations that the evidence of certain witnesses was false; she had alleged that Macdonald, as an agent for the pursuer, had gone to certain persons and obtained false evidence by subornation of perjury. That was the element wanting in the case of *Forster* v. *Grigor or Forster*, January 21, 1871, 9 Macph. 448. The case of *Lockyer* v. *Ferryman*, quoted by the Lord Ordinary, could not be an authority, as that was an extreme case, brought thirty years after the alleged hints on which the reduction was sought.

The respondent argued—The averments were not relevant. The evidence of the witness Christina Fairbairn was not material, the Lord Ordinary and the Inner House having both disregarded it, and besides, at the previous trial an unsuccessful attempt had been made to show that her evidence was false. The evidence of Elizabeth Fairbairn was certainly not disregarded by the Judges, but there was sufficient evidence to warrant decree apart from it. It was not averred that the pursuer was personally cognisant of the actings of Macdonald, even if the averments as to the latter were sufficient—*Lockyer* v. *Ferryman*, June 28, 1876, 3 R. 882.

At advising—

Lord Young—I was not one of the Judges who heard the previous action of divorce. I am therefore not intimate with the facts of it, but I have regarded this action, which has been raised for the purpose of reducing the decree in that action of divorce, as raising questions of the highest importance. The original action of divorce was begun in 1886, and decree was finally pronounced in 1887. In the latter part of the same year this action was brought, and it is founded substantially upon the ground that the evidence upon which that decree proceeded was false and perjured evidence, and not merely that the decree proceeded upon an erroneous view of that evidence. It is not merely said that there was an exaggerated view of the facts given, but further, that this false evidence had been of service in the cause, and had been material in the view of the Court in granting the decree they did, and that it had been procured by an agent for the husband by crime of subornation of perjury. I am not prepared just now to give any opinion on the question whether a decree in an action of divorce or any other decree of this Court may be set aside in an action of reduction upon the ground that the evidence upon which the Court proceeded in giving judgment was false and perjured. I do not need to express an opinion upon that point. We are told that there is no judgment upon the point, although there are *obiter dicta* to the effect that a reduction would not be entertained, and I desire to reserve my opinion. But it is in some respects a different question, and a more extensive one, whether it is not a relevant ground of reduction that a party should aver that a decree against him was obtained by means of evidence procured by subornation of perjury. It does not seem doubtful to me that if it was established that a man had procured decree of divorce against his wife by means of perjured evidence, procured either through his agent or by himself, that that decree could not stand whatever might be the means necessary for getting rid of it. I do not think it necessary to give any opinion upon the relevancy of the action, or whether the decree could be reduced even if it were proved that certain evidence was false, but the averments are such that I think it would be expedient for the parties and justifiable for the Court to see how the facts really stand before deciding the legal questions, or saying anything as to the materiality of the evidence given by the witnesses, except that the Court proceeded to a certain extent upon the evidence of one of them. It is averred that the pursuer's case had been handed over to Macdonald, that he went about procuring false evidence, and that he got these girls, partly by means of bribes and partly by threats, to give false evidence. The general result of it has been stated in the affidavits produced by the pursuer, and a fuller and more particular account has been given in the proposed amendments. It comes to this, that the defender and the co-respondent in the action of divorce acted in an unbecoming manner which indicated some immoral connection between them, and all the evidence of the Fairbairns is confined to matter tending to prove exhibitions, of a character favouring the idea, that they were significant of adultery. Now, the averment in this case is, that all this evidence was false in the knowledge of the witnesses, but that they were urged to give it by Macdonald's threats and bribes. If the evidence on this matter were taken by a short inquiry, a much easier issue would be left for us to decide than the very difficult questions of law which might arise on the case as it stands at present. The question then would be whether or not the evidence of these girls was false, and was induced by Macdonald's machinations. If the pursuer failed to establish her contention that the evidence at the former trial was false, then there is an end of the matter. If, however, the pursuer should succeed in proving that their evidence was perjured, then serious questions of law would emerge, but we should have all the circumstances before us. I think that we should allow a proof before answer with respect to the averments that the pursuer makes in regard to the evidence of the Fairbairns.

Lord Rutherfurd Clark—I also agree that we should allow a proof before answer, but nothing more at present. I would in the meantime rather refrain from making any observations on the matter.

Lord Lee and the Lord Justice-Clerk concurred.

The Court allowed a proof before answer as to the averments of the witnesses Fairbairn.

Counsel for the Appellant—Gloag—G. W. Burnet. Agent—Robert Stewart, S.S.C.

Counsel for the Reclaimer—J. B. Balfour, Q.C. —Jameson. Agents—Stewart & Stewart, W.S.

Thursday, November 15.

SECOND DIVISION.

[Sheriff Court of Ayrshire.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* BOYD, GILMOUR, & COMPANY AND OTHERS.

Process—Appeal—Competency—Court of Session Act 1868, *sec.* 71—*A.S., March* 10, 1870—*Omission to Lodge Prints in Time.*

In an appeal from the Sheriff Court the appellant failed to lodge prints within fourteen days after the Clerk of Court had received the process, in terms of A.S., March 10, 1870, sec. 3 (3), the appeal having been taken by mistake to the First Division instead of the Second Division. The Court, in the circumstances, and in view of the fact that no prejudice had been suffered by the respondents, *repelled* an objection to the competency.

The Act of Sederunt of March 10, 1870, which regulates the Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 71, provides, in regard to appeals from inferior courts—"3 (2) The appellant shall, during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof, if any, . . . and the appellant shall upon the box-day or sederunt-day next following the deposit of such prints with the clerk, box copies of the same to the Court. And if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court, as aforesaid, a print of the papers required, or to box the same as aforesaid on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed as hereinafter provided. Section 3 provides for reponing on cause shown within eight days after the appeal has been held to be abandoned—"(5) On the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid, if the appellant shall not have been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same, and the Clerk of Court shall further re-transmit the process to the Clerk of the Inferior Court."

Upon 29th June 1887 the Sheriff-Substitute of Ayrshire at Kilmarnock (Hall) decerned in favour of the pursuers in this action.

The defenders appealed to the First Division of the Court of Session, and upon 8th March 1888 the Second Division, to which the case had been transferred, allowed the record to be amended in terms of a minute lodged for the defenders.

Upon 15th March 1888 the Court recalled *in hoc statu* the said interlocutor of the Sheriff-Substitute, and remitted the case to the Sheriff with instructions to allow the parties a proof of their respective averments under the record as amended. The Sheriff-Substitute accordingly again allowed the parties a proof, and upon 29th June 1888 he issued an interlocutor by which he "repelled the defences, and decerned against the defenders in terms of the prayer of the petition."

The defenders appealed to the First Division of the Court of Session upon 25th July 1888, and the appeal was noted as received by the acting Depute Clerk of Session on 26th July 1888. The amended record, proof, and interlocutors were not boxed to the Court until 4th September 1888. When the case was put out for hearing upon 15th November the pursuers objected to the competency of the appeal on the ground that the defenders had failed to comply with the Act of Sederunt 10th March 1870 in not boxing the prints in the appeal within fourteen days from the 26th of July.

The pursuers argued—The prints ought to have been boxed to the Court on the first box day in vacation, which fell on 17th August, and if not boxed by that time, then the defenders could have applied within the next eight days to be reponed. But they did neither of those things. When the days for reponing had elapsed, the Clerk of Court ought to have marked upon the proceedings the intimation given in the Act of Sederunt, and re-transmitted the process to the Sheriff Court. But the defenders in this case borrowed the process, and so prevented the clerk from re-transmitting the process according to his duty. The appellants must be held to have abandoned their appeal, and the judgment of the Sheriff-Substitute had become final. In the cases quoted by the defender the parties had printed and boxed some part of the necessary prints, and were consequently allowed to print others, but in no case had the parties omitted to print all the papers, and yet had been allowed to prosecute their appeal—*Park* v. *Weir*, October 15, 1874, 12 S.L.R. 11.

The defenders argued—The delay had arisen through a mistake of the country agent, who had appealed the case to the First Division when he ought to have appealed it to the Second Division, and the agents in town did not become aware of the facts in time. But the Court had a discretion in the matter, and where no delay had been occasioned the appeal would be regarded as competent, although the terms of the Act of Sederunt had not been strictly complied with. Here the prints had been boxed by 4th September, and no prejudice had resulted—*Walker* v. *Reid*, May 12, 1877, 4 R. 714; *Young* v. *Brown*, February 19, 1875, 2 R. 457; *Lattimer* v. *Anderson*, December 20, 1881, 9 R. 371; *Robertson* v. *Barclay*, November 27, 1877, 5 R. 257; *Greig* v. *Sutherland*, November 3, 1880, 8 R. 41.

At advising—

Lord Justice-Clerk—The respondents in this appeal, who hold a judgment in their favour by the Sheriff-Substitute of Ayrshire, object to the competency of the Court taking up and disposing of the appeal on its merits, maintaining that under the 3d clause of the Act of Sederunt of 1870, regulating the preliminary procedure in such appeals, this appeal has fallen, and cannot be now considered by the Court of Session.

The facts are that the defenders on 25th July noted the appeal, and the process was transmitted on 26th July to the Clerk of Session. According to the Act of Sederunt the appellants should have boxed the prints of the proceedings on the box-day in August. This they did not do. They had it in their power within eight days to apply to the Lord Ordinary on the Bills, and to show cause why they should still be allowed to box the papers. This also was not done. The papers were boxed on the 13th of September, being the second box-day, having been lodged with the Clerk on 4th September. When the eight days had expired, the next step in ordinary course would have been for the Clerk of the Court of Session to mark the process with a note that the appeal had fallen, and to re-transmit it to the Sheriff Court. This was not done either. Accordingly the appeal, which was to the First Division of the Court, came up there for hearing, when the respondents took objection to the competency of proceeding with it in respect of the facts I have stated. The First Division transferred the case to this Division, and the question on the competency is again raised.

As regards the cause of the omission, I think it must be taken to be the fact that the failure in this case to box the prints within the time prescribed was due to inadvertence—and to inadvertence only—although I cannot help saying that the circumstances suggested by the defenders as accounting for the mistake seem to me to be of the most shadowy description, the only suggestion being that the appeal was marked to the First Division, although the proof to which the appeal referred had been taken on remit from this Division. How that fact should have made any difference in the conduct of the detail business of lodging papers I have not been able to see. I presume it must have been from some practice of communication between the officials in the office and the clerks of agents, but this is by no means clear. The real question, however, is whether the penalty for the inadvertent omission must be the loss of the right to prosecute the appeal, with the result that the judgment of the Sheriff-Substitute is stamped with finality.

The pursuers maintain that this must be the result. I think Mr Asher pressed his contention so far as to argue that on the day after the expiry of the reponing days the power of the Court to take up and consider the appeal absolutely ceased, and that whether the process had been transmitted back to the Sheriff-Clerk or not it was no longer before and could not be dealt with in any way by the Court of Session.

I do not think that in view of what has already been done by the Court in previous cases any such contention can be given effect to. For in numerous cases the question has been considered on the merits, with the result that in some of them the appeal has been allowed to proceed, a result which could not have followed had the Court felt itself compelled to hold that by the mere lapse of the time prescribed by the Act of Sederunt they had ceased to have any power over the process, and could not write upon it.

I cannot therefore give effect to the very broad and sweeping view which was pressed on us in debate that the lapse of the time fixed by the Act of of Sederunt operates as a removal of the process out of the Court of Session, so that we are precluded from dealing with it whatever may be the circumstances of the case as regards the failure to box papers.

But then it is contended that the failure makes it imperative upon the Court to hold it incompetent to proceed to hear and dispose of the appeal upon the merits, and that the judgment of the Sheriff must be held to be final. At first sight there is great force in this objection when the words of the Act of Sederunt are considered, which are very distinct.

We have thought it advisable to consult the other Division of the Court, and the conclusion which I have to state is that at which we have arrived after consultation.

Had it been clear that the Court are bound to regard a provision of an Act of Sederunt as being equivalent to a statutory enactment, I should have been unable to hold otherwise than that the defenders' appeal had fallen, and that it was not in the power of the Court to replace them in the position of being able to prosecute that appeal now.

But this is not the view that has been taken in previous cases. The Court have invariably held that they were entitled to consider whether the circumstances of the case made it necessary to enforce the Act of Sederunt to the effect of precluding the party in default from proceeding with this appeal. They have thought themselves entitled to consider what was the intention in passing the Act of Sederunt, and having regard to that intention, whether there was in the particular case ground for enforcing its penal provisions. Thus the Lord President in *Taylor or Young* v. *Brown*, February 19, 1875, 2 R. 370, says—"According to the Act of Sederunt this is a good objection. But I confess to a reluctance to sustain so technical an objection if it is possible to get the better of it. Now, it is important to observe that the provision founded on occurs in the Act of Sederunt and not in the statute. The regulation is made in place of the 71st section of the statute, and it is important to observe that under section 71 this objection would not have been fatal. Therefore the objection stands on a regulation of a form of process made by the Court. When we are satisfied that under an Act of Sederunt only a formal and innocent omission has been made we may allow the thing to be rectified." And again in *Lattimer Anderson* v. *Wight*, December 20, 1881, 9 R. 370, his Lordship said—"I think this case falls within the principle of the case of *Young* v. *Brown*, rather than of *Robertson* v. *Barclay*. In the latter case there was an entire failure to print. The appellant had not even attempted to take any step to print and box the appeal, and it was held that he had no excuse. The only excuse that was offered was that there had been verbal and obviously useless attempts to settle the case, which certainly did not justify the omission to prepare the prints. In the case of *Young* v.

Brown there was a failure to print a part of what is required by the Act of Sederunt—a part no doubt which was of less importance to the cause than that which has been omitted here—but I do not know that that fact will make any difference in the question whether the Act of Sederunt has been violated or not."

It also very clearly appears from the cases already decided that the Court have held the intention of the Act of Sederunt to be to prevent the delay in procedure, which the failure to box papers in due time tends to cause, to the detriment either of the interests of the opposing litigant, or of the despatch of the business of the Court; in short, that its penal action is directed against dilatory tactics, or, to use the word of the Lord President in *Robertson* v. *Barclay*, November 27, 1887, 5 R. 257—"One of the leading objects of all recent legislation and of the Acts of Sederunt relative to procedure is that the procedure of the Court should be expedited, and the tendency of recent legislation in this direction is very peremptory. Here the party has a certain term assigned to him for lodging his printed papers. If he does not lodge them timeously he is held to have abandoned his appeal. But this indulgence is conceded to him, that within eight days after the term has elapsed he may move the Court to repone him. But the Act of Sederunt requires that that shall not be done unless upon cause shown."

Now, this being the manner in which cases of failure to box prints have been dealt with hitherto, what is the case here? It is not suggested that the defenders did not box papers because they desired delay, or that in point of fact any delay was or could have been caused by the failure to box. It was admittedly an entirely unintentional mistake which did not delay by one day the business of the Court, or cause any inconvenience or hardship to the pursuers. The box-day was in August, the prints were lodged early in September, and the Court did not meet for business till the 15th of October. The spirit and intention of the Act of Sederunt, of which the Lord President spoke in the case of *Robertson* v. *Barclay*, were thus in no way violated by what occurred. What was done was not done in pursuance of off-putting tactics, and did not cause any delay or inconvenience whatever.

The case therefore falls to be considered in the light of those decisions under which appeals have been allowed to proceed notwithstanding the failure to box prints of parts of the process required by the Act of Sederunt to be boxed. Now, in the case of *Taylor or Young* v. *Brown* the note of appeal, which is one of the things specified, was by inadvertence not boxed. Notwithstanding this it was held that the Court could proceed to hear and dispose of the appeal, and that they were not compelled by the terms of the Act of Sederunt to hold that the appeal had lapsed. The only difference between that case and the present is that there the appellant was in default as regarded only one of the many things required by the Act of Sederunt. Does it make any difference that here the omission is not one of the prescribed things, but of all? It does not appear to me that it makes any difference in principle. Equally in both cases the omission was a substantial omission, but equally in both it was unintentional, harmless to the interests of the opposite party, and had and could have no injurious effect upon the progress of the business of the Court. I am of opinion that in these circumstances the decisions already given by the Court are authorities for holding—(1) That it is not imperative on the Court to put in force the penal provisions of the Act of Sederunt; and (2) that the circumstances of this case do not call for an infliction of these penal provisions.

I am therefore in favour of repelling the objection to the competency of the appeal.

Lord Young—The objection which has been taken to the competency of the appeal in this case is one of a most technical character. The objection comes to this, that whereas according to the provisions of the Act of Sederunt of 1870 these prints, which comprise the whole proceedings in the case, ought to have been deposited with the Clerk of Court upon the 10th August and boxed to the Court upon the 17th August, were in reality not lodged until the 4th September, and were not boxed until the 13th of that month. But the contention of the respondents is that under the imperative provisions of the Act of Sederunt we must hold that in these circumstances the appeal has been abandoned, and that the Sheriff's judgment upon the merits of the case is final; that, however just we may think it, no relief should be given to the appellant, even although no harm has resulted to the respondents. I must repeat what I have said before, that I doubt whether the Court—whether it be the whole Court or a Division of the Court—is precluded by the terms of an Act of Sederunt from doing whatever it thinks justice and equity demand should be done. I do not know whether it was conceded, or even argued, that the only remedy for hardships resulting from construing the terms of this Act of Sederunt in the way we are asked to construe them would be by the passing of another Act of Sederunt granting the relief sought. That might be the strictly technical way of doing what the Court thought the equity and justice of the case demanded. The idea of the Court in making an Act of Sederunt is to compose a rule for its own practice and procedure, and to announce to the agents practising before the Court what procedure will as a rule be generally followed, but whether that rule is such as to preclude us from doing what we think to be just and right in individual cases is a question that is not necessary to be considered here, although I have a very strong opinion upon the subject.

I do not know why the first case which was cited to us should not be taken as an authority for this case. In fact, the case of *Walker* v. *Reid* seems to be on all fours with this case. I shall read the rubric—"In an appeal from the Sheriff Court the appellant omitted to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sec. 3, sub-sec. 1, of A.S., March 10, 1870, the agent having by mistake, as the day for lodging fell in vacation, lodged them on the box day instead. An objection having been taken by the respondent to the competency, the Court in the circumstances overruled the objection, and sent the case to the roll." The mistake of the agent in that

case consisted in thinking that the term of fourteen days did not run during the vacation as well as during session, and he had an impression—a mistaken impression as it turned out—that he should lodge the prints in the case upon the first box-day, and not at the end of the fourteen days. It was a mistake, and led to the violation of the Act of Sederunt, as the prints were not lodged at the time appointed by the Act. Here the prints should have been lodged upon the 10th August, they were not lodged till the 4th September; they should have been boxed upon the 17th August, they were not boxed until the 11th September. In that case there was a mistake which led to the violation of the Act of Sederunt; in this case it was an oversight. In that case the Court granted the relief asked; they did not think that it was imperative upon them under the Act of Sederunt to hold that the appeal had been abandoned when in reality it had not been abandoned. They were pressed to say that it was abandoned under the terms of the Act, but they allowed it to proceed. In that case I was called in to make a *quorum*, as the Lord Justice-Clerk was absent, and I said—"It must always be in the power of the Court to do justice in any case of this kind, and relieve a party of so severe a penalty, following on so critical a construction of what after all is only a rule of the Court, laid down by the Court, for its own guidance, with notice to parties and practitioners. We may advantageously and wholesomely make stern regulations in order to check appeals taken merely for delay or other improper purpose, but it is a strong thing to say that by any words of ours in an Act of Sederunt we preclude ourselves from doing what we think justice in any particular case, and that the accidental and harmless delay—it may be of a day or an hour—will make judgment final which is by the law of the land subject to review." That was my opinion then, and I adhere to it now.

Now, that judgment granted relief notwithstanding the terms of the Act of Sederunt had been broken. I should be prepared to read in to every Act of Sederunt, as incidental to its terms, that notwithstanding the terms of the Act it should be within the power of the Judge who tries the cause to give the relief to any of the parties in the case which he thought justice and equity demanded. I am of that opinion here. Indeed, it is indisputable that if we have the power to give the appellant here the relief which he asks it would be wise and discreet in us to exercise it, and we have the power to grant that relief unless we have deprived ourselves of it. I think that it is in the power of either Division of the Court, or of the Lord Ordinary who is trying the case, to give such relief as may be demanded in the circumstances of each case. If it was not so, what would the result be? For example, this is said to be a test case. The whole sum in dispute here, some £800, though it might have been a great deal more, has been decerned for by the judgment of the Sheriff, and his judgment might have had to be held as a final one, because by the result of an innocent oversight of the agent of one of the parties that party was held to have abandoned the appeal. It was urged that the mistake could have been set right by a reduction of the decree. Just consider what would have been the result if that suggestion could be adopted. I should doubt if a reduction could have been brought, but suppose it could, and the whole action tried over again in that process, what results would the Act of Sederunt have brought about? The Act was passed to prevent delay and to expedite business as affording economy in the carrying on of actions in the Court of Session, and I suppose that it is in the interest of despatch and economy that an action of reduction should be necessary to enable the appellant to bring forward his case. I do not think that it could be done, but even if it could, I think it would only show the necessity of the Court having the power to render that procedure unnecessary. Could the respondent not have agreed to the case going on under the circumstances in this case, or could we not have allowed such a proceeding, but must in justice to the parties have refused to hear the case, as the process ought to have been transmitted to the Sheriff Court whenever the days of reponing had passed? I think that too much weight has been attached to Acts of Sederunt, and I am not sorry to have an opportunity to give my opinion as to their character and function in regulating the course of our procedure.

Lord Rutherfurd Clark—In this matter we have consulted the Judges of the First Division, and the prevailing view of your Lordships has been that this appeal is competent, notwithstanding the terms of the Act of Sederunt, because the mistake, on account of which the parties did not comply with the requirements of the Act, was due to the inadvertence of an agent of the parties. As this has been the judgment of the majority of your Lordships, I concur in it, but I do not think I could have reached it by my own unaided efforts.

Lord Lee—In my opinion the Act of Sederunt is binding on the Court, and we have no power to dispense with it or to avoid the results that must come from its operation. I confess to a dislike to dispensing powers, and think that the exercise of them may give rise to well-founded feelings of discontent, although no doubt the powers are always well exercised in the name of justice, or some other name, but as your Lordships, after consultation, have come to the conclusion that this appeal may be allowed I do not venture to dissent, but I cannot agree with some of the general principles that have been announced.

The Court allowed the appeal.

Counsel for the Pursuers—Asher, Q.C.—Murray. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for the Defenders—Balfour, Q.C.—Guthrie. Agents—John C. Brodie & Sons, W.S.

Tuesday, November 20.

SECOND DIVISION.

MITCHELL AND OTHERS *v.* RAWYARDS COAL COMPANY (LIMITED).

Public Company—Voluntary Winding-up—Petition for Supervision Order and for Appointment of Additional Liquidator — Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *secs.* 147, 149, *and* 150.

Upon 1st November a public company went into voluntary liquidation after a resolution passed by a large majority, both in number and value, of the shareholders, and a liquidator was appointed. Of the same date the liquidator issued a circular to the shareholders intimating a proposal to sell a colliery belonging to the company at an upset price, and requesting answers, if any, before 12th November. No answers were received, and upon 12th November the colliery was advertised for sale upon 22nd November at the upset price. It had been offered for sale on several recent occasions. Upon 3rd November a petition for a supervision order and for the appointment of an additional liquidator was presented by one of the shareholders of the company, and afterwards concurred in by thirteen others. In said petition objection was taken to the proposal to sell the colliery at present, but no allegations were made against the liquidator already appointed, nor any objection taken to the proposed upset price. The case was put out for hearing upon 21st November, and upon the evening of 20th November a minute was lodged by the petitioners making certain accusations against the *bona fides* of the liquidator, and objecting to the lowness of the upset price and to the shortness of the notice of sale. The Court *refused* the prayer of the petition, *holding* that the statements in the minute came too late.

The Rawyards Coal Company (Limited) was incorporated under the Companies Acts 1862 to 1880, on or about the 19th day of August 1872, and had its registered office at 8 High Street, Airdrie. The capital of the company was by the memorandum of association declared to be £30,000, divided into 3000 shares of £10 each. Of these only 2644 were alloted and fully paid up.

At an extraordinary general meeting of the company, held within the registered office on 1st November 1888, the following extraordinary resolutions were adopted, viz.—That it had been proved to the satisfaction of the company that the company could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the same; and that accordingly the company should be wound up voluntarily under the provisions in that behalf of the Companies Acts 1862 and 1867, and that Gavin Black Motherwell, solicitor, Airdrie, should be and was appointed liquidator for the purpose of winding-up the affairs of the company. At the said meeting of 1st November the only two shareholders actually present who opposed the resolution to wind-up were William Mitchell, Airdrie, holding 90 shares, and John Laurie, Airdrie, both directors of the company, who held certain proxies, and the total vote was 573 in favour of the resolution and 53 against it. Upon the same date the said liquidator issued a circular to the shareholders, stating that it was proposed to form a new company, and to advertise, *inter alia*, the colliery for sale at the upset price of £3000, and requesting answers on or before 12th November.

Upon 3rd November the said William Mitchell presented a petition to have the liquidation put under the supervision of the Court, and to have an additional liquidator appointed. The petition proceeded upon the facts that the indebtedness of the company was greater eight years ago than it was then; that coal had lately risen, and was still rising in price; that the present was therefore not a time to sell the works; and that as various complicated questions as to the management might be expected to arise it was desirable to have the liquidation carried on under the supervision of the Court and a second liquidator appointed.

Answers were lodged for the company and for the liquidator thereof, in which it was stated that "from the date of the incorporation of the company in 1872 until 1875 the company was entirely occupied in sinking pits and opening up the collieries which had been acquired on lease. In 1875 the company began to put out coal for the market, and according to the balance-sheet issued as at 31st May 1876 the expenditure of the company upon pit-sinking, buildings, machinery, railways, &c., amounted to £40,513, 4s., which had been met by the paid-up capital £22,494 0 0
And money borrowed chiefly from the Royal Bank . . . 18,028 1 6

£40,522 1 6

For the years 1877 and 1878 a dividend at the rate of 5 per cent. was declared. No dividend had been paid since 1878. At the present time the whole assets of the company could not be valued at more than from £10,000 to £12,000, while the indebtedness of the company amounted to £21,693, 9s. 9d., of which sum £10,643, 9s. 9d. was due to the British Linen Bank. In the spring and summer of 1888 repeated attempts were made to sell the colliery plant, &c., but without success. The same were exposed for sale by public roup at upset prices, which if obtained would not nearly pay the debts of the company."

Upon 12th November no answers had been received to the liquidator's circular, and upon that day the colliery was advertised in the *Glasgow Herald* at the proposed upset price of £3000, the sale to take place upon 22nd November.

Upon 16th November a minute was lodged by John Laurie, and other twelve shareholders of the company, concurring in William Mitchell's petition, and at the urgent request of the petitioners' the case was put out for hearing in the Summar Roll of 21st November.

Upon the evening of 20th November another minute was lodged by William Mitchell and John Laurie, which was only brought to the knowledge of the company immediately before the hearing on 21st November. In the minute it was stated that the minuters were liable *singuli in solidum* along with the other directors for the sum of £10,463, 6s. 9d. due to the British Linen Bank, and were alleged to be

also liable *singuli in solidum* along with said other directors for the payment of the sum of £4300 contained in a bond granted by the said company in favour of William Motherwell, chairman of the company, and father of the said liquidator. It was further stated that the minuters had been charged upon said bond, and had been sequestrated, but that said sequestration had been recalled by the Lord Ordinary and the case reclaimed to the First Division; also that the said John Laurie was creditor of the company for a further sum of £150. It was alleged that the upset price was too low, the notice of sale too short, and that the liquidator was a tool in the hands of his relations and friends, who were shareholders of the company, and desirous of acquiring the colliery at a low figure with the view of starting another company.

The Companies Act 1862 (25 and 26 Vict. cap. 89) provides, by sec. 147, that "when a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court . . . and equally upon such terms and subject to such conditions as the Court thinks just;" and by sec. 149, that "the Court may, in determining whether a company is to be wound up altogether by the Court, or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by sufficient evidence . . . In the case of creditors regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company;" and by sec. 150, that "where any order is made by the Court for winding-up, subject to the supervision of the Court, the Court may in such order, or any subsequent order, appoint any additional liquidator or liquidators." . . .

Argued for petitioners—The petitioners here were both shareholders and creditors. They were largely interested in this colliery realising a good price. They could not claim to have the prayer of the petition granted as a matter of right, but where reasonable evidence was put forward in support of the allegation of prejudice, the Court regarded such applications for a supervision order with favour. The statements made in their minute showed good grounds for distrusting the management of the present liquidator if uncontrolled—*Brightwen & Company, &c.* v. *City of Glasgow Bank*, November 27, 1878, 6 R. 244.

Argued for respondents—No ground had been stated for interfering with the conduct of this liquidation and proposed sale, which was approved of by the vast majority of the shareholders. It was only last night that the suggestion of conspiracy was made, and it was without foundation. The colliery had been in the market before, and therefore a long notice was unnecessary and undesirable, as it was being worked at a loss of £400 a-month. The upset price was the largest possible in the circumstances. No bid had been made when it was £5000, and the highest private tenders had been £3600 and £2700; both were withdrawn. It was conceded that even a creditor had no right to demand that such a petition should be granted, and here no relevant allegations had been made. The statements now offered were delayed without excuse till the last moment, and were not therefore to be regarded with favour. The matter was in the discretion of the Court, but by the terms of the Act regard must be had to the wishes of the majority.

At advising—

Lord Justice-Clerk—This history of this coal mining company is unfortunately like that of very many other similar undertakings during the last twenty years. It began with a capital of £22,494, and borrowed from the Royal Bank £18,028, making a total sum of £40,500. It paid a dividend for two years of 5 per cent., but no dividend whatever has been paid since 1878, and there is no doubt that this company has been in a lamentable condition for a long time, and is now being worked at a loss of something like £400 per month. A considerable sum has been borrowed from the British Linen Company's Bank, and the directors, including the petitioners Mitchell and Laurie, granted a bond for £4300 by the said company and themselves, for which they all became, jointly and severally, liable. Some of them seem able to pay the amount of this bond, but others do not, for having been charged upon the bond they have failed to pay, have thus been rendered notour bankrupt, and may therefore be presumed to be insolvent. The shareholders of the company were informed that the directors thought there should be a liquidation, and an extraordinary meeting of the company was accordingly held upon 1st November, at which it was resolved that the company should be wound up voluntarily, and that Mr Gavin Black Motherwell, solicitor, Airdrie, should be appointed liquidator. This resolution was carried by a majority of 573 to 53. There was thus a great preponderance in number of votes in favour of the resolution, and in value the majority seems to have been about six to one.

But the question here has arisen in consequence of a notice sent by the liquidator to the shareholders, also upon 1st November, stating that it was proposed to form a new company, and to advertise the colliery for sale at the upset price of £3000, and requesting them to communicate their views to him before 12th November. Now, following upon that intimation, the petitioner Mitchell on 3rd November presented this petition, and on 12th November, no reply having been received to the circular, an advertisement appeared in the *Glasgow Herald* of the sale of the colliery at the upset price of £3000, the sale to take place on the 21st inst.

The petitioners ask for a supervision order and the appointment of an additional liquidator, on the ground that this notice of sale is too short, and that the property is virtually being thrown away, because there has recently been a rise in the price of coal, and there are better prospects for the future. The liquidator, and a large body of the shareholders who agree with him, say that this was not really the first notice of sale, because this colliery was well known in the market. It had been put up on several occasions at prices varying from £5000 to the pre-

sent proposal of £3000, and when it was attempted to dispose of it privately there had been two offers, one of £3600 and the other of £2700, both of which had since been withdrawn. We are to consider whether we are to pronounce an immediate order, which will have the effect of putting a stop to the sale to-morrow. If the question had come up before us purely, I should have held that the notice was too short for the sale of such a concern as this, but we are asked to decide this matter the day before the proposed sale, and this position in which we are placed is aggravated by the fact that up to last night the petitioners had put forward no real statement of their case at all. The suggestion now made is that the liquidator and his friends have formed a plot to get possession of the colliery at a low figure in their own interest, and it was argued that it could not have been earlier stated. If the statements in the minute of last night are true they might have been made long ago. The petitioners therefore come here in a most unfavourable position to ask the Court to stop the proceedings of the liquidator and of the great majority of the shareholders. No doubt the petitioners have a large interest, because the amount of their liability will be increased or decreased according to the result of the sale, but their case is not to be favourably considered if they only come forward now with statements which could have been fully made at a much earlier stage, and this is what I think they have done. I am therefore of opinion that we should not grant the prayer of this petition, and I base my opinion upon these two grounds, viz., first, that the opposition to the proceedings of the liquidator is trivial; and second, that it is not the case to say that the colliery is not now offered for sale for the first time. The time is short, but not in the circumstances sufficient to warrant us granting the prayer of this petition.

Lord Rutherfurd Clark—The petitioners apply for a supervision order and the appointment of an additional liquidator, and, as I understood counsel, when the case was mentioned the other day, it is necessary for their purpose that we should to-day make the order they require, because if the order is not made to-day the evil they complain of will be caused. Therefore the only matter before us is, whether we should immediately make the supervision order which the petitioners ask. I do not doubt the great interest the petitioners have in this matter, because the amount realised by the assets will determine the amount of their liabilities. So far I consider their case very favourable. But we cannot lose sight of the fact that the proceedings of the liquidator have been approved of by the great body of the shareholders and by the other guarantors.

The first consideration is this, whether this sale, if it goes on, will take place upon insufficient notice. So far there is something in the objection, for at first sight it seems unwise to sell a colliery after only ten days' advertisement. But while that is so, we cannot hold that the mere shortness of the notice is by itself enough to justify us in pronouncing this order at once. We must take into account that this colliery has really been long in the market, and that those most interested in the matter ask the Court not to pronounce this order, because they say if the sale is stopped they will incur heavy expenditure in keeping up this colliery in the condition in which alone it is saleable.

But we cannot proceed apart from the following grounds—The petitioners make a charge against the liquidator of being a tool in the hands of his relations and friends, and of acting in the interest of these relations and friends with the view of their acquiring this colliery at a very small expense. I cannot look upon that allegation as warranting us in pronouncing this immediate order when I find that they only made the charge last night, and that the other side only knew of it this morning. I think the petitioners have themselves much to blame for bringing that matter before the Court only the day before the proposed sale.

I am therefore of opinion that we should refuse to pronounce any immediate order—that is, any order to-day for the supervision of the liquidator of this company. If the parties wish the matter left over for further consideration we may keep up the petition, otherwise we may dismiss it as of no further necessity.

Lord Lee—I am also for refusing the prayer of this petition. The question before us is, whether cause has been shown for the interposition of the Court under the sections of the Act which regulate this matter. The burden of showing cause is on the petitioners, and I am clear that in the petition as originally brought no sufficient cause was shown. I agree with your Lordships in thinking that the allegation there made is not so stated as to be relevant for inquiry. The allegation made last night, which is not very clearly stated, is that the Messrs Motherwell wish to get this colliery at an absurdly low price, and that the sale is not *bona fide*. We only hear that last night for the first time, although it is admitted that the resolution of 1st November was carried almost unanimously, and that the liquidation has been carried on ever since to the satisfaction of the great body of the shareholders, and without any personal allegation against the liquidator. If the proposed upset price is ridiculously low, one does not see why that was not thought of sooner, especially as it was admitted that the suggestion that the upset price should be £3000 was made in the circular sent out on 1st November, and that no answer was received objecting to that proposal. There are clearly more of the shareholders interested in getting a good price for the colliery than the two petitioners. I am therefore not prepared to take this order off the petitioners' hands, considering that the property has previously been frequently exposed, and I think no sufficient suggestion of unfair dealing has been made to give a ground for taking the matter out of the liquidator's hands. Further, I think this petition should not be allowed to stand over, which would not be fair to the liquidator, but should be dismissed at once.

The petition was accordingly dismissed.

Counsel for the Petitioners—Graham Murray—Shaw. Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondents—D.-F. Mackintosh—Dickson. Agents—Drummond & Reid, W.S.

Wednesday, November 21.

FIRST DIVISION.

THE NORTHERN HERITABLE SECURITIES INVESTMENT COMPANY (LIMITED) AND OTHERS *v.* WHYTE.

Bankruptcy—Trustee—Discharge—Appointment of New Trustee—Nobile Officium.

A bankrupt was discharged without composition in 1884, and his trustee was also discharged. By the contract of marriage of the bankrupt's parents the fee of certain bank shares remained in his mother. By deed of transfer dated 1870 she transferred the shares to herself in liferent, and to her children, including the bankrupt, in fee. She died in 1887. In a petition for the revival of his sequestration, on the ground that these shares had not been ingathered and divided, the bankrupt averred that the shares had not vested till his mother's death, which happened after the date of his discharge, but that in any view the trustee had abandoned them. There was no evidence of abandonment by the creditors. The Court *held* that the shares had vested in him before the date of his discharge, and (following the case of *Thomson, Petitioner*, December 17, 1863, 2 Macph. 325) remitted to the Lord Ordinary on the Bills to appoint a meeting of creditors for the election of a trustee.

The estates of George Whyte & Company, and George Whyte sole partner thereof, were sequestrated on June 7, 1882, and James Alexander Robertson, C.A., Edinburgh, was appointed trustee. He took measures to realise and divide the estates, which paid a dividend of 7½d. per £.

On 18th March 1884 the bankrupt was discharged without composition, and on 4th November 1887 the trustee was discharged by the Sheriff.

Mrs Isabella Mess or Whyte, the bankrupt's mother, died on 18th January 1887. Sometime before her death there stood in her name in liferent, and in the name of the bankrupt and of his three sisters in fee, certain shares of the Commercial Bank of Scotland.

By the contract of marriage entered into between the parents of the bankrupt, Mrs Whyte conveyed these shares to herself in liferent, but exclusive of the *jus mariti*, and failing her by death to her husband George Whyte in liferent, and in either case to the children of the marriage, equally among them if more than one, in fee, subject to the power of division and other conditions mentioned in the contract.

By transfer dated May 1870 Mrs Whyte transferred and made over these shares to herself in liferent, and her children equally in fee.

The present petition was accordingly presented by the Northern Heritable Securities Investment Company (Limited) (who were creditors of the bankrupt to the extent of £8124, 5s. 7d.) and others, who averred that the said Commercial Bank shares had fallen under the sequestration, and that the creditors of the bankrupt were entitled to this asset, and to any other estate which might yet fall in and be available for distribution. The petitioners applied to the Court to remit to the Lord Ordinary on the Bills to order an early meeting of the creditors of George Whyte & Company, and of the said George Whyte sole partner of the said company, to be held to elect a trustee on the sequestrated estate.

Answers were lodged by the said George Whyte, who averred that his whole assets were fully known to his trustee and creditors before his sequestration came to an end, and that the petitioners were consenters to his discharge; that he acquired a vested right to these shares only on his mother's death; and that neither the creditors nor the trustee, who were both well aware of the condition of these shares, had taken any steps to have it found that they were entitled to them; and that accordingly the creditors and trustee had abandoned any right competent to them to these shares.

The respondent referred to the action at his instance against D. H. Murray, *supra*, p. 67.

Argued for the petitioner—The bank shares formed estate falling under the sequestration which had not been ingathered. They were vested in the bankrupt at the time of his sequestration. The bankrupt being discharged without composition the sequestration was not ended, and he was not reinvested in his estates. The present question related to a claim of debt under a marriage-contract. The effect of the marriage-contract was to leave Mrs Whyte the fiar of these shares. A power of apportionment did not affect vesting, nor did a destination-over where there was no clause of survivorship. Vesting here took place subject to defeasance if the children died leaving issue—*Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269. The share of each child vested in 1870 at the date of the transfer, and that being so, the bankrupt's share vested in him prior to his sequestration, and so passed to his trustee—Bankruptcy Act 1856, secs. 102 and 103. The trustee had not abandoned this security, although he did not take any active steps to bring it into the sequestration. In order to infer abandonment there must be something more than mere silence; there must be actually abandonment in favour of the bankrupt. Here, at the most, there was abandonment in error—*Greig* v. *Fraser*, February 6, 1850, 12 D. 684; *Mackay* v. *Brownlee*, January 31, 1866, 4 Macph. 333; *Douglas* v. *Maclachlan*, February 4, 1881, 8 R. 470. At all events there had been no abandonment by the creditors.

Argued for the respondent—The proposal of the petitioner was to revive a sequestration in order to deal with estate which had been overlooked by the negligence of the trustee, and this four years after both the bankrupt and the trustee had been discharged. No case could be cited where the Court had appointed a new trustee to deal with estate which had come to the bankrupt during the course of his sequestration or prior to his discharge. This application could not be made under section 103 of the statute. It could only be under section 102, and under that section there was no provision for such an appointment as was here sought. There was no vesting of this stock under the clause in the marriage-contract, for the fee was in Mrs

Whyte—the children's rights were qualified by the terms of the transfer. No right vested in them till after the death of Mrs Whyte—*Kirkland* v. *Kirkland's Trustee*, March 8, 1886, 13 R. 798. This was an appeal to the *nobile officium* of the Court, and it was a case in which to preserve the interests of all parties a judicial factor should be appointed, for if the sequestration was revived the old trustee would be reappointed, and this was undesirable, as he would thereby be in a condition to control any proceedings which might be taken against himself relative to the past management of this estate—*Thomson, Petitioner*, December 17, 1863, 2 Macph. 325; *Fleming* v. *Walker's Trustees*, November 16, 1876, 4 R. 112; *Taylor* v. *Charteris*, November 1, 1879, 7 R. 128; *Abel* v. *Watt*, November 21, 1883, 11 R. 149.

At advising—

Lord President—This is an application to revive a sequestration in which both the bankrupt and his trustee have been discharged. Such an application is addressed to the *nobile officium* of the Court, and in the series of cases which have occurred since the case of *Thomson* we have followed the course which was then adopted.

What is necessary in order to sustain this application is, first, an averment that there are funds which belonged to the bankrupt at the date of his sequestration, and which have not been divided among his creditors; and second, that there are creditors who were ranked in the sequestration, and who have not been paid in full, who are supporting the petition.

Now, the objection which is taken by the respondent is, that there are no funds to be recovered, and so that the present application is useless. It would certainly be a very awkward matter if a question of this kind fell to be determined in a process like the present. If, however, any difficulty were to arise as to whether or not these funds were to be held as forming part of the bankrupt's estate, that is a matter which the trustee will have to determine after his appointment. In the present case, however, there can be no question that the fund now sought to be brought into the sequestration formed part of the bankrupt's estate at the date of his sequestration. The bank shares in question were thus dealt with by Mrs Whyte, the bankrupt's mother. There was no trust created by the marriage-contract, but she simply conveyed these shares to herself in liferent, and to the children of the marriage in fee. Mrs Whyte thus remained the undivested fiar, while the right of her children was confined to a mere *spes successionis*. But after her husband's death in 1869 Mrs Whyte in 1870 executed a transfer of these shares, and it is of importance, looking to the contention of the respondent, to see in what way the rights of the children were affected by this transfer. By this deed, which bore to be in corroboration of a transfer already granted by her, Mrs Whyte transferred the said bank shares to herself in liferent, for her liferent use allenarly, and to the children of the marriage *nominatim* in fee.

Now, the effect of this transfer was to alter materially the relative positions of Mrs Whyte and her children; all that she thereafter had, was a reserved liferent, while the fee vested in the children whenever they accepted the transfer. It is said that there is a clause in this deed which restricts the right of the children by stipulating that the acceptance of the transfer by the children was not to affect their interests *inter se* under their father's marriage settlement and trust-disposition, but I can find nothing in the deed of transfer which can in any way qualify these children's right of fee. As regards their father's trust-disposition, it clearly does not carry any right to these bank shares, while all that the marriage-contract provides is, that the fee of these shares is to be in the children of the marriage, if more than one, then equally among them. In neither of these deeds can I find anything which, taken along with the clause in the deed of transfer, can be said to prevent the vesting of these shares in the children as at the date of the transfer. There is not, I understand, any dispute about the proportion of stock which fell to the bankrupt. He was entitled to one-fourth of these shares, and it is equally clear that they formed part of his sequestrated estate at the date of his sequestration. But it may be said if all this is so clear, why did not the trustee take up these shares and realise them, and divide the proceeds among the creditors? and it is now urged by the respondent that in consequence of his not doing so the trustee must be held to have abandoned this asset, and that the sequestration cannot be revived in order that these shares may now be taken up and dealt with by any trustee who may be appointed. Now, the evidence of what the respondent terms abandonment is somewhat remarkable. The trustee seems to have been placed in rather a curious position with reference to these shares, as a Mr David Hill Murray was said to be in right of them under an assignation alleged to be granted by the trustee and commissioners of the residue of the estate of the bankrupt's deceased father. In these circumstances the trustee had some difficulty in determining whether or not this could in any sense be viewed as an available asset. But what satisfies me that there was in the present case no abandonment of this asset is that anything that was done in the matter was done by the trustee alone. Abandonment to be effectual must be by the creditors, or by the trustee with the consent of the creditors. I know of no case where there was held to have been abandonment without evidence of the consent of the creditors, and there is not the slightest trace of anything of that kind here.

But it has been further urged that we should not in the present case follow the procedure which was followed in the case of *Thomson*, but that we should appoint a judicial factor to protect the various interests which are said to be involved. I can only say that it would require very strong reasons indeed to induce us to adopt any such course.

The appointment of a trustee must lie of course with the creditors, and it has been urged that the petitioners having a majority of votes will carry their own trustee and commissioners, and will re-appoint to this office the late trustee. This argument is somewhat inconsistent with what was stated in the course of discussion, viz., that the petitioning creditors are almost entirely paid up by collateral securities. If this be so, then their voting power will be proportionately reduced. All this, however, is mere speculation,

and does not enter into the present question. If the bankrupt has anything to allege against the management or actings of the late trustee he has his remedy, if so advised, in an action of reduction. Upon these grounds I think that the course proposed by the respondent is not only quite irregular, but that it is also unauthorised by decision. I am therefore for granting the prayer of the petition.

Lord Mure—If the right to these bank shares was in Whyte at the date of his sequestration, then there can be no doubt that it passed to his trustees, and that these shares formed an asset available for division among the creditors of the bankrupt. What the petitioners now propose is, that this sequestration should be revived in order that this fund may be made available for distribution. As regards the question of vesting, with which so large a part of the discussion was occupied, I quite concur in the view your Lordship has expressed upon that matter, and have nothing to add. I further think that there is not the slightest evidence to show that either the trustee or the creditors were at all aware that this asset was of any value whatever; and that being so, it is impossible to say that there was here anything of the nature of abandonment. With reference to the proposal that a judicial factor should be appointed on this estate instead of a trustee on the revived sequestration, I can only say that I have heard nothing from the respondent to justify so unusual a proposal.

I am therefore prepared to concur in the course proposed by your Lordship.

Lord Fraser—I concur, and have nothing to add.

Lord Shand and Lord Adam were absent from illness.

The Court granted the prayer of the petition.

Counsel for the Petitioners—D.-F. Macintosh, Q.C.—C. S. Dickson. Agent—A. Morison, S.S.C.

Counsel for the Respondent—Gloag—Watt. Agent—Party.

HIGH COURT OF JUSTICIARY.

Thursday, November 22.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee.)

DUNLOP *v.* WEIR.

Justiciary Cases—Contagious Diseases (Animals) Act 1878 (41 *and* 42 *Vict. cap.* 74), *sec.* 61, *sub-sec.* (1)—*Permitting Animals to be Moved without Declaration under Local Authority Regulations—Summary Prosecutions Appeals (Scotland) Act* 1875 (38 *and* 39 *Vict. cap.* 62), *sec.* 3, *sub-sec.* (9)—*Amendment of Case.*

The Contagious Diseases (Animals) Act 1878, by section 61, provides that if any person without lawful authority or excuse, proof whereof shall lie on him, does any of the following things he shall be guilty of an offence against this Act—(1) If he does anything in contravention of this Act or of a regulation of a local authority. The Animals Order 1886, passed by the Privy Council, provides—"If an animal is moved in contravention of a regulation made by a local authority, . . . the owner of the animal, and the person for the time being in charge thereof, and the person causing, directing, or permitting the movement of the animal . . . shall be deemed guilty of an offence."

A cattle-dealer was convicted of an offence within the view of these provisions, on the ground that he had permitted the removal of certain cattle from his farm into Lanarkshire unaccompanied by a declaration under the regulations of the local authority of Lanarkshire. In a case on appeal obtained by him it was stated that the appellant sold the cattle at his farm in Ayrshire, where they were delivered to the purchaser; that the person who drove them into Lanarkshire had not a declaration properly filled up under the regulations of the local authority of that county; that the Justices were "of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be removed into the county of Lanarkshire, was guilty of the offence charged." *Held* that the grounds stated were not sufficient to justify the conviction, which must be set aside, and a motion to remit the case to the Justices to be amended *refused.*

Observations (*per* Lord Justice-Clerk) upon the practice of remitting for amendment.

This was an appeal by Gabriel Dunlop, cattle-dealer, residing at Castle Farm, Stewarton, in the county of Ayr, on a case stated under the Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62) against a conviction obtained against him in the Justice of Peace Court of Lanarkshire, at Hamilton, on the 25th June 1888, upon a complaint at the instance of Robert Weir, Procurator-Fiscal of the Court.

The complaint set forth that the appellant "did, on 30th of April 1888 or 1st May 1888, move, or cause, direct, and permit to be moved, by some person to the complainer unknown, 8 cattle, of which he the said Gabriel Dunlop was then the owner or person in charge, from Castle Farm, Stewarton aforesaid, being within the district of the local authority of the county of Ayr, by road into the district of the local authority of the county of Lanark, without the said cattle being accompanied with the declaration required by the regulations dated 11th April 1888 made by the said local authority of the county of Lanark in virtue of the powers conferred on them by the Contagious Diseases (Animals) Acts 1878 to 1886, and the Animals Order of 1886, the said movement being thus contrary to the Act of Parliament 41 and 42 Vict. cap. 74, sec. 61, sub-sec. (1), and the said Gabriel Dunlop was, before your Honours' Court, at Hamilton, on 19th January 1888, convicted of an offence against the same sub-section of said section of said Act of Parliament, whereby the said Gabriel Dunlop is liable to a penalty not exceeding £5 for each of the said 8 cattle so moved as above libelled, together with expenses, said penalty and expenses

to be recovered by arrestment, poinding, and sale, or the said Gabriel Dunlop, in respect of it being a second offence, is liable, in the discretion of your Honours, to be imprisoned for any term not exceeding one month, with or without hard labour, in lieu of the pecuniary penalty to which he is liable."

The regulations referred to are as follows—1. No cattle shall be moved into the district of the local authority of the county of Lanark except as expressly authorised by the regulations. 2. Cattle, fat or store, including cows, may be moved into said district from the district of any local authority in England, Wales, or Scotland, provided they are accompanied by a declaration, signed by the owner, specifying the number and description of the cattle to be moved, the places from which and to which they are to be moved, and certifying that each head of such cattle has been in the place from which it is to be moved for at least fifty-six days immediately preceding the date of such declaration, and has not been within that time sold or exposed for sale in any market or fair, or in a sale-yard or other public or private place where cattle are commonly exposed for sale; is not and has not been affected with pleuro-pneumonia, and has not been in contact with cattle affected or suspected of being affected with that disease, and that there is not at the time of making the declaration a pleuro-pneumonia infected place or pleuro-pneumonia infected area within two miles of the farm or premises from which the cattle are to be moved, or within two miles of the road by which the cattle are to be moved. 4. Declarations accompanying cattle on their movements into said district in terms of the preceding regulations shall be delivered to the County Police Superintendent, or a police inspector of the police district into which the cattle are moved, within twelve hours after the arrival of the cattle. 5. These regulations shall commence and take effect from and after the 15th day of April 1888 years, and shall remain in force until altered or revoked. 6. The declarations above provided for shall only be on forms to be supplied by the local authority, those for cattle from other districts at any police station in the county. Every declaration must be signed by the person making the same in presence of a police-constable, who shall countersign it, and add his address, and it must be returned to the office where the form was got within four days from the date when the form was given out."

The case by the Justices contained the following statements:—"Four witnesses were examined in support of the complaint, and from the evidence adduced by them we held it proved that the appellant, who is a cattle-dealer and resides at Castle Farm, Stewarton, in the county of Ayr, had a sale of cattle at his farm on 30th of April 1888, when over 400 animals were sold; that 8 of these were purchased by Robert Forsyth, grain merchant, Chapelton, Lanarkshire; that after the sale the purchaser of the cattle, the said Robert Forsyth, depending upon the appellant making the necessary declaration before the cattle were moved, engaged John M'Millan, residing in M'Alpine Street, Glasgow, and who at the time was assisting the appellant at the sale, to drive the cattle from Stewarton farm to Strathaven; the cattle were accordingly driven there; that the declaration required by the regulations of the county of Lanark did not accompany the cattle, although the appellant averred that he had made such a declaration; that the witness John M'Millan stated that the declaration, which is not produced, was blank—at all events not complete—and it was proved that it had not been countersigned by a police-constable in terms of the said regulations issued by the local authority. The appellant contended that in respect he neither moved, nor was he the owner of the cattle, nor in charge of them at the time they were removed into the county of Lanark, he was not guilty of the offence libelled. We, however, were of opinion the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be moved into the county of Lanark, was guilty of the offence charged, and we convicted him and adjudged him to forfeit and pay the sum of £20 of modified penalty, being at the rate of £2, 10s. for each of the said 8 head of cattle, with the sum of £1, 15s. of expenses, and in respect the said sums of penalty and expenses were paid at the bar, found it unnecessary to pronounce further. We also held proved the previous conviction libelled."

The question of law for the opinion of the High Court of Justiciary was—"In the circumstances above set forth, was the appellant guilty of the offence charged?"

The Contagious Diseases (Animals) Act 1878 (41 and 42 Vict. cap. 74), sec. 61, sub-sec. (1), provides—"(1) If any person without lawful authority or excuse, proof whereof shall lie on him, does any of the following things, he shall be guilty of an offence against this Act—(1) If he does anything in contravention of this Act, or of an Order of Council, or of a regulation of a local authority . . . (2) And on a further conviction within a period of twelve months for a second or subsequent offence against the same sub-section of this section, he shall be liable, in the discretion of the court of summary jurisdiction before which he is convicted, to be imprisoned for any period not exceeding one month, with or without hard labour, in lieu of the pecuniary penalty to which he is liable under this Act."

The Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62), sec. 3, sub-section (9), provides—"The superior court shall have power . . . to cause the case to be sent back to the inferior judge to be amended in such manner as they shall direct, and thereafter, on the case being amended and returned, to deliver judgment on the case as amended."

Argued for the appellant—The appellant did not move the cattle, or cause or direct them to be moved. In the finding of the Justices that "in permitting the removal" he was guilty of an offence, the permitting was not found as a fact, but was an unjustifiable inference from the facts stated. The appellant did not permit, because he could not prevent. The only fact found was that the appellant did not make the statutory declaration. That was not enough to infer guilt. Further, the appellant was not the proper person to make the declaration. He was not the owner when the cattle were moved.

Argued for the respondent—The appellant was the only person who could make the declaration.

No one else could speak to the whereabouts of the cattle for fifty-six days before their removal. The appellant made a bad declaration. He thus assisted in the removal of the cattle. He was "art and part" in the matter. That was the meaning of "permitting."

It was observed by the Court that the facts on which the respondent based his case were very imperfectly stated. Counsel for the respondent moved the Court to remit the case to the Justices to be amended under the powers conferred by sec. 3, sub-sec. 9, of the Summary Prosecutions Appeals (Scotland) Act 1875. The motion was opposed.

At advising—

Lord Rutherfurd Clark—On 25th June 1888 the Justices of the Peace for the county of Ayr convicted the appellant of a contravention of the Contagious Diseases (Animals) Act. A case has been stated, and we have now to determine whether the conviction was right.

The respondent has moved us to remit to the Justices in order that the case may be amended, and the first question which we have to consider is whether we shall make that remit. I am of opinion that we should not. The case has no doubt been very imperfectly stated. But it was the duty of the parties to see that it was well stated, and I assume that it was submitted to them before it was finally adjusted. The imperfections are so great that it would require to be re-stated. I do not think that in the interests of justice it would be safe to direct this to be done. The time that has elapsed is very considerable, and there is of course no record of the evidence.

The charge against the appellant is that he "did move, or cause, direct, and permit to be moved," certain cattle from Ayrshire to Lanarkshire "without the said cattle being accompanied" with the statutory declaration.

The only word of which the meaning is not plain is the word "permit." I am disposed to think that it signified that if the permission had been withheld the cattle would not have been moved. But to use an obsolete formula, which is, however, well understood, we may safely hold that the charge against the appellant was that he was actor or art and part in the moving of the cattle.

It appears from the case that on 30th April 1888 the appellant had a sale of cattle on his farm, and that on that day the cattle in question were sold and delivered to Robert Forsyth, a grain merchant in Lanarkshire. It further appears that after the cattle were delivered they were moved to Lanarkshire by Forsyth, or by a person employed by him for that purpose. It is not said that the appellant in any way facilitated the removal of the cattle.

The case states that the appellant averred that he had made the statutory declaration. I presume that this averment was made to the Justices, and if so, it is nothing more than an untrue averment made in the course of the trial. Again, it is set forth that M'Millan, who was engaged by Forsyth to move the cattle, "stated that the declaration (which was not produced) was blank, at all events not complete." But it is not said that the appellant handed the declaration to M'Millan. If that had been so, there would have been room for the inference that the appellant was taking part in the moving of the cattle.

In conclusion the Justices say—"We were of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were to be moved into the county of Lanarkshire, was guilty of the offence charged."

I am disposed to think that the Justices were right in holding that the appellant was the person to make the statutory declaration. But the fact that he did not make it would not prove him guilty of the statutory offence. Yet I gather that it was from this circumstance that the Justices held the case to be proved. At least they state no other from which the guilt of the appellant can be inferred. From all that appears in the case the appellant, after he had delivered the cattle to the buyer, did nothing.

No doubt the Justices say, "in permitting the removal of the cattle," &c. This is stated, not as a fact, but as an inference, and there is nothing to support it. It is said that the appellant knew that the cattle were to be moved into Lanarkshire. It is not said that he had this knowledge before the cattle were delivered.

I am not determining any general question. I proceed entirely on the case as it has been stated to us, and on the circumstances therein set forth I am constrained to hold that the appellant was not guilty of the offence charged.

Lord Lee—The question stated for the opinion of the Court in this case is, whether in the circumstances set forth the appellant was guilty of the offence charged?

The offence charged was that he did move, or cause, direct, and permit to be moved, certain cattle from a place in the district of Ayr into the district of Lanark without the said cattle being accompanied with the declaration required by the regulations made by the local authority of the county of Lanark in virtue of the powers conferred by the Contagious Diseases (Animals) Act 1878 to 1886, and the Animals Order of 1886.

It appears from the case that the cattle in question (eight in number) had been sold by the defender on the morning before removal at his farm in the county of Ayr along with some 400 others, and it is stated as matter of fact that the purchaser, depending on the appellant making the necessary declarations before they were moved, engaged a man to drive them from the appellant's farm to Strathaven in the county of Lanark; that the cattle were accordingly driven there; that the declaration required by the regulations did not accompany them; and that although the appellant averred he had made such a declaration, it was proved that it had not been countersigned by a police-constable in terms of the regulations. The appellant's contention is stated to have been that as he neither moved, nor was the owner of the cattle, nor in charge of them at the time they were removed into the county of Lanark, he was not guilty. The finding of the Justices is stated as follows—"We, however, were of opinion that the appellant was the only person who could have made the declaration, and in permitting the removal of the cattle without such declaration, in the knowledge that they were

to be removed into the county of Lanark, was guilty of the offence charged."

If it had been stated as a finding in point of fact that the appellant did permit the cattle to be removed without the required declaration, I could not have answered the question before us in the negative, because I see no reason to doubt that the Justices were right in holding that under the regulations the appellant, as owner, selling and allowing the removal of the cattle, was the only person who would make a declaration of the kind required, and ought to have seen that it was made, not the less so that he ceased to be owner before the removal into Lanark district took place. But the difficulty is that the essential fact in the case is not stated as a fact, but merely as matter of opinion. That is not sufficient, and I therefore agree that we cannot answer the question stated in the case in the affirmative.

I have had some doubt, however, whether, on the case as stated, we can answer it either way? and whether we ought not to deal with the case as insufficiently stated, and to remit to the Justices to give us the facts on which they founded their opinion. It is not satisfactory to my mind to quash the conviction merely because the Justices have not stated these facts, which might or might not if stated have been sufficient to support it. I should have preferred for my own part to make a remit. But as your Lordships are against that course, and there certainly are many objections to getting the case re-stated now, I do not dissent from a finding that in the circumstances set forth it is impossible to find the appellant guilty.

Lord Justice-Clerk—I am of the same opinion. I sympathise with what Lord Lee has said with reference to the question whether there is enough in the case to allow us to dispose of it. But looking to the form in which the question is put, viz., "In the circumstances above set forth was the appellant guilty of the offence charged?" I have no difficulty in answering it in the negative. And with reference to the sending back of cases to be amended, I only say this, that that is a practice which ought to be strictly safeguarded, because it is well that magistrates should understand that they are bound to state their cases with care and attention, and to consider well whether they have fully stated the facts which are suggested in their question as justifying a conviction. I think it is proper to send back a case to be amended in circumstances where some slight alteration may bring out clearly some important point; as, for example, where a fact of importance is stated with ambiguity, or where a matter of fact is not stated with such clearness as to enable an important point of law depending upon it to be decided satisfactorily. But I am clearly of opinion that no case should be sent back where practically the case has to be set aside and a new one stated, or where there is a failure to state the facts, because the person convicted is entitled to have a case stated when the facts are fresh in the recollection of the Justices. Therefore, although sharing the difficulty of Lord Lee, I think the proper course is to deal with this case as one which fails to state facts necessary to a conviction for the offence charged.

The Court quashed the conviction.

Counsel for the Appellant—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Respondent—Dundas. Agents—Bruce & Kerr, W.S.

COURT OF SESSION.

Saturday, November 24.

FIRST DIVISION.

[Sheriff of Argyllshire.

CAMERON AND OTHERS *v.* THE DUKE OF ARGYLL.

Crofter—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *secs.* 25 *and* 28—*Order of Commissioners—Finality—Sheriff—Appeal—Competency.*

The Crofters Holdings (Scotland) Act 1886, sec. 25, provides—"The decision of the Crofters Commissioners in regard to any of the matters committed to their determination by this Act shall be final." Section 28 provides—"Any order of the Crofters Commission . . . may be presented to the Sheriff, and the Sheriff if satisfied that the order has been made in conformity with the provisions of this Act and has been duly recorded, may pronounce decree in conformity with such order on which execution and diligence shall proceed."

Certain crofters in the island of Tiree presented an application to the Crofters Commission praying the Commissioners to fix fair rents to be paid by them and to deal with the question of arrears. The Commissioners pronounced an order, which was recorded in the Crofters Holdings Book for the county of Argyll. The Duke of Argyll, as landlord, presented a petition to the Sheriff praying the Court to interpone authority to said order, and to pronounce decree in conformity therewith. *Held* that the decision of the Commissioners being final, and the Sheriff having satisfied himself that their order was in statutory form, and having pronounced decree, an appeal thereagainst was incompetent.

The Crofters Holdings (Scotland) Act 1886, sec. 25, provides—"The decision of the Crofters Commissioners in regard to any of the matters committed to their determination by this Act shall be final." Section 28 provides—"Any order of the Crofters Commissioners . . . may be presented to the Sheriff, and the Sheriff if satisfied that the order has been made in conformity with the provisions of this Act and has been duly recorded, may pronounce decree in conformity with such order on which execution and diligence may proceed."

Archibald Cameron and others, crofters in the island of Tiree, presented an application in December 1886 to the Crofters Commission in terms of the Crofters Holdings (Scotland) Act 1886, praying the Commission to fix the fair rent

to be thereafter paid by them for their holdings, and dealing with arrears.

After sundry procedure the said Commissioners in October 1887 pronounced an order which was duly recorded in the Crofters Holding Book for the county of Argyll at Tobermory. The schedule appended to the order set out—(1) The total amount of arrears due by the applicants; (2) the amount cancelled; (3) the amount ordered to be paid; (4) the number of instalments; (5) the amount of each instalment and the dates when payable.

In June 1888 the Duke of Argyll presented a petition in the Sheriff Court of Argyllshire at Oban, against the said Archibald Cameron and others, and prayed the Court to interpone authority thereto, and to pronounce decree in conformity therewith. He pleaded that he was entitled to decree as craved in terms of the Crofters Holdings (Scotland) Act 1886, sec. 28, with expenses.

On 27th July 1888 the Sheriff-Substitute (MacLachlan) refused the motion for the pursuer that the cause should be tried summarily, continued the cause until the first vacation court, and allowed the defender to lodge defences within that time.

"*Note.*—The pursuer contended that parties should be heard summarily, but as the Crofters Holdings Act makes no provision for summary procedure in applications such as the present, the Sheriff-Substitute was obliged to refuse the pursuer's motion as incompetent. It is also to be noticed that the warrant for service obtained on the pursuer's application is in the ordinary form, and not in the form provided by section 52 of the Sheriff Courts Act 1876 for having causes disposed of summarily."

The pursuer appealed to the Sheriff (Forbes Irvine) who on 22nd September 1888 sustained the appeal, interponed authority to the said order, and granted decree in terms thereof.

"*Note.*—The Crofters Commission not being a court of record, their orders can be enforced only through the interposition of a court of law. The Act therefore provides, by section 28, that 'any order of the Crofters Commission or two of their number acting as hereinbefore provided may be presented to the Sheriff, and the Sheriff, if satisfied that the order has been made in conformity with the provisions of this Act, and has been duly recorded, may pronounce decree in conformity with such order on which execution and diligence shall proceed.' The statute does not set out any precise form in which this and similar applications may be made, but it may be remarked that soon after its passing it was ably analysed and annotated by Mr C. N. Johnstone, advocate, who added a set of suggested forms, many of which have not been superseded by the official forms issued by the Commission (Rankine on Leases, p. 513, note 1). The application by the pursuer in the present case is substantially in terms of one of these forms (No. 8, p. 60).

"Neither does the Act point out any particular mode of inquiry by which the Sheriff before pronouncing this 'decree conform' is to satisfy himself that the order of the Commissioners, or the decision of a single arbiter mutually chosen (section 30), is in conformity with the statutory provisions. It would, indeed, seem that this important matter is left pretty much to the discretion of the Judge, subject always, as his decision is, to the review of the higher Court. In the present case, however, owing to the form which the cause took in the first instance the Sheriff has had the advantage of the able pleadings of the parties on the question at issue.

"It is indeed true that the Act does not say in set terms that the proceedings under it are to be summary, but this would seem to be in conformity with the general tone and tenor of the statute. By section 25 the decision of the Crofters Commission is final. The pursuer has here produced an order by the Commissioners, with a certificate thereon that the same has been recorded in the book kept for that purpose by the Sheriff Clerk in terms of section 27 of the Act, and it does not appear to be contemplated that a formal record should be made up, with its necessary delay and eventual cost; it indeed seems difficult to conceive a case where it is more for the interest of all parties that the question at issue between them should have an early settlement."

The defenders appealed to the Court of Session, and argued that they were entitled to lodge defences, as the Act nowhere said that the procedure under it was to be summary.

The respondent argued that the appeal was incompetent. Sec. 25 of the Act declared that the decision of the Commissioners was to be final. The Sheriff had pronounced decree in terms of sec. 28, and there was nothing to appeal from. The proceedings were summary—*Bone* v. *School Board of Sorn*, March 16, 1886, 13 R. 768.

At advising—

Lord President—I think this appeal incompetent, and the subject-matter of it is such that we cannot entertain it or look at it at all. The 25th section of the Crofters Act provides that a decision under the Crofters Commission in regard to any matters committed to their determination by that Act shall be final. Now, that clause of itself creates a finality at a very early stage of the proceedings. The determination of the Crofters Commission is to be final; there is not an appeal against it, but there is a process of registering that determination in the Sheriff Court books as provided by the 27th section. The 28th section of the Act provides that any order of the Crofters Commission or two of their number acting as therein provided may be presented to the Sheriff, and the Sheriff, if satisfied that the order has been made in terms of the Act, and has been duly recorded, may pronounce decree in conformity with such order, on which execution and diligence shall proceed. The object of the Crofters Act is plainly that the order of the Commission may be enforced by the ordinary diligence of the law where necessary. It is not imperative that the order of the Crofters Commission should be presented to the Sheriff, it is only declared that it "may be presented to the Sheriff." As I understand the 28th section, the only object of presenting an order to the Sheriff is to make it the foundation of a diligence. Now, what is the Sheriff to do when the order is presented? He is to pronounce decree conform to it, but he is to satisfy himself at the same time that the order has been made in conformity with the provisions of the Act. But I do not understand these words to import that the Sheriff is to

have a process before him, or that he is to hear parties, but that he is to read the order for himself and see that it is in the statutory form, and then pronounce decree. Now, the notion of there being an appeal to this Court against the decree in conformity with the Act is quite out of the question. Never was there such a thing heard of. The sole object of a decree conform to the Act is to make the order a basis for a diligence. If anything has gone wrong in the course of the proceedings, either before the Crofters Comission or in the deliverance of the Sheriff in pronouncing the decree as conform to the Act, of course that may be set aside in the ordinary way by suspension or reduction, but certainly it is not intended by the statute that there should be a process in the Sheriff Court. And there being no process in the Sheriff Court, there can be no judgment of the Sheriff which can form the subject of an appeal.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court dismissed the appeal as incompetent.

Counsel for the Appellant—Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent — Mackay — H. Johnston. Agents—Lindsay, Howe, & Company, W.S.

Thursday, November 22.

FIRST DIVISION.

[Lord Lee, Ordinary on the Bills.

LAURIE *v.* MOTHERWELL.

Bankruptcy — Sequestration — Recal — Affidavit — Right in Security — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 22.

Where the oath of a petitioning creditor in a sequestration was *ex facie* conform to statute, but omitted to specify as security of the debt certain valueless inhibitions, a petition for recal of sequestration *refused.*

The directors of a public company became jointly and severally liable under a bond for £4300 to one of their number, who, under a charge upon the bond, obtained sequestration of the estates of one of his co-obligants. The creditor deponed that the debtor owed him £3583, 6s. 8d., being the balance of £4300, less the sixth part due by himself in his character of co-obligant, and that he held the other co-obligants—naming them, but making no mention of himself—liable for the debt. He omitted to state among the securities held by him for the debt certain inhibitions over the creditor's estate which had attached nothing.

In a petition for recal of the sequestration —*held* (1) that the oath of the creditor specified all those who were, besides the bankrupt, liable for the debt, and (2) that it was within the discretion of the Court to consider that no prejudice had arisen from the omission to specify the inhibitions over the creditor's estate, and the petition *refused.*

This was a petition by John Laurie for recal of the sequestration of his estates. Answers to the petition were lodged by William Motherwell, the creditor at whose instance sequestration had been awarded.

The petitioner and respondent were both directors of the Rawyards Coal Company (Limited). The respondent had advanced various sums to the company, amounting in all to £4300, for which he received a bond dated 15th April 1884 by the company and its directors, William Mitchell, William Motherwell (the respondent), Andrew Aitken, John Laurie (the petitioner), John Motherwell, and George Walkinshaw. Under this bond the granters bound and obliged the company, and themselves as individuals, and their heirs, executors, and successors, all jointly and severally, without the necessity of discussing them in their order, to repay the sum of £4300 to the respondent with interest and penalties.

On 4th June 1888 the bond was recorded in the Books of Council and Session, and on 18th July the petitioner was charged to make payment of £3583, 6s. 8d., or five-sixths of the sum of £4300 due under the bond. The charge having expired without payment the respondent applied for sequestration of the petitioner's estate, and on 9th August 1888 sequestration was awarded by the Lord Ordinary on the Bills.

In the affidavit produced along with his application the respondent deponed that the petitioner owed him the sum of £3583, 6s. 8d., being the balance of the sum of £4300 contained in the bond above mentioned, after deduction of £716, 13s. 4d., "being the deponent's one-sixth share or proportion thereof as co-obligant" under the bond. He further deponed that no part of the debt had been paid or compensated, and that besides the petitioner he held "the said Rawyards Coal Company (Limited), the said Andrew Aitken, John Motherwell, William Mitchell, and George Walkinshaw, liable for the said debt;" that he held a security to the extent of £500 for the debt; and that he held "no other obligants or securities for the said debt than those above specified."

By the 22nd section of the Bankruptcy Act the creditor applying for sequestration of his debtor's estate is required to state "what other persons, if any, are, besides the bankrupt, liable for the debt or any part thereof, and specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound and no security, he shall depone to that effect."

The petitioner averred, *inter alia*, in his petition that the affidavit made by William Motherwell in support of his application for the petitioner's sequestration did not comply with the statutory requisites above described. In particular, (1) it did not specify among the securities held by William Motherwell for the debt two inhibitions duly executed on 4th June 1888 over the estates of the petitioner and William Mitchell, a co-obligant; and (2) it did not specify all the co-obligants. William Motherwell, the creditor in the bond, was also debtor in the bond for the whole debt, the parties being liable *singuli in solidum.* He was not therefore entitled to

charge the petitioner for payment of the whole debt under deduction only of his own *pro rata* share. A *pro rata* share might not be the ultimate liability of the petitioner or William Motherwell.

In his answers William Motherwell admitted that he had omitted to specify in his oath the inhibitions executed over the estates of the petitioner and William Mitchell, but explained that no security had been created by them. He further stated that in his examination before the Sheriff under the proceedings in his sequestration the petitioner had deponed to having executed in May preceding a general trust conveyance of his whole means and estate for behoof of his wife and daughter to take effect during his life. He had thus attempted to defeat the claims of his creditors.

The Lord Ordinary (LEE) pronounced the following interlocutor:—"In respect that the affidavit of the petitioning creditor is not conform to the requirements of the Bankruptcy (Scotland) Act 1856, recals the sequestration of the estates of the petitioner John Laurie awarded by the Lord Ordinary on 9th August 1888: Prohibits any further proceedings therein: Appoints the judgment of recal to be entered in the Register of Sequestrations, and marked on the margin of the Record of Inhibitions, and decerns; and in the circumstances finds no expenses due.

"*Opinion.*—Although the sequestration was competently awarded, seeing that notour bankruptcy was proved, and that the affidavit produced with the petition was *prima facie* sufficient, the objections urged in the petition for recal must be considered in the light of the documents now produced, and of the undisputed averments.

"So considered, it appears (1) that the respondent, besides being creditor in the bond, was one of the joint obligants for the debt of the Rawyards Coal Company along with the petitioner and four others; and (2) that the answers contain no denial of the allegation that the respondent (the petitioning creditor) held an inhibition which he had used on 4th June against the present petitioner and another of the joint obligants.

"It was incumbent on the respondent, under section 22 of the statute, to state in his oath 'what other persons, if any, are liable for the debt, or any part thereof,' and also to specify 'any security which he holds over the estate of the bankrupt, or of other obligants.' It appears to be settled that an inhibition is a security which ought to be specified.

"My opinion is that the affidavit in this case did not comply with the requirements of the statute. It is framed on the assumption, which I think erroneous, that the respondent's liability as one of the joint debtors was limited to one-sixth. It states that for the amount which the bankrupt was charged to pay the respondent held no other obligants than the Rawyards Coal Company and the four other obligants named. But he himself was an obligant exactly in the same position as all the others.

"I think that it was a mistake on the part of the respondent to assume that because he was the creditor in the bond he was entitled to deal with himself as one of the joint and several obligants in any other way than he deals with the rest. He himself was an obligant for every part of the debt just as much as the others. Yet this is not stated. In fact the oath by its terms leaves it to be understood that he was under no liability after deducting one-sixth.

"Further, the affidavit is defective in not specifying the inhibition, the use of which is not denied.

"These omissions in the affidavit are not mere technicalities. They give rise to a substantial objection. For, whether the Rawyards Coal Company is insolvent or not, it puts the petitioner in a very disadvantageous position to be forced to work out his rights of relief as a sequestrated bankrupt. It is admitted in the answers that his other debts are of small amount. The respondent may have been within his legal rights in giving the petitioner a charge to pay under the bond. But he has not satisfactorily explained either why he did not mention himself as liable for the whole debt, or why he did not proceed against the proper debtor, viz., the Rawyards Coal Company. To use the process of sequestration for the purpose of gaining an undue advantage over a co-obligant is to abuse it, and there is sufficient authority to show that the Court, even where the proceedings are *ex facie* regular, can prevent this—*Gardner* v. *Woodside*, 24 D. 1133."

The respondent reclaimed, and argued—The question whether a sequestration was to be recalled or not was a matter for the discretion of the Court, unless there were *ex facie* of the proceedings in the application for sequestration an omission of some essential step ordained by the statute—*Barr* v. *Ballantyne*, January 29, 1867, 5 Macph. 330. Here there was no such omission. (1) The debt due by the petitioner was rightly stated in the oath to be the balance of the whole sum due under the bond after deducting one-sixth. That was the extent of the respondent's liability in an action of contribution. It could not be supposed that his position as co-obligant deprived him of all the advantages of his position as creditor. (2) The omission to mention the inhibitions did not appear *ex facie* of the oath. In the exercise of its discretion the Court would not in the circumstances of the case recal the sequestration. The inhibitions had attached nothing, and the omission to mention them had caused the petitioner no detriment. On the other hand, he had attempted to denude himself of his estate, and so defeat the claims of his creditors. A distinction must be drawn between objections to the oath of a petitioning creditor and to oaths necessary for voting—*Hay* v. *Durham*, February 5, 1850, 12 D. 676; *Learmonth* v. *Patten*, July 18, 1845, 7 D. 1094; *Mackay* v. *His Creditors*, November 19, 1864, 3 Macph. 74.

The petitioner argued—The argument founded on *Barr* v. *Ballantyne* was really founded on an *obiter dictum* of Lord Benholme's which was misleading. The real distinction was not between cases where omissions appeared *ex facie* of the proceedings, and where it required inquiry to discover them, but between cases where the statutory requisites had and had not been complied with. Only in the latter case had the Court a discretion—*Tennent* v. *Martin*, March 6, 1879, 6 R. 786. No valid distinction could be taken between the construction of oaths neces-

sary for voting and the original oath of the petitioning creditor. In the present case the omission to comply with statutory requisites was twofold—(1) The respondent not having mentioned himself, had not specified all the obligants whom he held liable for the debt besides the petitioner. His right as creditor did not divest him of his obligations as one of the co-obligants. The omission of his name was not a merely formal defect, as his ultimate liability might come to be more than the one-sixth deducted. (2) He had not specified the inhibitions. No doubt this was a purely technical objection, but technical objections had been held sufficient to justify recal —*Kinnes* v. *Adam*, March 8, 1882, 9 R. 698; *Joel* v. *Gill*, June 10, 1859, 21 D. 937; *Campbell* v. *Myles*, May 27, 1853, 15 D. 685; *M'Ewan* v. *Cleugh*, December 7, 1842, 5 D. 273; *Wright* v. *Corrie*, November 19, 1842, 5 D. 164; *Imrie* v. *Commercial Bank*, July 6, 1842, 4 D. 1532.

At advising—

Lord President—In this case the Lord Ordinary has recalled the sequestration of the petitioner on two grounds. These require separate consideration, for this reason, that one appears and is said to be an *ex facie* defect in the petition for sequestration, and the other depends on matters of fact not appearing on the face of the proceedings.

As regards the first of these the complaint is that the petitioning creditor failed to comply with that part of the provision in the 22nd section of the Bankruptcy Act which requires him to state in his oath what other persons, if any, are, besides the bankrupt, liable for the debt or any part thereof. The debt must be the debt which the petitioning creditor claims, and therefore the inquiry is, whether it appears on the face of the affidavit that there are other persons liable to pay that debt beyond those specified in the affidavit.

The bond out of which the claim of the creditor arises is a peculiar deed, and requires careful consideration. The object with which it was granted was to raise money to carry on the business of the Rawyards Coal Company. That company had no credit, and the directors of the company interponed their personal security in order to obtain the money. The way in which it was done was this. One of the directors Mr Motherwell advanced the money required, namely, £4300, and the bond bears that it was advanced by him, and the obligation in the bond is to repay that money. Motherwell became one of six co-obligants bound under the bond. In a question with his co-obligants he is only liable to pay one-sixth part of the debt, viz., £716, 13s. 4d., though *ex facie* of the bond he is liable for the full sum of £4300. The letter of the bond makes him a debtor in £4300, but it is perfectly plain that he was never so bound, because beyond his debt as a co-obligant the debt was due to himself. The way Motherwell puts the matter in his affidavit is that he deducts one-sixth part of the debt from his claim. His position is—"My co-obligants and I are each liable for one-sixth part of the debt in an action of contribution, and therefore I make no claim as creditor in the bond for one-sixth part of the debt, but claim payment of the debt minus that sixth, viz., of £3583, 6s. 8d. That is the debt which is mentioned in the 22nd section of the statute, and the creditor in his affidavit is bound to set out what other persons are liable for that debt. My opinion of the true construction and effect of this bond is that Motherwell is not liable for any part of that debt. He cannot be a debtor to himself, and he is a debtor to his co-obligants only to the extent of £716, 13s. 4d., and in no part of the £3583, 6s. 8d. claimed in the affidavit. I think it is perfectly clear that neither the affidavit nor the bond shows any person liable for the debt who is not mentioned in the affidavit. The first objection accordingly is disposed of. I may say, however, that if well founded it would have been a relevant objection, and indeed one which we could not have resisted, because it was grounded on a failure to comply *ex facie* of the proceedings with a statutory provision.

The second ground of objection is of a different kind, namely, that the oath fails to specify a security which the creditor holds over the estate of the bankrupt or other obligant for the debt. In point of fact he held the security, which might be more or less valuable, over the estate of the bankrupt in the shape of an inhibition, and no mention is made of the inhibition in the affidavit. Here there is an objection, not *ex facie* of the affidavit, but requiring to be made a matter of extrinsic publication, and if necessary proved. This is a perfectly different kind of objection, and I admit it is necessary that I should say at once that in my opinion the case of *Barr* v. *Ballantyne* decides this not by way of an *obiter dictum*, but as the essence of the judgment, that there is a distinction to be made between two classes of objections, namely those which appear *ex facie* of the proceedings, and those which do not appear *ex facie*, but require to be shown otherwise. In the first class *Ballantyne* v. *Barr* decides that the Court is bound to recal the sequestration, in the other that the Court is entitled to exercise its discretion. The reason is very obvious. In the latter class although there may be a failure to specify on oath some security or obligant for the debt, it may turn out that the matter is of slight importance, and that no one has been harmed by the omission, while on the other hand, when a petitioning creditor has presented his affidavit and vouchers, to all appearance good and sufficient, the whole other creditors are entitled to rely that sequestration will be awarded, and be available to them. If it is open to have the sequestration ended by a latent objection there is no security for the other creditors who are standing by, and going to avail themselves of it, that they have a good sequestration at all. All the creditors are entitled to rely that the sequestration is good if the proceedings are *ex facie* regular. I do not say that it may not be recalled if the debt of the petitioning creditor is discovered to be bad. The Court will then recal the sequestration, but it will recal it in the exercise of its discretion, and not on a failure to comply with the statute, as the oath appears to be on the face of it everything which the statute requires. Therefore it is within the power of the Court, when any objection of this class is taken, to inquire if there is any substance in it, and if there is not to refuse to recal the sequestration.

Now, it has been explained that the security created by the inhibition is worth nothing, because the bankrupt had no heritable estate. But

even supposing the inhibition to have secured something, it would not have disturbed the sequestration or given a reason for its recal. Only the claim would have been wrong, and would have required to have been rectified.

I am of opinion that in the exercise of our discretion we should refuse to give effect to this objection.

Lord Mure—I am of the same opinion. There are two objections on which the Lord Ordinary has recalled the sequestration. One has to do with the amount of debt incurred under the bond, and as to the parties liable for the debt. The objection that has been raised here is *ex facie* of the proceedings, and I am of opinion that it is not well founded. I think that the respondent in his affidavit made quite a fair disclosure of his position as to the other parties liable for the debt, and therefore that the Lord Ordinary is wrong in thinking that there is any fatal objection *ex facie* of the affidavit.

The second objection is that the petitioning creditor omitted to specify a security which he held, as he was bound to do under the 22nd section of the Bankruptcy Act. What he is said to have omitted to do was to state that he held an inhibition, and there is no doubt that he did not state that. *Ex facie* of the affidavit that omission did not make the affidavit objectionable. The affidavit was *ex facie* good, and sequestration was awarded. It appears that there was an inhibition held by the respondent, and probably the Lord Ordinary is right in saying that it was an omission on the part of the respondent not to have stated that, and that he was bound, according to the strict interpretation of the clause of the Bankruptcy Act, to have mentioned in his affidavit the fact that he held an inhibition. The cases, I think, go that length. An inhibition is a security in the sense of the interpretation clause of the statute. In some cases also, of which the case of *Hay* v. *Durham* is an instance, it has been held necessary to value an inhibition in the oath, though in that case it was only of the value of about £2. I accordingly hold that the Lord Ordinary was right in thinking that the inhibition should have been mentioned in the affidavit, but it is, I think, in the discretion of the Court to consider whether the sequestration should be recalled on that ground, and I do not think it is such an omission as to make that course necessary.

I agree with your Lordship that the case of *Barr* v. *Ballantyne* decided that a distinction should be made between objections which arise *ex facie* of the proceedings and those which arise by virtue of inquiry.

Lord Shand—I concur with your Lordships.

It appears to me that the passage which occurs in the case of *Barr* v. *Ballantyne* at the close of Lord Benholme's opinion (5 Macph. 334) supplies the rule to be applied in questions of this kind. His Lordship there says — "I am anxious to state my view on this matter, that where there is no nullity *ex facie* of the proceedings, though nullity may be made out on investigation, the Court may exercise its discretion as to recalling or not recalling the sequestration, but where an objection founded on the statute appears *ex facie* of the proceedings the Court cannot exercise any discretion, but is bound to recal." The provisions of the 29th and 30th sections of the Bankruptcy Act, which direct the Lord Ordinary or the Sheriff to give sequestration, plainly indicate that the procedure is to be of a summary nature. If the petition is presented by the debtor himself, or with his consent, the judge is "forthwith" to grant sequestration. If the petition is not presented with his consent, the bankrupt must on citation show that sequestration cannot competently be granted, and if he fail to do so, and does not pay the debt, the judge is to grant sequestration, and by section 31 it is provided that the deliverance awarding sequestration shall not be subject to review. The statute does not contemplate or warrant the making up of records or other detailed procedure as between persons seeking and opposing sequestration. In cases which raise such a question as whether the bankrupt is subject to the jurisdiction of the Court, or whether notour bankruptcy has been constituted, there must be some sort of investigation. Beyond that, if the affidavit and the vouchers are *ex facie* in terms of the statute, and the debt in any view which can be prescribed by or for the debtor amounts to £50, it is not intended that the Judge should refuse to grant sequestration.

Here it is not disputed that the affidavit was in all respects *ex facie* regular, subject only to this observation, that it is said the petitioner was a creditor of himself as well as of the other obligants, and that therefore he ought to have mentioned himself as one of the obligants whom he held liable to himself for the debt. The debt deponed to in the affidavit amounts to £3583, 6s. 8d. The affidavit bears that certain other persons named besides the bankrupt are obligants for the debt, and that the deponent holds no other obligants and no securities for the debt beyond one heritable security which is specified. Everything is *ex facie* regular, and sequestration was properly granted. Applying the *dictum* of Lord Benholme, we should refuse, I think, to recal the sequestration, unless indeed it can be shown that in justice to the bankrupt or the other creditors it ought to be recalled.

The Lord Ordinary has thought that in justice to the bankrupt it ought to be recalled. That view, I think, has been shown to be erroneous. The bankrupt has attempted to put away his means and effects, and for that reason it is proper that a trustee for creditors should have a title under the sequestration to reduce the deed granted. But even apart from this specialty, I think there is nothing in the position of the bankrupt which would entitle him to say that the sequestration should be recalled. A creditor is entitled to use the diligence of sequestration against a debtor who cannot meet his debt.

It is said that the debt is overstated in the affidavit. But assuming that it may turn out to be overstated, or subject to deduction or repetition of a part, because it may be eventually found that certain of the obligants cannot pay their shares, and that the creditor himself must bear a share of the deficiency, yet if it appears that in any view there is a debt of £50, that is sufficient to warrant sequestration, and I should regret if the practice to give effect to this rule were altered. In any possible view, at least £2000 is due by the debtor, even supposing the other obligants could

pay nothing. The two points pleaded are technical. First, it is said the creditor should have stated that he held himself liable for part of the debt. Apparently he held he was not so liable, and your Lordship has indicated an opinion favourable to that view. That is not I think clear. But really the affidavit discloses the whole facts on which the question turns, and the affidavit does not preclude the question being raised and properly determined in the sequestration, it may be, in accordance with the bankrupt's contention.

It is further said that there has been an omission to make mention of a certain security held by the creditor; that an inhibition has been used, and that it ought to have been stated and valued in the affidavit. I am not prepared to say that a creditor is bound to mention a security of that kind where the debtor has no heritable property. It must be borne in mind that inhibition is no longer available against future acquisitions of estate. It is not even now said that either of the debtors had any heritable property. If a creditor uses an arrestment, and it attaches no funds, is he bound to specify the arrestment as a security? I think not. He has attempted to get a security but failed, and an inhibition which affects no heritage is not in my view a security. Supposing, however, that the debtor has heritable property, the question comes to be whether the neglect to mention the use of an inhibition is a sufficient reason for recalling the sequestration. No prejudice to anyone has been done by the absence of notice of the inhibition, and none by the failure of the creditor to refer to his own obligation to share in a deficiency caused by any obligant failing ultimately to pay his share of the debt.

In the matter of recalling a sequestration the Statute of 1856 has no provisions relative to the grounds on which a sequestration should be recalled. I think the views expressed by the Judges in the case of *Barr* v. *Ballantyne* are sound, and I am for giving effect to them. If the debtor meant to contest his liability for the debt, he should have brought a suspension of the charge, which he did not do. A sequestration once granted is very important in its effects from the date of the first deliverance under section 42 of the statute, and the provisions of section 107 and the following sections relating to diligence and prescription. Creditors may very reasonably rely on a sequestration duly obtained on an affidavit and claim in all respects *ex facie* regular and duly vouched, and indeed are in such circumstances I think precluded from having a second sequestration where one has been already granted. It would be an injustice to them to recal the sequestration on any technical grounds or on any grounds which do not go to the root or substance of the petitioning creditor's claim, or which at least go the length of showing that an injustice has been done to the bankrupt in awarding sequestration. That is certainly not the case here. I think the Lord Ordinary's interlocutor should be recalled and the petition refused.

Lord Adam was absent.

The Court recalled the Lord Ordinary's interlocutor, and refused the petition for recal of the sequestration.

Counsel for the Reclaimer—Sir Charles Pearson—Low. Agents—Drummond & Reid, S.S.C.

Counsel for the Petitioner—Graham Murray—Shaw. Agent—Thomas Carmichael, S.S.C.

REGISTRATION APPEAL COURT.

Monday, November 26.

(Before Lord Mure, Lord Lee, and Lord Kinnear.)

MACDONALD *v.* DICKSON.

Election Law—Burgh Franchise—Lodger—Occupation by Tolerance—The Representation of the People (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 48), *sec.* 4.

A son had the sole use of two rooms in his father's house, of the value and for the period required by the statute, as a gift and as part of his allowance from his father, and paid no rent for them. *Held* that he was not entitled to be enrolled as a lodger.

At a Registration Court for the burgh of Edinburgh held at Edinburgh on the 1st day of October 1888, William Kirk Dickson, No. 38 York Place, Edinburgh, claimed to be enrolled on the register of voters for the said burgh of Edinburgh (West Division) as a lodger. James Macdonald, Writer to the Signet, No. 21 Thistle Street, Edinburgh, a voter on the roll, objected to the said claim, on the ground that the said claimant did not pay rent for his lodgings. The Sheriff (Crichton) rejected the claim.

The claimant took a case. The admitted facts were stated in the case as follows, viz.—"That the claimant has occupied for some years past two rooms at No. 38 York Place, of a clear yearly value, if let unfurnished, of upwards of £10; that he has had the sole use of these rooms; that he has paid no rent for them, but has enjoyed them as a gift and as part of his allowance from his father."

The question of law for the decision of the Court of Appeal was—"Whether, in order to constitute a lodger qualification, it is essential that the claimant should have paid rent for the rooms occupied by him, or whether enjoying the use of them as part of an allowance as a gift is sufficient?"

The Representation of the People (Scotland) Act 1868 (31 and 32 Vict. cap. 48), section 4, provides as follows, viz.—"Every man shall, in and after the year One thousand eight hundred and sixty-eight, be entitled to be registered as a voter, and when registered to vote for a member or members to serve in Parliament for a burgh, who is qualified as follows, that is to say—1, if of full age and not subject to any legal incapacity; and 2, as a lodger has occupied in the same burgh separately, and as sole tenant, for the twelve months preceding the last day of July in any year, lodgings of a clear yearly value, if let unfurnished, of £10 and upwards; and 3, has resided in such lodgings during the twelve months immediately preceding the last day of July, and has claimed to be registered as a voter

at the next ensuing registration of voters."

Argued for the appellant—The occupation was as a lodger and as sole tenant. It was not necessary that any rent should be paid. From the facts stated it must be presumed that the lodgings were occupied under a contract—*Brown* v. *Martin, &c.*, November 6, 1885, 13 R. 159; *Ferguson* v. *Kerr*, November 6, 1879, 7 R. 7; *Parker* v. *Campion*, November 29, 1870, Ir. Rep., Registry & Land Act Appeals, 75.

Counsel for the respondent was not called upon.

At advising—

Lord Mure—I do not think it necessary to call upon the respondent here. It seems to me that the Sheriff has taken a sound view. The possession of two rooms in a father's house as a gift is no contract in any sense of the word. It was, as I understand it in this case, defeasible at any moment. In the case of *Brown* v *Martin*, and the other cases reported with it, the sons actually paid a rent in money or money's worth, and were living continuously and by contract in the rooms occupied by them for the period of time required by the statute. But I know of no authority under the statute to give to a son occupying a room in his father's house by permission of his father a right to be enrolled in respect of that permission, which may be withdrawn at any time.

Lord Lee—I come to the same conclusion. I have no doubt whatever that a father may agree with his son to give him rooms on such terms with or without payment as to give him a right to claim as a lodger, but the question is whether there is anything of that kind set out in this case. I think there is not. There is no adverse claim to be regarded as sole tenant stateable by the son here as against his father.

Lord Kinnear—I am of the same opinion. The qualification is that the claimant shall have as a lodger, and as sole tenant, occupied lodgings of a certain yearly value. A person who occupies lodgings as sole tenant must occupy them under a contract of lease, and the admission in this case is that the claimant has not occupied under any contract whatever, but by the gift or tolerance of the owner or occupier of the house. Upon the admitted state of the facts it seems perfectly clear that the occupancy of the claimant might have been determined by the will of his father at any moment during the twelve months. I think that is not a right qualifying under the statute.

The Court dismissed the appeal and confirmed the judgment of the Sheriff.

Counsel for Appellant — Crole. Agent — William Black, S.S.C.

Counsel for Respondent—A. S. Young. Agent —James Macdonald, W.S.

COURT OF SESSION.

Tuesday, November 27.

FIRST DIVISION.

[Exchequer Cause.

CHEAPE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Inhabited House Duty—14 and 15 Vict. cap. 36, Schedule.

By the schedule of this Act a duty of ninepence for every pound of annual value is imposed upon occupiers, with certain specified exceptions, "for every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards by the year."

By Schedule B of the Act 48 Geo. III. c. 55, to which the later Act above mentioned refers, it is enacted under rule 2 that "every coach-house, stable, wash-house, . . . and all other offices and gardens and pleasure grounds, belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house: Provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued."

The committee of subscribers to a pack of hounds rented certain premises, consisting of a house which was occupied by the huntsman, cottages occupied by a whip and a groom, kennels and stables. The annual value of these subjects, taken together, was over £20 a-year. *Held* that a duty of 9d. per £ was rightly imposed on the committee for the occupation of these premises.

Captain Cheape, Master of the Linlithgow and Stirlingshire Pack of Foxhounds, on behalf of himself and the other members of the committee of subscribers to the hounds, appealed against an assessment of £1, 10s. made upon them for inhabited-house-duty for the year ending 24th May 1888, at the rate of 9d. per £ on £40, the rent or annual value of premises occupied by the committee at Golfhall, in the parish of Corstorphine, and belonging to Sir James R. Gibson Maitland, Bart.

The premises consisted of—1, A two-storeyed dwelling-house of six apartments, occupied by the huntsman, of the probable annual value of £9; 2, a cottage of two apartments and a bed-closet, occupied by the whip, worth probably about £4 per annum; 3, a groom's house of three rooms, worth £4 per annum; 4, stables, with harness-room, and other accommodation for 20 horses; 5, a kennel, capable of holding about 50 dog hounds, with exercising yard attached; 6, a kennel, capable of holding 50 bitches, with exercising yard attached; 7, a small kennel, and yard attached; 8, two boiling-houses, and several other outhouses; 9, about 3 and a quarter acres of land on the east side of the kennels, which is used chiefly as a training and exercising yard.

These subjects were let at a *cumulo* rent of

£40, with £9, 15s. 8d. as for interest on expenditure on the kennels some years ago. The interest was regarded by all parties as equal to the rent of the land, and it was assumed that the balance of £40 represented the annual value of the whole buildings.

Under the schedule of the Act 14 and 15 Vict. cap. 36, a duty of ninepence for every pound of annual value is imposed, with certain specified exceptions, "for every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of £20 or upwards by the year."

Special reference is made by this Act to Schedule B of the Act 48 Geo. III. cap. 55, rule 2 of which enacts—"Every coach-house, stable, brew-house, wash-house, laundry, wood-house, bake-house, dairy, and all other offices, and all yards, courts, and curtilages, and gardens and pleasure grounds, belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house: Provided no more than one acre of such gardens and pleasure grounds shall, in any case, be so valued."

By rule 3 it is enacted that all shops and warehouses which are attached to the dwelling-house, and have any communication therewith, shall be valued together with the dwelling-house. An exception is made of such warehouses as are distinct and separate buildings from the dwelling-houses and shops attached thereto, employed solely for the lodging of goods or the carrying on of a manufacture (notwithstanding the same may adjoin to or have communication with the dwelling-house or shop).

The Commissioners refused the appeal, and the appellant requested a case to be stated for the opinion of the Court under the Taxes Management Act 1880 (43 and 44 Vict. c. 19).

Argued for the appellant—The premises in question were not such as were properly subject to inhabited-house-duty. They were not the pertinents of a gentleman's residence, but rather premises occupied for the business, so to speak, of hunting—*Douglas* v. *Young*, November 14, 1878, 7 R. 229. They more nearly resembled a home farm, or a farm where the tenant did not reside, which it was the invariable practice of the Inland Revenue to exempt from this duty. The houses of the servants of the hunt were merely accessions to the stables and kennels. If they did not fall under rule 2 of Schedule B of the Act Geo. III., they certainly did not fall under rule 3, as none of the separate houses was by itself of the annual value of £20, and there was no internal communication between them. Even were the huntsman's house of the annual value of £20, the assessment should be laid on him, as the occupant, and not on the committee of subscribers, who were assessed already in the same duty for their residences elsewhere.

Argued for the respondent—The committee were the real occupants of these premises, which were leased for the purposes of the hunt. The assessment was therefore rightly laid on them. There was a dwelling-house here, and the stables and kennels were occupied in connection therewith. Rule 2 therefore applied, and the argument based on the want of internal communication fell to the ground.

At advising—

Lord President—The Act which imposes the duty which is now laid on the appellant is 14 and 15 Vict. c. 36, and the schedule, which is the important part of that Act, authorises duties to be levied upon inhabited dwelling-houses according to the annual value thereof—that is to say, on "every inhabited dwelling-house which, together with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of £20 a-year." There must be an inhabited dwelling-house in order to bring the subject of the assessment within the scope of the schedule, but that inhabited dwelling-house need not of itself be of the value of £20 if the household and other offices, yards, and gardens therewith occupied and charged make it up to that amount. And with regard to the different modes of occupation we have it provided in the schedule that where the dwelling-house is occupied by any person in trade who shall expose for sale and sell any goods in any shop or warehouse, being part of a dwelling-house, and also where a dwelling-house shall be occupied by any person who shall be duly licensed to sell beer, ale, wine, or other liquors, and also where any dwelling-house shall be a farm-house occupied by the tenant or farm-servants, and *bona fide* used for the purposes of husbandry only, the assessment is to be at the rate of 6d. per £. But in all other cases, except these three, the assessment is to be at the rate of 9d. per £. But it is obvious that what is contemplated in all these cases is that the dwelling-house may be occupied by a person other than the person assessed, for there is given, as one example, a dwelling-house, being a farm house, occupied by a farm servant, upon which nevertheless the owner or tenant may be assessed. Now, the schedule of the old Act of 48 Geo. III., to which this later statute refers us back, has this rule—"Every coach-house, stable, brew-house, and so forth belonging to and occupied with any dwelling-house shall, in charging the said duties, be valued together with such dwelling-house," provided that no more than one acre of garden ground shall in any case be so valued. Then the question comes to be, have we in this case a dwelling-house to begin with? Now, undoubtedly there is; there is a dwelling-house of some importance. It is said not to be quite of the value of £20 in itself, but nevertheless it is a two-storeyed house with six rooms, and is occupied by the huntsman who, of course, is the chief man in the premises. The other houses consist of stables and kennels which are occupied along with the dwelling-house in this sense, that they are all occupied for the purposes of the hunt; they are all occupied for one and the same general purpose, and therefore they seem to me to fall within the description both of the schedule in the old Act and of the schedule in the new Act. Now, it is not pretended that these premises are under the value of £20; on the contrary, they are very much above it, and therefore it appears to me that the Acts of Parliament are directly applicable. Some reference was made to the fact of the different buildings constituting these premises having separate entrances and no internal communication, but that has no relevancy in regard to a subject of this kind. But the second rule in the schedule

of the Act of 48 Geo. III. makes no reference to internal communication or anything of the kind as being necessary; on the contrary, it is quite obvious that the sort of premises there in view are premises occupied in connection with the dwelling-house, but not by any means necessarily communicating with the dwelling-house in any way. And just as little is there any such idea to be found in the schedule of the more recent statute. I therefore think this assessment is well laid on.

Lord Mure concurred.

Lord Shand—It appears to me upon the statement of the case that we have here a dwelling-house and pertinents such as are described in rule second of the Act of 48 Geo. III., in the occupation of the committee of the hunt, upon whom the assessment has been laid, and as these are to be regarded, as I think, as one subject, and are above the value which renders the subjects liable to assessment, I have no doubt the assessment has been well laid on.

Lord Adam concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellant—Chisholm. Agents—Wallace & Begg, W.S.

Counsel for the Commissioners — Young. Agent—Solicitor of Inland Revenue.

Tuesday, November 27.

FIRST DIVISION.

[Exchequer Cause.

HENDERSON *v.* THE LORD ADVOCATE.

Revenue — Public-House — Licence-Duty—Early Closing—Deduction—25 and 26 Vict. cap. 35—37 and 38 Vict. cap. 94, sec. 7—50 and 51 Vict. cap. 38, sec. 4.

By section 7 of the Act 37 and 38 Vict. cap. 94, made applicable to Scotland by a later Act, the holder of an early closing licence is obliged to close his premises one hour earlier than the ordinary hour provided by the Act, and is entitled to a deduction of one-seventh from the licence-duty which he would otherwise have to pay.

By the form of certificate contained in Schedule A of the Act 25 and 26 Vict. cap. 35, the hour of closing for public-houses in Scotland was fixed at eleven at night. By section 4 of the Act 50 and 51 Vict. cap. 38 (which does not apply to places of over 50,000 inhabitants), the form of certificate was altered, and it was prohibited to sell or give out liquor "after such hour at night of any day, not earlier than ten, and not later than eleven, as the licensing authority may direct."

Acting under the power so conferred upon them, the justices of a county passed a resolution closing all public-houses in the county at ten p.m. In an action by a publican in the county to recover from the Commissioners of Inland Revenue one-seventh of the licence-duty, as calculated on their rental—*held* that he was not entitled to recover the amount claimed, not being the holder of an early closing licence in the sense of 37 and 38 Vict. cap. 49, sec. 7.

This action was raised by William Henderson, wine and spirit merchant at Straiton, in the county of Midlothian, against the Lord Advocate, as representing the Commissioners of Inland Revenue. The sum sued for was £4, 5s. 9d., being part of the sum paid by the pursuer to the defenders as licence-duty, and to which extent he maintained he had been overcharged by them.

Section 49 of 35 and 36 Vict. cap. 94, dealing with Sunday trading, enacts that "where on the occasion of an application for a new licence or transfer or renewal of a licence which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant at the time of his application applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which such licence is or is to be granted closed during the whole of Sunday, the justices shall insert the said condition in such licence. The holder of a licence in which such condition is inserted (in this Act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday, and the provisions of this Act with respect to the closing of licensed premises during certain hours on Sunday shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only. The holder of a six-day licence may obtain from the Commissioners of Inland Revenue any licence granted by such Commissioners which he is entitled to obtain in pursuance of such six-day licence, upon payment of six-seventh parts of the duty which would otherwise be payable by him for a similar licence not limited to six days; and if he sell any intoxicating liquor on Sunday, he shall be deemed to be selling intoxicating liquor without a licence."

By section 7 of 37 and 38 Vict. cap. 49, it is enacted that "where on the occasion of any application for a new licence, or the removal or renewal of a licence which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant applies to the licensing justices to insert in his licence a condition that he shall close the premises, in respect of which such licence is or is to be granted, one hour earlier at night than that at which such premises would otherwise have to be closed, the justices shall insert the said condition in such license. The holder of an early closing licence in which such condition is inserted (in this Act referred to as an early closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act." It is further enacted "that the holder of an early closing licence may obtain from the Commissioners of Inland Revenue any licence granted by such Commissioners which he is entitled to obtain in pursuance of such early closing licence, upon payment of a sum representing six-sevenths of the duty which would otherwise be payable by him for a similar licence not limited

to such early closing as aforesaid."

Section 8 further enacts that "a person who takes out a licence containing conditions rendering such licence a six-day licence, as well as an early closing licence, shall be entitled to a remission of two-sevenths of the duty."

By the 44th section of the Inland Revenue Act 1880 (43 and 44 Vict. cap. 20) the provisions contained in the sections of the Acts above quoted were made applicable to Scotland.

After the passing of the Inland Revenue Act 1880, the Commissioners of Inland Revenue recognised the right of Scottish publicans to a remission of one-seventh of the total licence-duty, as the holders of six-day licences, in virtue of the fact that they could not open their premises on Sunday.

In Scotland the hour of opening and closing were fixed by the form of certificate contained in Schedule B of the Public-Houses Acts Amendment Act 1862 (25 and 26 Vict. cap. 35), which provided that a publican should not "keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors, before eight of the clock in the morning, or after eleven of the clock at night of any day," or "open his house for the sale of any liquors, or permit or suffer any drinking therein, or on the premises thereto belonging, or sell or give out the same, or any other goods or commodities on Sunday."

Section 2 of the same Act contained a *proviso* that "in any particular locality within any county or district or burgh, requiring other hours for opening or closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto," it shall be lawful for the justices or magistrates respectively "to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit."

By the 4th section of the Act 50 and 51 Vict. cap. 38 (which does not apply to any town, burgh, or populous place containing 50,000 inhabitants), the form of certificate was materially altered, for it enacts—"(*b*) The form of certificate for public-houses set forth in schedule A of the Public-Houses (Scotland) Acts Amendment Act 1862, shall be amended as follows—'The words "and do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning or after eleven o'clock at night of any day," shall be omitted from the said certificate, and there shall be inserted in place thereof these words, "and do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after such hour at night of any day not earlier than ten, and not later than eleven, as the licensing authority may direct."'

Acting under the powers thus conferred upon them, the Justices of the county of Midlothian resolved that all licensed houses within the county should be closed at ten o'clock at night. In virtue, however, of the special powers reserved to them by section 7 of this last mentioned Act, they gave a special exemption to the keeper of the Granton Hotel to keep open house till eleven o'clock at night.

In consequence of the resolution of the Justices above mentioned the following special endorsement was made upon the pursuer's correct certificate—"The licensing authority, at a meeting held on 14th March 1888, resolved that from and after Whitsunday next, and until the licensing authority shall otherwise determine, all licensed houses within the county of Midlothian shall be closed at ten o'clock at night."

The pursuer claimed a deduction of two-sevenths from the total licence-duty as calculated on his rental in terms of secs. 7 and 8 of 37 and 38 Vict. c. 49. The Commissioners granted the established deduction of one-seventh for a six-day licence, but refused the deduction of another seventh claimed by the pursuer as the holder of an early closing licence.

The pursuer pleaded—"(1) The pursuer is, in law and within the meaning of the Inland Revenue Act 1880, the holder of an early closing licence for the current year, and he is therefore entitled to a deduction of one-seventh from the licence-duty imposed by the said statute."

The Lord Ordinary (Fraser) on 27th October 1888 assoilzied the defender from the conclusions of the summons.

"*Opinion.*—The sum sued for in this action is only £4, 5s. 9d., but it is stated on the record that the action is brought by agreement in order to settle an important point on the construction of the Revenue Laws as to publicans' licences. It is necessary, in disposing of the questions raised, to consider not merely the statutes relative to public-houses applicable exclusively to Scotland, but also certain Inland Revenue Acts which are applicable to the United Kingdom.

"The first statute (1872) requiring attention is the Act 35 and 36 Vict. cap. 94, which by the second section is declared not to extend to Scotland, but which in part by a subsequent enactment was so extended. The 49th section of this Act, dealing with Sunday trading, enacts as follows—'Where on the occasion of an application for a new licence or transfer, or renewal of a licence which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant at the time of his application applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which such licence is or is to be granted closed during the whole of Sunday, the justices shall insert the said condition in such licence. The holder of a licence in which such condition is inserted (in this Act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday, and the provisions of this Act with respect to the closing of licensed premises during certain hours on Sunday shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only. The holder of a six-day licence may obtain from the Commissioners of Inland Revenue any licence granted by such Commissioners which he is entitled to obtain in pursuance of such six-day licence, upon payment of six-seventh parts of the duty which would otherwise be payable by him for

similar licence not limited to six days; and if he sell any intoxicating liquor on Sunday he shall be deemed to be selling intoxicating liquor without a licence.'

"The next statute (1874) is 37 and 38 Vict. cap. 49, which the defender says is not exclusively applicable to England, and there is no express declaration in the statute, as there is in the Act of 1872, that it is not to extend to Scotland. It is of no consequence to determine the point, because by a subsequent enactment the two sections bearing upon the present question have been made applicable to the United Kingdom. The seventh section of this statute enacts that when an application is made for a licence, and the applicant applies to the justices to insert in the licence a condition 'that he shall close the premises in respect of which such licence is or is to be granted one hour earlier at night than that at which such premises would otherwise have to be closed, the justices shall insert the said condition in such licence.' And then it is enacted that 'the holder of an early closing licence in which such condition is inserted (in this Act referred to as an early closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act.' It is next enacted that the holder of such early closing licence shall obtain from the Commissioners of Inland Revenue the licence granted by such Commissioners upon payment of six-sevenths of the duty which would otherwise be payable by him for a licence not limited to such early closing. And the 8th section enacts that 'a person who takes out a licence containing conditions rendering such licence a six-day licence as well as an early closing licence, shall be entitled to a remission of two-sevenths of the duty,' that is to say, an English publican who takes a licence with the condition that he shall not open his house on Sunday, and who agrees to shut it an hour earlier on other days of the week, gets a deduction of two-sevenths of the duty.

"These two statutes apparently were held to be applicable only to England, because by the Inland Revenue Act of 1880 (43 and 44 Vict. cap. 20, sec 44), it is enacted 'that the provisions regarding six-day licences and early closing licences, contained in section 49 of the Licensing Act 1872, and sections 7 and 8 of the Licensing Act 1874, shall be deemed to apply throughout the United Kingdom.'

"The Commissioners of Inland Revenue have recognised the right of the Scottish publican to a remission of duty by reason that he is by the Scottish law restricted to a six-day licence in respect that he cannot open his premises on Sunday, but they have refused to recognise his right to demand remission of duty on account of his being restrained by the regulation of the justices acting under the recent 'Public-Houses Hours of Closing (Scotland) Act 1887,' from carrying on his trade beyond ten o'clock at night. The pursuer contends that he is thus forced to an early closing, and is entitled in consequence to remission of another one-seventh of the duty.

"It is therefore necessary now to see what is the course of legislation in reference to this matter of early closing in Scotland. The English practice of the applicant applying to the justices to insert in his license from them (in Scotland called a certificate) a condition that he will close his premises one hour earlier than the ordinary hour for closing, is not in accordance with the Scottish practice. It is not necessary to have such an application in order to limit the publicans' business hours. The certificate which he received from the justices peremptorily stated, until the passing of the Act of 1887, hereafter mentioned, what is the hour of closing without the intervention of the applicant at all. It is unnecessary to refer to the earlier statutes, because this subject, until last year, was regulated by the Act of 1862 (25 and 26 Vict. cap. 35). The second section of this Act enacts that 'the forms of certificates contained in Schedule A to this Act annexed shall come in place of the forms of certificates provided by the recited Acts, or either of them.' Now Schedule A contains a form of certificate for public-houses in which there is this enactment, 'and do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquor before eight of the clock in the morning or after eleven of the clock at night of any day; and do not open his house for the sale of any liquors, or permit or suffer any drinking therein, or on the premises thereto belonging, or sell or give out the same or any other goods or commodities on Sunday.' There is in the body of the statute itself no provision enacting any rule as to the hour of closing. It rests simply on this certificate. This clause in the certificate was a repetition of the form contained in the Act of 1853 (16 and 17 Vict. cap. 67), called 'The Forbes Mackenzie Act,' where it appears for the first time. In the Home Drummond Act, 9 Geo. IV. cap. 58, the condition in the certificate is merely that the publican shall not suffer any drinking in the premises 'during the hours of divine service on Sundays, or other days set aside for public worship by lawful authority, nor keep the same open at unseasonable hours.'

"A further step in the way of restriction, or in the power of restraining the publican, was taken in the Act of 1887 (50 and 51 Vict. cap. 38), which does not apply to any town, burgh, or other populous place containing 50,000 inhabitants. It is not disputed that it applies to the premises held by the pursuer. Now the 4th section of this Act materially alters the terms of the certificate, for it enacts '(*b*) the form of certificate for public-houses set forth in Schedule A of the Public-Houses (Scotland) Acts Amendment Act 1862, shall be amended as follows:—The words "and do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning or after eleven o'clock at night of any day," shall be omitted from the said certificate, and there shall be inserted in the said certificate in place thereof these words—"And do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after such hour at night of any day not earlier than ten and not later than eleven, as the licensing authority may direct."' Acting under the powers thus conferred upon them, the Justices of Mid-

lothian, at a meeting held on the 14th of March 1888, resolved—'That from and after Whitsunday next, until the licensing authority shall otherwise determine, all licensed houses within the county of Midlothian shall be closed at ten o'clock at night.' The pursuer does not state that in defiance of this resolution of the Justices he has kept his premises open, and the remedy he seeks is a return of duty, in consequence of the loss he sustains by the restriction of the hours of business. It was suggested that the Justices had no power to pass a general resolution applicable to the whole county of Midlothian, but that they must deal with each man's certificate by itself if they choose to restrict the business hours. The Lord Ordinary is not called upon in this process to deal with any such question. All that he has to determine is, whether there is a good claim in law here for the return of one-seventh of the duty in addition to the one-seventh at present allowed for the Sunday closing.

"The case of the pursuer is simply this, that the ordinary hour of closing was eleven o'clock, and if he must now close at ten, then his license is an 'early closing licence,' and he is entitled to a return of the duty. Now, the assumption here made is quite unfounded. Eleven o'clock no doubt was the hour mentioned in the form of certificate in the Act of 1853 and the Act of 1862, but it can be carried no further back, and it rests upon the condition inserted in the certificates granted under these statutes. Now, when the Act of 1887 expressly declares that the condition fixing the hour of closing at eleven o'clock shall be deleted from the certificate and another form of condition inserted, viz., an hour to be fixed by the justices, the hour so fixed by them becomes the ordinary hour of closing for the district to which the resolution applies. Eleven o'clock is entirely blotted out of the regulations as to business hours, and a substitute put in its place. There is now no 'ordinary' hour for closing except the hour so fixed; and there is no early closing at an hour other than the ordinary one. The result consequently must be that this action fails.

"The pursuer complains that the Justices have extended the time to the Granton Hotel for closing. This they did in virtue of powers specially reserved to them by the Act of 1887, the seventh section of which enacts that 'nothing contained in this Act shall affect the provisions of the sixth section of the Act 25 and 26 Victoria, chapter 35, respecting the granting of special permissions.' Now this sixth section of the Act of 1862 gives power to the chief magistrate and to the justices of any county respectively to grant permission to extend the time for supplying liquors in regard to any public or special entertainment, or in any other place or premises during any particular time beyond the time prescribed by the certificate for closing. It was under this power that privilege was granted to the Granton Hotel. And it is further enacted by the Act of 1862 that it shall be lawful for the justices or for the magistrates 'to make such general regulations touching such permissions as they shall think fit, and such special permissions shall be subject to such general regulations.' The power therefore to pass general regulations by the justices, as was done by the Justices of Midlothian in 1888, seems to be thus recognised."

The pursuer reclaimed, and argued—The 44th section of the Act of 1880 was not meant to introduce into Scotland any new system as to licences, but to give the Scottish publican certain financial benefits enjoyed by publicans in England and Ireland. After the passing of the Act the Commissioners of Inland Revenue had allowed Scottish publicans a deduction of one-seventh from the total duty payable as being holders of six-day licences, in respect that they could not keep open house on Sunday. Sec. 2 of 25 and 26 Vict. c. 35, gave the justices power to close public-houses earlier in particular localities than eleven, which was the general hour of closing—*Macbeth* v. *Ashley*, 11 Macph. 708 (H. of L.), 1 R. 14. Suppose the Justices had exercised this power in any particular locality, could it have been said that the publicans who were obliged to close earlier that the general hour were not entitled to a deduction of duty as the holders of early closing licences in virtue of 37 and 38 Vict., secs. 7 and 8? The case here was almost the same. The Justices had exercised the powers conferred on them by sec. 4 of 50 and 51 Vict. cap. 38, and as a consequence the pursuer had been obliged to close his premises one hour sooner than what had before been the ordinary hour of closing. There was no statutory enactment fixing another hour of closing than eleven, but the pursuer was compelled to close at ten. He was therefore entitled to a deduction of a seventh from the licence-duty as the holder of an early closing licence. The indulgences granted in particular cases, such as the Granton Hotel, and the fact that in Edinburgh and Leith the closing hour was still eleven, emphasised the hardship to which he would be subjected were the benefit of the deduction claimed not granted.

The respondent was not called upon.

At advising—

Lord President—By the Inland Revenue Act of 1880 it is provided that "the provisions regarding six-day licences and early closing licences, contained in section 49 of the Licensing Act 1872, and sections 7 and 8 of the Licensing Act 1874, shall be deemed to apply throughout the United Kingdom." Now, of course that means only that if there are cases in Scotland or Ireland of the same nature as those provided for in these previous statutes with regard to England, then the previous Acts shall apply to these cases. It becomes necessary therefore to consider what is the case of a six-day licence and what is the case of an early closing licence, which entitles a party holding such licence to a deduction from the full amount of his licence-duty.

Now, in the case of a six-day licence, the statute makes it very clear that the case contemplated is that of the party applying for a licence desiring to have inserted in his licence a condition that he shall close on Sunday, and that the Justices shall comply with that application, and insert the condition in the licence. In regard to the early closing licence, the 7th section of the Licensing Act of 1874 provides that "where, on the occasion of any application for a new licence, or the removal or renewal of a licence which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant applies to the licensing justices to insert in his licence a con-

dition that he shall close the premises, in respect of which such licence is or is not to be granted, one hour earlier at night than that at which such premises would otherwise have to be closed, the justices shall insert the said condition in such licence. The holder of an early closing licence in which such condition is inserted (in this Act referred to as an early closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act." Now, the Licensing Statutes are clear in their provisions. I do not think they admit of any ambiguity. They both contemplate—both the Statute of 1872, regarding a six-day licence, and the Statute of 1874, regarding an early closing licence—that the applicant for a licence shall desire to be put under a restriction, and if he does, then the restriction shall be quoted in the licence by the Justices, and they shall be obliged to keep it. In the case of the early closing licence it is made very clear what is meant by early closing. It is closing at an hour earlier than the ordinary hour at which such premises would be closed. Now, if after the passing of the Inland Revenue Act 1880 this question had arisen, the condition of the law relating to the licensing of public-houses was such that a very nice and important question would have arisen as to whether the English Licensing Statutes were applicable, or could be made applicable, to the then existing state of the law. By the Act 16 and 17 Vict. cap. 67, and also by the Act 25 and 26 Vict. cap. 35, the condition which the holder of a licence came under was, that he "do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom, any liquors before eight of the clock in the morning or after eleven of the clock at night of any day." Now, if in that state of the law the applicant for a certificate had inserted in his petition a prayer that he should be put under obligation by his certificate that he should close his premises at ten o'clock at night instead of eleven—eleven o'clock being then the ordinary hour of closing—it would have been difficult to say that the effect of the Act of 1880 would not have been to have given him the benefit of the 7th section of the Act of 1874. But I put the case also upon this—Supposing the applicant for a certificate did not himself desire or apply to be put under that restriction, but that the Justices, in the exercise of the power committed to them by the existing Public-House Acts, had put his premises under the condition of closing at ten o'clock instead of eleven, would or would not the provisions of the English Licensing Acts, made applicable to Scotland by the Revenue Act of 1880, have applied? That might admit of a good deal of argument, as I think it would. That is not the case we have to deal with here, otherwise we should have required to consider the matter more anxiously. But putting that aside altogether, it is quite obvious that where a party is bound to close at ten o'clock instead of eleven under the Act of 1880 and the Public-Houses Acts then in existence, the fact of his being obliged to close at ten instead of eleven would clearly bring him into this category, that he was under obligation to close an hour earlier than the ordinary hour of closing, and that certainly would have brought him within the spirit of that clause of the Act of 1874, which gives a right to a deduction of one-seventh of the licence-duty in such circumstances. But this case turns upon the more recent Act of 1887 (50 and 51 Vict. cap. 38), and the question of course which naturally arises under that statute is whether there is now any ordinary hour of closing at all. If there be none, I do not very well see how the 7th section of the Act of 1874 can be applied, because there could only be a right to the deduction of one-seventh from the licence-duty in the event of the licence holder being put under the condition that he shall close an hour earlier than the ordinary hour of closing, or, in other words, that he shall close earlier than his neighbours generally; but the Act of 1887, while it professes in the preamble to meet a desire that an earlier hour than eleven o'clock at night should be fixed for the closing of premises licensed for the sale of exciseable liquors, does not by its enactments really carry out that object, because it does not by these enactments fix any hour at all; on the contrary, it leaves it to the justices in Quarter Sessions—the licensing authority as they are called—to dispose of that question at their discretion. The form of certificate is to be altered from that contained in Schedule A of the Public-Houses (Scotland) Acts Amendment Act 1862, and in place of the existing form this is to be inserted—"And do not keep open house, or permit or suffer any drinking or selling of any liquors before eight of the clock in the morning, or after such hour at night of any day not earlier than ten and not later than eleven, as the licensing authority may direct." Now, the statute does not thereby fix an hour; on the contrary, it leaves it to the licensing authority to fix the hour, and they may fix any hour between ten and eleven or ten or eleven. I do not suppose it will be contended that under this provision it would not be competent for the Justices to fix half-past ten, or to fix a quarter-past ten, or a quarter to eleven; all that is within their discretion, and what they have done in this particular case is to come to a general resolution that ten o'clock in the county of Midlothian shall be the hour for closing—that is to say, the ordinary hour of closing. Now, that being so, how can it be said that the applicant here is under a condition or obligation to close his premises, in terms of the 7th section of the Act of 1874, "one hour earlier at night than that at which such premises would otherwise have to be closed," or, as it is put in another part of the clause, "shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed." Instead of being an hour earlier, the hour at which he closes his premises is the ordinary hour at which all other premises are closed, unless there is some special dispensation with regard to the particular locality. Therefore I come to the same conclusion with the Lord Ordinary, that the passing of the Act of 1887 made the clauses of the Act of 1874 inapplicable to any case within the county of Midlothian, or any case to which the Act of 1887 applies, and therefore it is impossible to grant this relief to the applicant.

Lord Mure—I agree with your Lordship. As I understand, this early closing licence is given to a party who applies, under the English Acts, to the magistrates or justices to have his pre-

mises closed at an hour earlier than that fixed in the statute as the ordinary hour of closing, and if the magistrates or justices make an arrangement of this sort, and his licence is so fixed that he shall close his premises at ten o'clock instead of eleven, then that is an early closing licence, and he is entitled to a reduction of licence-duty. Now, that is the way in which the thing is done, as I understand, in the English cases. Before the passing of the later Acts the magistrates or justices in Scotland had no such power, but a six-day licence in Scotland was granted since the passing of the Inland Revenue Act 1880, by which less duty was charged for the six-day licence than the seven-day licence. Then in the English Act of 1874 the general hour for closing in certain districts, which had been eleven o'clock before, was fixed to be ten o'clock, but that did not make the parties who closed at ten entitled to an early closing licence. If a party wished to have an early closing licence under the general provision of the Act of 1880, he still required to go to the justices and put himself under a further restriction in the matter of time than the Act itself did. He then put himself in the position of closing earlier than the ordinary hour fixed by the statute. He could still do that, and get his early closing licence. So standing the matter, we come to the Act of 1887, which gives a discretionary power to the licensing justices as to the hour of closing. Now, under that Act of 1887, instead of eleven o'clock being taken as the general hour of closing, there are certain provisions by way of alteration of the certificate by which the general hour of closing is made different if the magistrates choose to make it different. There is a power given them, and under that power the licensing justices in each district can fix a general hour instead of that being done by the Act of Parliament itself; and the Magistrates of Midlothian have, as I understand, fixed ten o'clock under the powers so given, and the certificate which was handed up to us bears that that is the hour. Now, the applicant's certificate binds him to close at ten o'clock, but he is not closing earlier than any other person in Midlothian holding such licences; they all close at ten o'clock. Therefore I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to.

Lord Shand—Notwithstanding the full and able argument which has been addressed to us on the part of the reclaimer here, I am of opinion that the judgment of the Lord Ordinary is well founded. It appears to me that after the passing of the Inland Revenue Act of 1880, which was intended to give to publicans the benefit of the provisions regarding six-day licences and early closing licences, which had been conceded to persons carrying on businesses of that kind in England and Ireland only, those who had obtained certificates or licences in this country would have had the benefit of these provisions. It is conceded that they did get the benefit of the provisions so far as the Sunday licence was concerned. They got a-seventh off the licence, because practically they were holding six-day licences, and got the benefit in that way. But I further think that although there may have been some difficulty as to the form in which it was to be done, there can be no doubt that some form could have been arrived at by which they could also have got the benefit of the early closing licence. Your Lordship has put one case. Supposing a person making an application, in making it conforms literally with the provision of the statute by applying to have his licence limited so that he should close his premises an hour earlier than that at which his premises would otherwise have to be closed, then I cannot doubt that the magistrates must have dealt with that application and acceded to his request; they would have marked it on his certificate, and he would have got the benefit of the provision. But we must further bear in mind that at that time, when the Statute of 1880 was passed, in virtue of sec. 2 of 25 and 26 Vict. c. 35, the Act of 1862, while the certificate did contain the usual hour as at that time 11 o'clock, being the hour of closing, there was this provision—"Provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing . . . public-houses than those specified in the forms of certificates, . . . it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same, as they shall think fit." And if magistrates, in the exercise of that power in any particular district, said certain persons holding certificates must now close at ten instead of eleven, which was the hour which the statute authorised them to be open to, speaking generally, then I take it there would be room for holding clearly that in that case also the publican would have had the benefit of the early closing licence, which would give him a seventh off—at least I say there is a great deal to be said on the point. Matters remained in that position from 1880 to 1887.

I concur in holding that all that has been changed by the Statute of 1887. What is the feature of the English Act which is sought to be applied to the Act of 1887? It is this, that the reduction of the sum paid upon the licence is to be given where the person holding the licence shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act. We must read these words as meaning that he is to close his premises one hour earlier than the ordinary hour at which such premises would be closed under the statute we are now reading, viz., the Statute of 1887. Now, can it be shown that the reclaimer has to close his premises an hour earlier than the ordinary hour at which under this Act he would be entitled to keep his premises open? The answer to that is just what the Lord Ordinary has given, there is no longer any fixed hour up to which he is entitled to keep open, and requiring that he should be restricted in order to take away the right. The question here is, what is the ordinary hour of closing? The ordinary hour is not eleven o'clock, but such hour not earlier than ten, and not later than eleven, as the Magistrates may think fit to fix, and as the Magistrates have fixed ten, I do not think it can be said that the reclaimer is a person who has to close his premises earlier than the hour which the statute sets forth as the ordi-

nary hour of closing. Upon that ground I agree with all that your Lordships have said. I am of opinion that the Lord Ordinary's judgment should be adhered to.

Lord Adam—It appears to me that the provisions as to early closing, as they have been explained to us, are clear and intelligible in their native soil, and as applicable to the English system, but I confess that since they have been transplanted here, I see and would have seen great difficulties in reconciling them with our Scottish system, which was entirely different, and if this question had occurred prior to the passing of the Act of 1887 I should have participated in your Lordship's difficulties upon the case, and would have wished further time for consideration. But now, after the passing of the Act of 1887, I do not think this case is attended with difficulty. Every certificate, as has been pointed out, must now bear that the publican does not keep open house after such an hour at night of any day not earlier than ten and not later than eleven as the licensing authorities may direct. Therefore, now, as I read that, the licensing authority must direct what the hour of closing is to be. The hour of ten is not fixed, and the hour of eleven is not fixed, and there is no hour between these two fixed by statute; there is no hour fixed, but the licensing authority shall say what the hour shall be. That is the position of matters under the Act of 1887. Now, that being so, the question comes to be, whether this publican, whose certificate ordains that he shall close at ten o'clock, has what is called an early closing licence? Early closing implies that it must be earlier than something. Earlier than what? Now, that takes us back to the English statute, because it is the English statute which introduces this. It is said that the premises shall be closed at an hour earlier than that at which such premises would have to be closed. Otherwise than what? If we go a little further down the clause we find what it is; it is earlier than the ordinary hour at which such premises shall be closed under the provisions of the Act—that is to say, under the provisions of the Act we are now considering. But, as has been pointed out, there is no ordinary hour fixed by the Act of 1887 at all; that is to be fixed by the licensing authority. In this case the licensing authority have fixed ten o'clock as the hour of closing for the whole of Midlothian, and that is the ordinary hour if there is any ordinary hour. Well, then, the question comes to be, as this gentleman's certificate declares that he shall close at ten o'clock, is that earlier than the ordinary hour fixed by the statute or by the Justices under the statute? I am totally unable to see that it is. Therefore I am unable to see that this is an early closing licence or certificate in the sense of the English Acts, and therefore I agree with your Lordship and the Lord Ordinary.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer in support of the reclaiming-note against the interlocutor of Lord Fraser of date 27th October 1888, and considered the cause, Adhere to the interlocutor reclaimed against, and refuse the prayer of the note: Find the defender entitled to additional expenses," &c.

Counsel for the Pursuer (Reclaimer)—Baxter—Vary Campbell. Agents—Wylie & Robertson, W.S.

Counsel for the Defender (Respondent)—Young. Agent—The Solicitor of Inland Revenue

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Wednesday, November 28.

FIRST DIVISION.

ROSSBOROUGH'S TRUSTEES *v.* ROSSBOROUGH.

Succession—Heritable and Moveable—Bond and Disposition in Security—Conversion—Terce— Jus relictæ.

The husband's infeftment at the time of his death is the measure of the widow's right of terce.

The holder of certain heritable bonds had before his death taken steps towards realising the securities. Intimation and requisition for payment was served on the debtor in one of the bonds, but no further steps were taken. Similar intimation was made in respect of another bond, and the subjects of the security were advertised but not exposed for sale. The subjects under a third bond had been exposed for sale, but had not found a purchaser. In the fourth case the subjects had been exposed for sale and sold, but the purchaser having failed to pay the price had not obtained infeftment at the death of the bondholder. His widow claimed her legal rights.

Held that the bonds had not been rendered moveable as to the widow by the steps taken to realise the securities, and that she was not entitled to any part of the sums contained in the bonds *jure relictæ*.

Succession—Heritable and Moveable—Trust—Liferent—Residue—Capital and Income—Lease.

A testator in his trust-disposition and settlement, after making certain provisions for behoof of his widow in liferent, directed his trustees to pay the income of the residue of his estate to his sister and her children, and after her death, and when the youngest of the children had attained the age of twenty-five, to divide the capital of the residue among them. The testator was tenant of certain premises, where he carried on business as a purveyor of public entertainments, and when he died some years of the lease were still to run. His business was wound up after his death, and the trustees having failed to dispose of the lease or to sublet the premises, they became unoccupied. The testator's widow repudiated her provisions under the settlement, and claimed her legal rights.

Held that, in a question with the widow, the loss occasioned to the estate by the premises being unoccupied fell to be charged against the moveable estate of the deceased; and in a question between the trustees, as representing the fiars and the sister of the

testator, the loss fell to be charged against the residue of the estate, and did not form any proper charge against the sister as life-rentrix in the settlement.

Hubert Thomas Rossborough died on 28th March 1887, leaving a widow but no children.

By his trust-disposition and settlement, dated 8th June 1886 and recorded 4th April 1887, he conveyed to certain trustees his whole means and estate for the following among other purposes—(2) He directed his trustees to invest a sum of £5000, and pay the annual income arising therefrom to his widow, so long as she should survive him and remain unmarried. (5) He directed his trustees, after paying certain legacies, to hold and invest the residue of his estate, and to pay one-half of the annual income therefrom to his sister Sarah Jane Rossborough if she survived him, and the other half to her children. (6) After his sister's death they were to divide and pay the income of the whole residue among her children till the youngest reached the age of twenty-five years, when they were to realise the residue and divide it among the said children. It was further declared that the provisions in the settlement in favour of the testator's wife were to be accepted by her as in full of all claims of terce, *jus relictæ*, and all other claims of every description which might be competent to her in and through the testator's death.

When the testator died his sister had two children, one in pupillarity and another in minority.

The estate of the deceased consisted, *inter alia*, of sums due under certain bonds and dispositions in security, amounting in all to £29,870. Previous to his death the testator had taken certain steps towards realising the sums due under some of these bonds—(1) With regard to a bond and disposition for £1800, he had served the usual requisition for payment, and the period specified in the intimation had expired without payment, but no other steps had been taken. (2) With regard to a bond for £1800, a requisition had been served, and after the expiry of the period for payment the security-subjects had been advertised but not exposed for sale, the testator having died without signing the articles of roup. (3) Under a bond for £1150 the subjects had actually been exposed for sale, but had not been sold; and (4) under a bond for £3000 the subjects, which were situated in College Street and High Street, Glasgow, had been exposed for sale by public roup, and actually sold, but the purchaser, not having been able to implement his bargain by paying the price, had not been infeft in the subjects. The testator was also creditor in two bonds and dispositions in security, each for £1000, over these last-mentioned subjects, but no demand for payment of either of these two bonds had been made.

Section 117 of the Titles to Land Consolidation Act 1868 (31 and 32 Vict. c. 101), makes heritable securities, except where conceived expressly in favour of heirs, excluding executors, moveable as regards the succession of the creditors therein, but with the proviso that they shall "continue and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband and wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband."

The testator at the time of his death was tenant of the Britannia Music Hall, Trongate, Glasgow, under a lease for twelve years from Whitsunday 1878, at a rent of £600 per annum for each of the last two years of the lease. After his death the trustees were unable either to effect a sale of the lease for the period still to run, or to sublet the subjects, which, after the deceased's business had been wound up, fell out of occupation, and yielded no return to the estate.

The widow Mrs Rossborough claimed her legal rights in place of the provisions in her favour contained in the settlement, and a question having arisen as to the nature and amount of these rights, and also as to what part of the estate should be charged with the rent and taxes of the Britannia Music Hall, a Special Case was presented for the judgment of the Court, to which the trustees, who represented the interests of the flars, were the first parties, the widow the second party, and the sister the third party.

The second party maintained that *qua* relict she was entitled to one-half of the moveable estate, including therein, as being moveable (first) half of the sum of £5000, being the principal sums of £3000, £1000, and £1000 contained in the three bonds and dispositions in security over the College Street and High Street properties; and (second) one-half of sums contained in the bonds and dispositions in security, on which formal intimations had been given calling for payment, and the notices had expired prior to Mr Rossborough's death without payment being made. She also claimed (third) to be relieved of all claims for rent, taxes, and other charges connected with the Britannia Hall from and after Whitsunday 1887. The first parties admitted the right of the second party to repudiate the provisions of the settlement and to betake herself to her legal rights, but they maintained that the second party was not entitled to one-half of said sums of £3000, £1000, £1000, £1800, £1150, and £1300, or to relief from whatever loss might be incurred in connection with the Britannia Music Hall from Whitsunday 1887 till the end of the lease. The third party Mrs Sarah Jane Rossborough or Sheridan maintained the same pleas as the first parties, and further maintained that in the event of the lease of the Britannia Music Hall not being realised profitably for the estate, the rent, taxes, and other charges under the lease, and all loss or deficiency thence arising to the estate, should be charged against and deducted from the capital or residue of the estate liferented by her and her children.

The questions were—"(1) Were the bonds above mentioned, or any of them, rendered moveable as to the relict by the steps taken to realise the securities, and is the second party entitled to one-half of the sums contained in said bonds, or any of them, as *jus relictæ*? (2) Can the rent of the Britannia Music Hall, and the tenant's obligations under the lease thereof, till the expiry of the lease, be so charged by the first parties as to affect the estate falling to the widow as terce or *jus relictæ*? (3) Are the obligations in the tenant's part of the lease of the Britannia Music Hall, including therein rent, taxes, and all other charges falling upon the

tenant, to be charged against and deducted from the capital or residue of the estate? Or do the said obligations fall to be charged against the revenue thereof?"

Argued for the first parties—The bonds had not been rendered moveable by the steps taken to realise the securities. Taking the case as one between heirs in moveables and heirs in heritage, the test of conversion was whether the testator had gone so far as to be unable to draw back; whether at the time of his death there remained in him only a claim for a sum of money. Bonds and dispositions in security differed from the old rights of annual rent. In the case of the latter the effect of requisition was to extinguish the real security. That was not so as regarded the former. Even in the case of the bond of £3000, where the steps taken had gone furthest towards realisation, the testator had power to resile owing to the failure of the purchaser to implement his bargain. His heritable security was not extinguished, and therefore there was no conversion—More's Notes to Stair, 143; Ersk. Inst. ii., title 2, sec. 16, title 8, secs. 23 and 25; Bell's Com. (7th ed.), ii. 6 (5th ed.), *ibid*; *Montier* v. *Baillie*, June 29, 1773, Hailes' Dec. 530, and M. 15,859; *Heron* v. *Espie*, June 3, 1856, 18 D. 917 (*per* Lord Justice-Clerk and Lord Murray, pp. 928, 937, 938); *Wilson* v. *Wilson*, November 29, 1808, F.C.; *Johnston* v. *Greig*, June 28, 1831, 9 S. 806; *Paul* v. *Horne*, July 5, 1872, 10 Macph. 937. Assuming that the steps taken towards realisation made the bonds moveable in a question between heir and executor, that would not be the case as to the widow. With her at all events it was a question of fact and not of intention. The husband died infeft in the security subjects, and therefore the widow's right of terce was not concluded. Having a right of terce she of course could not claim his *relictæ*, nor could she choose between the two rights—Erskine ii. 9, 46; Bell's Prin. 1600; *MacCulloch* v. *Maitland*, July 10, 1788, M. 15,866; *Campbell* v. *Campbell*, February 17, 1776, 5 Brown's Supp. 627; Fraser on Husband and Wife, ii. 1095; Titles to Land Consolidation Act 1868 (31 and 32 Vict. c. 101), sec. 117. II. As regarded the Britannia Music Hall—(1) In a question with the widow—The lease was a fruit-bearing subject. If the trustees, to whom the testator had conveyed the *universitas* of his estate, could have carried it on at a profit, the fruits would have fallen into executry, out of which the widow would have had a claim of *jus relictæ*. As loss had occurred she was therefore bound to bear her share of it — *Ferguson* v. *Ferguson's Trustees*, February 23, 1877, 4 R. 532. (2) In a question between the liferenter and fiar—The lease being part of the residue, the profits by increasing the residue would have increased the income arising therefrom. Therefore the loss should lie on the revenue also.

The second party argued—(1) In all the six bonds out of which the widow claimed *jus relictæ* the testator had clearly shown his intention to realise. That should govern his succession. As regarded the bond for £3000, and the other bonds over the same subjects, the testator had actually sold the subjects. Here at all events there was conversion. He had deliberately divested himself of his character of security-holder, and so far as his own acts went converted his claim into one for a sum of money. He might have a right of retention for the price, but that was quite a different thing from his position as security-holder. It would be absurd to think that the insolvency of the debtor in the contract of sale could regulate the succession to the creditor's estate—Stair's Inst. ii. 4; Mack. Inst. ii. 2, sec. 6; Bell's Comm. (5th ed. and 7th ed.) ii. 6; opinions *per* Lord President and Lord Curriehill in *Heron* v. *Espie*, *supra*; *Wilson* v. *Wilson*, *supra*; Fraser's Husband and Wife, ii. 985. (2) If the heir had sold the reversion of the lease of the music hall, the profits would have gone to him, and therefore he must bear the loss. Rent was a proper charge against the heir. The lease not being subject to the widow's terce, she could get no benefit from it, and therefore she should not be subject to any loss arising therefrom—*Dundee Police Commissioners* v. *Straton*, February 22, 1884, 11 R. 586.

The third party concurred in the arguments stated for the first parties, with the exception that they argued that in a question between liferenter and fiar, the loss arising from the lease of the music hall should fall on the capital and not the revenue of the estate—*Ferguson* v. *Ferguson's Trustees*, *supra*.

At advising—

Lord President—The late Mr Hubert Rossborough died on 28th March 1887, leaving a settlement dated 8th June 1886 disposing of his whole estate. He was married to Miss Elizabeth Gifford, the second party in this Special Case, but there is no issue of the marriage.

The widow rejects the provisions made for her in the settlement, and claims her legal rights, and it is not disputed that she is entitled so to do.

Her rights extend to one-third of her husband's heritable estate and one-half of the moveable estate. Her interest therefore is to augment the amount of the moveable estate as much as possible, or, in other words, to enlarge the amount affected by her *jus relictæ* at the expense of the estate subject to the terce.

The greater part of Mr Rossborough's heritable estate consisted of bonds and dispositions in security on which he was infeft. The Act 31 and 32 Vict. c. 101, sec. 117, makes such securities moveable as regards the succession of the creditors therein, but with the express proviso that they shall continue heritable *quoad fiscum*, "and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband."

Where a widow claims her legal rights in opposition to her husband's settlement, all questions between her and the parties interested in her husband's succession must be settled as in a case of intestacy, for while the latter cannot found on the settlement to the prejudice of the former's rights, neither can the former take any benefit from the settlement which she has repudiated. The question therefore comes to be, what portion of the deceased's estate is to be considered heritable and what moveable in a ques

tion between the widow on the one hand, and the heir and executor respectively on the other. Now, the statute settles that question so far when it enacts that heritable securities shall be subject to the terce as heritage, and shall not pertain to the widow *jure relictæ*.

But as regards certain of the heritable securities in the present case, the widow contends that both the common law and the statute which declares and confirms the common law should receive no effect because of the steps which were taken by her husband before his death for the purpose of converting the heritable securities into moveable estate. These steps amount in substance to this—Of the entire amount of heritable bonds belonging to the deceased (£29,870) he had previous to his death demanded payment in the usual form of four bonds, amounting in all to £7250. In one case he had served the usual intimation and requisition for payment, but no further steps were taken. In another, after the expiry of the period for payment under the requisition, the subjects were advertised for sale, but had not been sold or exposed for sale. In a third, the subjects had been brought to sale, but had not found a purchaser. In the fourth, the subjects had been exposed for sale, and were actually sold. But the purchaser being unable to pay the price the contract of sale remained unfulfilled, and the purchaser obtained no title to the subjects.

In all these cases it is clear that the infeftment of the deceased as creditor stood undischarged and undisturbed, and afforded him at the time of his death precisely the same security over the same subjects as he acquired when he originally took infeftment on the bonds, excepting only any change in the value of the security subjects.

It is well settled law that the husband's infeftment at the time of his death is the measure as well as the security of the tercer's right, and that though the husband has actually sold his heritable estate, and the purchaser be ready to fulfil his contract and pay the price, yet if the purchaser be not infeft during the husband's lifetime, the right of terce will not be excluded. It seems needless to add (though the statute above cited has done so) that estate which is subject to the terce cannot be affected in any way by the *jus relictæ*.

The first question therefore falls to be answered in the negative.

As regards the second and third questions, Mr Rossborough was at the time of his death tenant of the Britannia Music Hall under a lease for twelve years from Whitsunday 1878 at a rent of £600. He carried on business there as a manager and purveyor of public entertainments, and realised profits from that business. But when his estate came into the hands of his trustees they were unable either to carry on the business or to find a purchaser for the unexpired term of the lease. They have accordingly wound up that business, and the hall is unoccupied, and instead of yielding revenue is an annual burden on the estate to the extent of the rent and taxes till the expiry of the lease at Whitsunday 1890.

It appears to me that this is a loss occasioned to the estate by the failure of a speculation in business, and falls to be charged against the moveable estate of the deceased in a question with the widow, and against the residue of the estate under the settlement in a question between the other parties to the case, and does not from any proper charge against the third party as liferenter.

Lord Mure—I agree in the opinion read by your Lordship, and having had the opportunity of previously seeing it, have nothing to add.

Lord Adam—The main question in this case is, whether the widow of the testator has a claim of *jus relictæ* out of the sums due under the six bonds amounting in all to £29,870 5s.? The bonds are mentioned in the case presented, and it is not disputed that they are all heritable bonds, and that the husband died infeft in the subjects over which the bonds were granted. Neither do the trustees dispute that the widow has a right of terce out of the bonds. On the contrary, they assert that she has such a right, and that is their principal reason for holding that she is not entitled to *jus relictæ*. *Prima facie* the right of the widow is one of terce, and terce only, but it is said—and it is the first question that we have to decide—that certain steps taken by the husband during his life with a view to realise the securities had the effect of rendering the bonds moveable, so as to give the widow a claim of half the amount due under the bonds as *jus relictæ*.

It is only necessary to consider the steps taken to realise the security as to the bond for £3000, because the steps taken with regard to that bond went a great deal further towards realisation than the steps taken under any of the other bonds. If the widow cannot succeed on the facts in the case of that bond, she cannot succeed as to the others.

With reference to that bond it is set forth in article 7 of the case that the security subjects were exposed for sale by public roup at the upset price of £5250. A purchaser appeared and offered the upset price, and was preferred to the purchase. The purchaser was unable to fulfil his bargain, and a charge for payment was served upon him, which was allowed to expire without payment being made. It is not relevant to consider what the trustees did after the testator's death, and therefore the proceedings are just these—The testator endeavoured to realise the security subjects, and they were knocked down to an intending purchaser for a certain sum, but the testator died without having got payment of the price, and still infeft in the subjects.

Now, in my opinion the widow is not entitled to *jus relictæ* out of that bond, but is clearly entitled to terce. There is no doubt that the husband's sasine is the measure of the widow's right, and no proceedings which have not the effect of evacuating the husband's sasine can preclude the widow's right. There are two authorities on the point, one a very strong authority. The first is the case of *M'Culloch* v. *Maitland*, July 10, 1788, M. 15,866, where certain lands were disponed by a husband and the disponee took possession but was not infeft in the lands. The husband died. The widow claimed terce out of the lands which had been actually disponed by the husband during his life, and were in the pos-

session of the disponee. The husband's sasine, however, had not been evacuated by the disponee becoming infeft, and it was held that the widow was therefore entitled to terce out of the lands.

The other case is the case of *Campbell* v. *Campbell*, February 17, 1776, 5 Brown's Supp. 627, and it is there said—"The husband's sasine, says Mr Erskine, b. 2, title 9, sec. 46, is the measure of the wife's terce; thus neither an heritable bond nor a disposition of lands granted by the husband if death has prevented him from giving sasine to the creditor or disponee can hurt the terce, and so the Lords found—'In respect that the deceased John Campbell was not at the time of his death denuded of the subject within mentioned by infeftment, but only by a title which remained personal; therefore find that Katherine Waddell, his relict, is entitled to a terce of said subjects, and not to a third part of the price thereof.'"

Now, it humbly appears to me that both of these cases are—one of them much—*a fortiori* of the present case. There was not only an intention to sell, but an actual disposition, not followed, however, by the infeftment of the disponee. The sasine stood in the husband's name, and with it the widow's right of terce. I cannot find circumstances so strong in the present case, and therefore I think these authorities are conclusive of this case, and it must be held that the widow has a right to terce, and that being so, the irresistible and only conclusion is that the securities being heritable and subject to the widow's right of terce, as a necessary consequence, are not subject to a claim of *jus relictæ*. I agree, therefore, with your Lordships in regard to the bond for £3000, that the only answer we can give is that the widow is not entitled to *jus relictæ* out of it. If that is true of that bond, it is also true of the rest, and so I agree that we must answer the first question in the negative.

I also agree with your Lordship as to the answer to be given to the second and third questions.

Lord Shand was absent.

The Court pronounced the following interlocutor:—

"In answer to the first question, Find and declare that the bonds mentioned in the case were not rendered moveable as to the relict by the steps taken to realise the securities, and that the second party is not entitled to any part of the sums contained in said bonds *jure relictæ*: In answer to the second and third questions, Find and declare that the loss occasioned to the estate of the deceased by the subsistence till 1890 of the lease of the Britannia Music Hall is occasioned by the failure of a speculation in business, and falls to be charged against the moveable estate of the deceased in a question with the widow, and against the residue of the estate under the settlement in a question between the other parties to the case, and does not form any proper charge against the third parties as liferenters, and decern: Find the first and third parties entitled to expenses against the second party."

Counsel for the First Parties—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for the Second Party—Guthrie Smith. Agent—Adam Shiell, S.S.C.

Counsel for the Third Party—Vary Campbell. Agents—Campbell & Smith, S.S.C.

Wednesday, November 28.

FIRST DIVISION.

[Lord Fraser, Ordinary.

WALES *v.* WALES.

Jurisdiction—Burgh Court—Summary Ejection—Heritable Right.

By a mutual disposition and settlement a husband disponed certain premises to his wife "in liferent, for her liferent alimentary use allenarly." After the husband's death his heir-at-law disponed the premises to the widow in fee. She married again, and, as liferentrix of the premises under her former husband's will, she presented a petition in a burgh court for ejection against her present husband. He lodged defences, on the ground that the disposition to the fee in favour of his wife did not exclude his *jus mariti* and right of administration. The burgh court granted decree of ejection. A suspension thereof at the instance of the husband *sustained*, on the ground that the question involved in the case was one of heritable right, and so beyond the jurisdiction of the Burgh Court.

A petition was presented in the Burgh Court of Stranraer by Mary Wales, praying to have her husband Robert Liddle Wales ordained to remove from certain premises, and in the event of his refusing to remove, for warrant to eject him.

The petitioner averred that by a mutual disposition and settlement dated 21st March 1867, executed between John M'Lauchlan (her former husband) and herself, John M'Lauchlan had disponed to her, in case she should survive him, "in liferent for her liferent alimentary use allenarly, whom failing and at her death to my own heirs, executors, and assignees whomsoever, in fee, all and whole my heritable and moveable estate," including the said property mentioned in the prayer of the petition; that she and her husband, the defender, had lived together in the said property, but that she had had to leave home owing to his ill-treatment, and declined to return to live with him; that she had legally warned him to remove, but he refused to do so.

The defender stated—"The pursuer acquired absolute right to the properties in question by disposition granted by William M'Lauchlan, land steward, Billown, near Castletown, Isle of Man, in her favour, dated the 16th and recorded in the division of the General Register of Sasines applicable to the county of Wigtown the 20th, both days of August 1873. The defender's right of *jus mariti* and right of administration are in no way excluded by the terms of said disposition, and no other deed has entered the record in any way affecting or restricting them." To which the pursuer answered—"Irrelevant. Admitted that the pursuer, as alimentary life-

enter allenarly of the properties in question, ome five years after her husband's death, purchased from the fiar of said properties his right to and in the fee thereof, subject to her liferent. The deed bearing this expressly on its face is produced. Admitted that there is no exclusion of rights regarding the property of the fee thus purchased. But averred that the pursuer is not now enjoying or possessing the property under her right to the fee, but in virtue of her liferent provision. *Quoad ultra* denied."

The pursuer pleaded—"(4) The disposition of 1873 in favour of the pursuer, having only and expressly vested pursuer in the fee of the properties subject to her liferent as therein stated, which, being a separate inalienable right in her person, could not be affected in any way by infeftment in the fee, and the existence of such alimentary liferent being quite consistent with such infeftment in the fee, the pursuer is entitled to decree as craved."

The defender pleaded—"(1) It is incompetent for this Court to entertain any consistorial question, such as the pursuer's justification for separating herself from her husband, and all such averments should be deleted from the proceedings. (3) The defender, in entering into the contract of marriage with the pursuer, was entitled to rely on the public records, and the same not disclosing any exclusion of his legal right of *jus mariti* and right of administration in the properties in question, no secret or latent deed containing such exclusion can be competently pleaded against him. (4) Assuming that, by the terms of said mutual disposition and settlement, defender's legal rights were excluded, the pursuer not having taken infeftment thereon, but on a title containing no such exclusion, the defender cannot be affected by the terms of the former deed."

The Magistrates on 28th May 1888 pronounced the following interlocutor:—"Find in fact—(1) That the pursuer was, prior to her marriage with defender in 1877, widow of the late John M'Lauchlan, vintner, at Nos. 1 and 2 Agnew Crescent, Stranraer, who was proprietor, *inter alia*, of said subjects; (2) that by a mutual disposition and settlement executed between the said John M'Lauchlan and the pursuer, then Mrs Mary M'Dowall or M'Lauchlan, dated 21st March 1867, the said John M'Lauchlan gave, granted, assigned, and disponed to and in favour of the pursuer, in case she should survive him, 'in liferent for her liferent alimentary use allenarly, whom failing, and at her death, to my own heirs, executors, and assignees whomsoever in fee, all and whole my heritable and moveable estate,' including Nos. 1 and 2 Agnew Crescent; (3) that the pursuer being the alimentary liferenter of the subjects in question by a disposition in her favour granted by William M'Lauchlan, land steward, Billown, near Castletown, Isle of Man, dated 16th and recorded 20th, both days of April 1873, acquired right to the fee of the properties in question; (4) that the pursuer and defender have been living apart since about the month of July 1887; (5) that the pursuer legally warned the defender to flit and remove from said premises Nos. 1 and 2 Agnew Crescent at and against the term of Whitsunday 1888: And find in law that the liferent alimentary allenarly provision in favour of the pursuer, contained in the mutual disposition and settlement executed by her former husband and herself above referred to, implies an exclusion of the *jus mariti* and right of administration of the defender, and will not fall under the legal assignation implied in the marriage, the effect of such exclusion being to place the pursuer in the same position as if she were an unmarried person; that it is quite competent for pursuer to hold two interests at same time in same property, one the liferent alimentary, the other the fee; that the liferent alimentary provision of pursuer has not been in any way assigned, sold, attached, superseded, or discharged by her acquisition of the fee; that the pursuer's alimentary liferent right has not been consolidated or extinguished by her acquisition of the fee; and that therefore pursuer is entitled to exercise the whole rights of property over the properties in question without being subject to the control or administration of defender: And therefore, and in respect that the term of Whitsunday has now come and is bygone, the Magistrates grant warrant to officers of Court to eject the defender, his family, servants, and effects furth and from the said premises Nos. 1 and 2 Agnew Crescent, Stranraer, in terms of the alternative conclusions contained in the prayer of the petition: Find the defender liable to the pursuer in the expenses of process, &c., and decern.

"*Note.*—The Magistrates think it right to point out that while the pursuer's arguments and pleas were supported by the *dicta* of institutional writers and decided cases, the defender's case was entirely unsupported by such, not a single case or authority having been cited on his behalf."

The defender presented a note of suspension of this decree to the Court of Session. He averred, *inter alia*—"The above-recited judgment of the Magistrates is wrongous and unjust. Not only is it unsound in law, but it deals with questions of right, of which the Magistrates are not competetent judges, and it does so in a summary process of ejection—a form of process under which such a question could not be competently tried even in a competent court. In these circumstances the complainer is humbly of opinion that this note should be passed without caution or consignation."

The complainer pleaded—"(1) The decree complained of is incompetent, and ought to be suspended. (2) The question of right at issue between the complainer and respondent not being a question between landlord and tenant, but between husband and wife, the Court of the royal burgh of Stranraer has no jurisdiction to entertain and decide the said question."

The Lord Ordinary (Fraser) on 8th November 1888 pronounced the following interlocutor:—"Repels the reasons of suspension: Finds the threatened charge orderly proceeded, and decerns: Finds the respondent entitled to expenses, &c.

"*Opinion.*—The first objection stated by the complainer is that the decree complained of is incompetent in respect the magistrates of Stranraer had no jurisdiction. The subjects from which the complainer is sought to be removed were subjects within the royal burgh of Stranraer. The whole proceeding was gone about in a formal manner, as in removings in a burgh.

The complainer was duly warned, as is certified by the burgh officer's execution. A petition for removing was then presented, and the period for removal having expired, the magistrates were entitled to grant a warrant of ejection, which they did. The whole proceedings were in accordance with the law as laid down in *Robb* v. *Menzies*, January 20, 1859, 21 D. 277.

"It is next said that the Magistrates of Stranraer had no power to pronounce judgment in such a case as this, because it was not a case between landlord and tenant but between husband and wife. They had certainly the power to see whether the wife had a title to sue, being the proprietor, and this was all they did. It is of no consequence that this is a litigation between a husband and a wife. The question is simply whether the complainer ought not to be removed from premises within their jurisdiction and that depends entirely upon the title which is produced, and which the Magistrates are entitled to read.

"It is then said that the respondent, the wife, having acquired the fee of the property, the liferent which she formerly possessed vanished, being consolidated with the fee. It is undoubted law that if there be such consolidation there is no longer, in the ordinary case, a liferent, the reason being, as the civilians put it, '*quia re propria nemo uti frui potest.*' But this cannot be taken absolutely and unqualifiedly. The wife in the present case obtained from her husband a disposition 'in liferent for her liferent alimentary use allenarly' of his whole heritable and personal estate, and the property from which it is now sought to eject the complainer was a part of the property so disponed. Now, clearly such a conveyance to the wife was one which excluded the *jus mariti* and right of administration of any husband she might afterwards marry. Alimentary provisions do not fall under the *jus mariti* at all when declared alimentary by the deed of a third party. Therefore if the case stood upon the deed of the first husband, the complainer, the second husband, had no right to the rents of the property, nor to interfere in its administration. But the wife afterwards acquired the fee, and the contention of the complainer is that the protected liferent, with its exclusion of the *jus mariti* and right of administration, was at an end, and there being no restriction of the wife's right contained in the disposition to her by the fiar, the complainer thereby became in right of the rents of the property, and could possess it or let it at his pleasure. This is not the reading of these deeds which the Lord Ordinary adopts. He holds that any protection which the wife had when she acquired the fee still subsists; and it has been determined that the alimentary character of a fund will subsist during the marriage, notwithstanding the union of the two rights of fee and liferent. In *Balderston* v. *Fulton*, January 23, 1857, 19 D. 293, it appeared that the fee had vested in a woman who already liferented the property under a trust excluding the *jus mariti*, and the Court refused to order the money to be paid over to the husband. Still further, supposing it to have been the case that the effect of the junction of the fee and liferent in the present case was to open up the rents and the administration of the property to the husband, this would be a donation revocable by the wife, and she has revoked it by her present action."

The complainer reclaimed, and argued—The decree was incompetent, as the Magistrates had no jurisdiction—(1) in respect that the question was between husband and wife, and the rights involved in the *jus mariti*, while their jurisdiction only extended to the relations between landlord and tenant—Ersk. Inst. ii., tit. 6, sec. 48; (2) in respect that the complainer had an *ex facie* good title, and was therefore neither a vicious or precarious possessor, and the whole question involved was one of heritable right—*Hally* v. *Lang*, June 26, 1827, 5 Macph. 951; *Scottish Property Investment Company Building Society* v. *Horne*, May 31, 1881, 8 R. 737.

The respondent argued—The Magistrates had jurisdiction. (1) They had to deal with rights of possession in general, and not with right of landlord and tenant only. (2) If the argument of the respondent was sound, the complainer was a precarious possessor, as the Lord Ordinary had found him to be. The question of competency, so far as regards this ground, was waived in the Burgh Court.

At advising—

Lord President—In this case we have had an interesting question raised and partially argued before us. Bnt according to the view I take it is impossible to reach the consideration of that question. We are met by the preliminary objection that the proceedings under which the decree of ejection was obtained were incompetent.

My view is contained in the opinion which I gave in the case of *Hally* v. *Lang*. The general rule which applies to summary ejections of this kind is, that there must be an allegation and proof that possession is either vicious or precarious. These words are perhaps a little technical and require definition. A vicious possessor is one who has obtained possession either by force or fraud; a precarious possessor one who holds by mere tolerance.

No doubt, as I said in the case of *Hally* v. *Lang*, there are certain anomalous exceptional cases which do not fall under these two heads, but this case is not one of these. Therefore we have to consider whether the possession was vicious or precarious here.

Now, it is plain enough that it was not vicious, for the husband and wife were in possession of the tenement in question, and lived there as husband and wife. The possession was therefore lawfully obtained. But it is said that it was precarious. That is really an extraordinary proposition in the circumstances of the case. The only existing infeftment of the wife is under a disposition from William M'Lauchlan, heir-at-law of her former husband, proceeding on the narrative of purchase, and though no doubt it is mentioned that the widow was already liferentrix, nothing is said in the deed about the nature of her liferent. And, therefore, taking the existing investiture, it is demonstrable that the husband was entitled either to rent, or to possession of the subjects in the event of their not being let, in virtue of his *jus mariti*.

True, it is said that is so on the face of the existing infeftment, but the pursuer undertakes to show that the infeftment cannot receive its natural and proper effect because of a liferent provision, which she is entitled to represent as a separate title, and

to found upon as a separate title from the disposition. That is a very important and interesting question of heritable right as distinctly as can be. And it is not possible to hold that in a process of summary ejection a burgh court can decide as the foundation of its decree of ejectment that the provision of an alimentary right in favour of a wife is such as can be held on a separate title—a title merely of liferent. It is not competent to the burgh court to decide that question, and if they cannot give a decree of ejection without doing so, the whole proceedings are incompetent.

I agree with what has been said as to the case having been very well treated in the Inferior Court. The judgment is most excellent if there had been jurisdiction to pronounce it. The interlocutor is remarkably well put, but it is self-condemnatory as regards the competency, because it finds in law that a certain right belongs to the wife, and not to the husband as regards heritable subjects.

Lord Mure—I have come to the same conclusion. I should have been very glad if we could have decided the questions raised on the titles. The question of competency, however, is raised, and we must dispose of that first.

I have always understood that inferior courts, with the exception of cases where they have special jurisdiction given them, have no right to entertain questions of heritable right. That I think is quite fixed.

The first time I read the interlocutor of the Magistrates it appeared to me that it distinctly raised and decided a question of heritable right. Mr Ure suggested that it was rather hard that because the Magistrates gave findings in law a decree of ejection, otherwise good, should be touched. But the case stated on record, and the pleas-in-law, forced them to decide the question of heritable right. The third plea for the defender is—"The defender in entering into the contract of marriage with the pursuer was entitled to rely on the public records, and the same not disclosing any exclusion of his legal rights of *jus mariti* and right of administration in the properties in question, no secret or latent deed containing such exclusion can be competently pleaded against him." And the fourth plea is—"Assuming that by the terms of said mutual disposition and settlement defender's legal rights were excluded, the pursuer not having taken infeftment thereon, but on a title containing no such exclusion, the defender cannot be affected by the terms of the former deed."

It was not the Magistrates who raised the question, they merely applied themselves in their findings to dispose of pleas specifically put as to the meaning of the titles. It was simply a question of heritable right which was before them, and I quite agree that it was incompetent for them to entertain it.

Lord Shand—I think it not surprising that the Burgh Court did not take up this question, as the only plea stated to the competency on the record is the first—"It is incompetent for this Court to entertain any consistorial question, such as the pursuer's justification for separating herself from her husband, and all such averments should be deleted from the proceedings."

And apparently, even when the case came up on the suspension, the same view ran through the arguments. The point argued before Lord Fraser, as may be seen from his note, was that the case of husband and wife is not like the case of landlord and tenant. Further, the opening on the reclaiming-note did not suggest the point upon which the case is now decided. The question was raised by Mr Strachan sharply upon this argument, that because the question was one of heritable law, therefore it was incompetent for the Burgh Court to entertain it. That is an objection applicable not merely to Burgh Courts but Sheriff Courts.

Taking the argument as now stated I see no answer to it. The pursuer claims possession of this heritable property in virtue of her right of liferent under the mutual disposition. The defender replies that he has also a heritable right, founding upon the disposition under which the widow bought and was infeft. The question comes to be a competition of heritable rights. Whether that arises in a process of summary ejection or another process makes no difference. The ground of decision is not rested on the fact that this was a process of summary ejection. The objection taken is that a Burgh Court has no jurisdiction in questions of heritable right. This case requires the decision of a question of that kind, and therefore it is incompetent for the Burgh Court to entertain it. I am accordingly of opinion that we must sustain the objection to the competency even though it has been taken late in the day.

Lord Adam—No doubt a summons or petition of removing and ejection is quite competent in a Burgh or Sheriff Court. But where it appears that the whole question on which the decision of the case must depend is one of heritable right, what might be, as originally brought, a competent summons of removing becomes incompetent as involving a question of heritable right. Accordingly from the nature of this case it appears to me that there was necessarily no jurisdiction in the Burgh Court to entertain it.

The Court recalled the interlocutor of the Lord Ordinary and sustained the reasons of suspension.

Counsel for the Complainer — Strachan — M'Lennan. Agent—Robert Broatch, L.A.

Counsel for the Respondent—Ure—A. S. D. Thomson. Agents—Smith & Mason, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Sheriff of Elginshire.

ADAM *v.* M'LEAN.

Reparation — Slander — Privilege — Defamatory Statement by Member of Public Committee with Reference to Business before it.

At a meeting of the Public Health Committee of a village the chairman stated that a case of typhoid fever had been reported to him by a medical practitioner, who said that

it was probably traceable to the milk supplied from a certain dairy. In an action of damages for slander against him by the dairyman it appeared from the evidence that there was no ground for attributing the outbreak of the disease to the pursuer's dairy, and it was not proved that the doctor had indicated the dairy as the probable source of the danger. *Held* that as the defender had made the statement in the discharge of his public duty, and in the honest belief that he was correctly representing the views expressed by his informant, malice could not be inferred, and that the defender was entitled to absolvitor.

This was an action in the Sheriff Court of Elginshire by Donald M'Lean, carter, Dunbar Street, Burghead, against William Adam, chemical manure manufacturer there, for damages for alleged slander.

The pursuer kept a small dairy in addition to his other business. There was a severe outbreak of typhoid fever in the town in June 1887, and upon the 22nd June the defender, who was chairman of the Public Health and Water and Drainage Committees of the local authority of the district, made a statement to the members of the committee, which appeared in the minutes thus—"The convener stated to the meeting that a case of typhoid fever had been reported to him by Dr Hay, Forres, who said that it was probably to be traced to the milk supplied from Mr D. M'Lean's dairy, as cases resembling typhoid had been in that family for some time previous. It was the opinion of the committee that a sample of the milk should be procured, and sent for analysis to Dr Littlejohn, Edinburgh. Mr Adam and Mr Jenkins were appointed a committee to have this done."

The pursuer averred that this statement was false, and was made maliciously and without probable cause, and that in consequence thereof his business had greatly fallen off, and he had sustained loss and injury to the amount of £250.

The defender denied these averments. He averred that in June 1887 he became aware of a serious outbreak of typhoid fever in Burghead, and that he along with a number of the inhabitants was greatly alarmed thereat. In his position as convener of the committees above named, and also as being an inhabitant of the village, he was desirous to ascertain, and if possible remove, the cause of the epidemic. By certain circulars which the Board of Supervision had issued from time to time, and which had been received by the said local authority, he learned that it had been ascertained that disease, especially enteric or typhoid fever, had been transmitted through the agency of milk. These circulars recommended all local authorities in whose district there might be dairies to inspect them from time time to time with reference to their water supply and their general sanitary arrangements, and also to cause inquiries to be made from time to time as to the existence of contagious or infectious disease at such dairies, and whenever such disease was found to exist to take such steps as their medical officer might advise with a view to prevent the dissemination of the disease. He further stated that on June 20th, in consequence of a consultation with Mr Dick, a medical student, and Dr Petrie Hay and Mr George Grant, Burghead, an inquiry was instituted as to the source of the milk supply of certain patients who were then suffering from typhoid fever in Burghead. It transpired, as he averred, that in four cases of illness, which were reported to be typhoid fever, the milk supplied to the houses in which the patients lived had come from the pursuer's dairy. He further stated that "immediately after making these inquiries he, along with Messrs Grant and Dick again met Dr Petrie Hay, and reported to him the result, whereupon he expressed his opinion that the typhoid fever might have come from pursuer's dairy, as he had recently attended two children in his house, and could not account for the high fever they were suffering from."

The defender pleaded—"(4) The defender having acted solely in the discharge of a public duty, with probable cause and without malice in the matter complained of, he is entitled to have decree of absolvitor pronounced in his favour. (5) The defender having in his official capacity as convener foresaid, conducted the inquiry referred to in his statement of facts, and having at the meeting of the said committee, and solely for their guidance in the matter, made the statement complained of in accordance with a duty incumbent upon him to supply all information in his possession relating to the public health of Burghead, he is entitled to the plea of privilege."

It appeared from the proof that in June 1887 there had been a serious outbreak of fever in Burghead and the surrounding district, and that circulars from the Board of Supervision had been addressed to the local authority upon the subject. Dr Hay deponed as follows with regard to his interview with the defender—"Mr Dick was with me all the time when I had a conversation with Mr Adam. I did not know that he was convener of the local authority at the time. I was merely talking on the subject of the fever as I might have talked with any other person. The conversation so far as I recollect was about milk in the first place, and something about drains or both. Mr Adam referred to the question of milk; I did not express an opinion that the fever could be traced to the milk, but I rather thought the opposite. In the conversation he tried to make that out, and he advised me to look to the milk supply. He stated that he considered the milk was the cause of the fever, or at all events the cause of the outbreak. We had a conversation—backward and forward—on the subject, but I cannot meantime remember all that passed, and I said when I left him that I was unable to convince him, and he went away with the same opinion that he held when he came up to me. I talked more about the drains than the milk. I went to look at a ventilator with Mr Adam and Mr Dick in Sellars Street, afterwards there was some talk about the smell, and I made the remark that I would find all the ventilators blindfolded if they would lead me along the streets; I think that was what I said, at least it is all I recollect. When Mr Adam was talking about the milk I spoke about the milk which Ross of Coltfield supplied. I said he was also supplying milk to Forres and the Coltfield district, and if there had been any fever in Forres I said I should have found out where the milk came from that the people were taking. I

advised Mr Dick to ascertain in cases of fever where the milk was coming from. . . I saw a baby in the pursuer's house suffering from measles. There was another child ill, but he got better in a week. Mr Adam spoke to me about having the milk analysed. I said it would be all into buttermilk before it could be analysed. I asked Mr Dick to make sure and find out where the people were getting their milk from, and to see if it was coming from one source. He told me next day that the people were getting it from various quarters. . . Burghead is not a large place. The streets were opened up at the time. They are very porous, and they have been made use of for every kind of sewage since ever it was a village. When the drains were formed and the earth thrown up to a depth of several feet I think you have not far to go for the cause of the fever. The soil was saturated with sewage. . . It is not a correct report of my conversation with Mr Adam if he stated that I said that a case of typhoid fever was probably to be traced to the milk supplied from the pursuer's dairy."

The defender, after narrating his meeting with Dr Hay on the morning of the 20th June, and the inquiries made as to the milk supplied to the infected houses, deponed—"I saw Dr Hay during that day again, and we told him the result of our investigations, and he said, looking to Dick, That is just it, these cases we met with in M'Lean's house must have been typhoid fever. We spoke about the matter and talked a good deal about it, and I asked Dr Hay what should be done. . . I met him again at the ten o'clock train. We talked about having an analysis of the milk. . . We talked the matter over generally, and he said if a case existed like that of the pursuer's in Forres they would have no hesitation in closing it right of. Immediately on going to the office I wrote a note to Mr Nicoll asking him to call a meeting of the Health Committee."

The witness Grant deponed—"We met Dr Hay again at the end of the street. I don't know which of us made reference to the milk and where it was got. Dr Petrie Hay answered that that was just what he was saying, and that all these children he had seen were suffering more or less of the same. I had heard at this time that the pursuer's children were ill, I never heard of anything further than measles."

It was proved that the pursuer's dairy business had been ruined by the reports which circulated in regard to the milk supplied by him, and that he had been compelled to sell his cow.

The Sheriff-Substitute (Rampini) upon 28th June 1888 found that the said statements were unfounded in point of fact, and that they were made maliciously, and without reasonable or probable cause; that they were not privileged in point of law; that in consequence of the said statements the pursuer had suffered serious injury and damage to his business and reputation, and that the defender was liable to him in damages to the amount of £100.

"*Note.*— . . . It seems very much to the Sheriff-Substitute as if the defender, having formed his own theory of the cause of this fever, had been determined to maintain it through thick and through thin; that so convinced was he in his own mind that he was right, and that Dr Hay was wrong, that he could not or would not listen to anything that was said on the other side. In no other way can the Sheriff-Substitute account for the reckless, and, as it has been proved, entirely unfounded statement he made to the meeting on 22nd of June. This is not the temper in which the chairman of an important committee should approach the discussion of questions which involved so much to the whole community of Burghead. Nor is this, the Sheriff-Substitute thinks, the temper which will entitle him to plead privilege in a case like the present.

"Personal ill-will, the Sheriff-Substitute gladly believes, the defender had none against the pursuer. But evidence of personal ill-will is not required to establish malice in law. Malice may be inferred from facts and circumstances, and 'the falsehood of what is said is not always an important consideration in cases of this kind, but sometimes it is conclusive,' and as the Sheriff-Substitute has been unable to find the slightest justification in fact for the statements the defender made to the meeting he thinks it is conclusive here." . . .

The defender appealed, and argued—The occasion on which the alleged libellous statement was made was privileged, and malice must be proved. There was no malice here. At the worst the defender had misunderstood the medical men, and in his report to the meeting he honestly believed that he was correctly reporting the result of the consultations. The statement was made in the interests of the public, and in discharge of the defender's duty as a public official. Publication was not proved, as this statement complained of was made to a committee and not to the public; what really had caused the loss of the pursuer's business was the fact that milk had been sent away for analysis from the pursuer's dairy, but he had not complained of that—*Shaw* v. *Morgan*, July 11, 1888, 15 R. 865; *Broomfield* v. *Greig*, March 10, 1868, 6 Macph. 563; *M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725.

The respondent argued—Even if the occasion on which the statement containing the alleged slander was uttered was privileged, there was such malice and want of probable cause as would make the defender liable. It was proved by the evidence of the doctor, and of the defender himself, that Dr Hay had not told the defender that the milk from the pursuer's dairy was the source of the disease. The statement was made with such recklessness and disregard of the interests of his neighbours that malice might be inferred. Dr Hay deponed that the fever arose rather from exhalations from the drains than from the milk, and the defender was the author and chief supporter of the drainage scheme being then carried out in Burghead, so that he might be desirous to shift the blame from himself—*Denholm* v. *Thomson*, October 22, 1881, 8 R. 31.

At advising—

Lord Justice-Clerk—The pursuer claimed damages from the defender on the ground that his business as a milk-dealer in Burghead, in the county of Elgin, had been ruined in consequence of a statement made by the defender that an outbreak of typhoid fever among the inhabitants was probably to be attributed to milk supplied by the pursuer. The defender maintained that the statement was made by him as the chairman of

the Burghead Public Health and Water and Drainage Committee, and in the fulfilment of his office as a member of a public body having a duty to report such matters relating to the sanitary condition of the place as might become known to him, and that he neither acted maliciously nor without probable cause. The Sheriff-Substitute has, after taking a proof, decided against the defender, and finding that the statements were made maliciously and without probable cause, has awarded £100 of damages. The case is a most unfortunate one. The evidence makes it certain that there was no ground for attributing the outbreak or spreading of typhoid fever in Burghead to the milk sold by the pursuer, and it appears to be highly probable that but for the unfortunate report of the defender to the committee, and the somewhat ill-judged action taken upon that report, the pursuer might have been selling his milk profitably to this day instead of having his little business destroyed. I think the defender would have acted much more prudently if he had confined his report to the expression of his belief that milk would probably be found to be the cause of the mischief, and if the committee, instead of singling out and pointing the finger of suspicion at the pursuer's dairy as distinguished from others, had directed samples to be taken from all the milk-dealers; they would thus have saved the pursuer from the desertion of customers, which in so small a place was sure to follow any indication on the part of the authorities that one dairy in particular was suspected.

But while it is certainly deplorable that such error in discretion should have been committed, leading to disastrous results to the pursuer's milk business, the question, whether it is to be held that the defender in making his report was acting maliciously, and therefore is to be liable in damages for the consequent injury, is an entirely different one. It can hardly be suggested that in this case there is any trace of personal malice producing a direct desire to cause injury. The pursuer's counsel did not in debate maintain that the proof disclosed any such case. He rather argued that malice was to be implied in the legal sense from the facts disclosed, on the ground that the true inference from them was that the report had been made in reckless disregard of the pursuer's interests. The highest point to which he attempted to bring up his case was that the evidence did not justify the idea that the pursuer could have had an honest belief in the truth of what he said had he well considered the matter, and that he must be looked upon as guilty of such recklessness as is held in law to imply malice from his making so groundless an assumption. Now, it appears to me that the inference of malice from the recklessness of statement must depend not merely upon the falsity of the statement, however gross, although that is undoubtedly an element which may be of importance along with others, but upon other considerations. A statement may be absolutely devoid of foundation, and yet may not be uttered in such circumstances of reckless disregard of another's interest or peace of mind as necessarily to be held malicious. Malice may or may not be the necessary implication according to the surrounding circumstances. For example, if the injurious statement accuses the injured party of some gross crime or highly dishonourable conduct—attacks a man in such a way as to bring disgrace on his personal character, the inference may readily be drawn from the mere fact of its being recklessly made without any reasonable ground for belief that the person originating the calumnious report, or spreading it, acted maliciously, regardless whether his injurious words were true or not. On the other hand, if the direct statement complained of is plainly not to injure the person to whom it relates, or to indulge a propensity to tell scandalous tales of one's neighbours, but to effect some laudable innocent purpose, and particularly if the purpose be one of importance to the public weal, then it is not, and cannot be so easy to infer that the rashness of the statement, as indicated by its falsity, amounted to utterly reckless, and therefore in a legal sense malicious calumny.

What then were the circumstances of the present case, and how do these principles apply to them? There was a serious outbreak of typhoid fever in Burghead. It was plainly the duty of the defender in his official position to endeavour to trace the disease to its source, and I think the evidence indicates that he was doing so, not with the object of attacking or injuring anyone, but for the purpose of doing what he could to assist in checking the outbreak and stamping out the disease. He had interviews with Dr Hay, who practised in the village, and with Mr Dick, a gentleman acquainted with medical science, at which undoubtedly the milk supply was spoken of by the medical men as a proper subject for inquiry—a circular from the Board of Supervision had asked attention to the milk supply as a probable means of communication of enteric disease. It was after these interviews with Dr Hay and Mr Dick that the defender made the report complained of. Now, that he should be engaged in inquiry, should have conversations with the doctors, and should report to his committee, were all proceedings in themselves within his duty, and perfectly laudable. He was no busybody rushing about to make himself important by professing superior knowledge, and making statements without responsibility. His actions are therefore to receive favourable and not unfavourable constructions in themselves. The circumstances all point to his being engaged according to his rights in the fulfilment of public duty. Then the report which he makes is upon a matter of importance in the circumstances. Unquestionably the subject of milk was brought up in the conversations with the medical men, and was considered by everyone as being one for consideration and inquiry. There is a conflict of evidence as to the question whether Dr Hay did or did not indicate milk supply as the probable source of the mischief. It is undoubted that he did direct attention to milk supply, because he states that he cautioned Mr Dick, who was resident in Burghead, about the milk, and that he advised him to ascertain in cases of fever where the milk was coming from, and he and Mr Dick inspected the pursuer's milk premises, and made inquiries from the witness Grant as to the place from which the milk supply came to a house in which typhoid fever had broken out. But Dr Hay, while admitting that there was conversation about milk, which he says "one is always suspicious of" in

cases of typhoid outbreak, he denies that he gave the defender any ground for believing that he thought the pursuer's dairy the probable source of the evil. He states that he said to the defender that he "could not convince him," meaning by these words that he could not convince him that the fever was to be attributed to bad drainage and not to milk, and Mr Dick's evidence tends to confirm this. On the other hand, the defender states that Dr Hay, on learning that the milk had been supplied from pursuer's dairy, made the remark "That is just it," and these cases we met with in M'Lean's house "must have been typhoid fever;" and this is so far confirmed by the witness Grant, who states that on Dr Hay being informed of the milk supply to the infected house coming from pursuer's dairy, he answered that "was just what he was saying, and that all those children he had seen were suffering more or less of the same." In the view I take of the case it is unnecessary to solve this conflict of evidence. The whole evidence taken together plainly imports that in the circumstances the question of milk supply was important, and should be investigated, and that, rightly or wrongly, the defender had taken up the impression that Dr Hay had suggested that the illness in the pursuer's house had probably a typhoid character, and that therefore there were probable grounds for suspicion that the pursuer's milk might be a cause of propagation of the disease. He may have formed a wrong impression of what Dr Hay meant, and the recollection of four persons present may vary as to details of a general conversation, but I find nothing in the evidence, taken as a whole, to satisfy me that the defender was not in the *bona fide* belief that suspicion did attach to this dairy of the pursuer, and that, in stating that belief to the committee, of which he was chairman, he acted in his public capacity, and without any motive except the good of the community. I have said already that I think greater prudence would have been shown had the report been more guarded, and been acted on in a less invidious way. But, looking to the whole circumstances, I am unable to come to the conclusion that the defender either was actuated by direct malice or acted with that disregard of a neighbour's good name and interests which is to be held so inexcusable in its recklessness as that malice must be held to be implied from the acts done without any evidence or direct malice. I must move your Lordships therefore to recal the interlocutor of the Sheriff-Substitute, to find that the pursuer has failed to prove that the defender, in making the report to the Water and Drainage Committee, acted maliciously, and to assoilzie the defender from the conclusions of the action.

Lord Young—I am substantially of the same opinion. I do not know that it is necessary almost to say anything. I must confess the record in this action did not make a favourable impression on me, and I thought from the first reading of it and of the evidence that it was altogether exaggerated, and a great deal made of very little. The pursuer is a carter in Burghead, and he kept one cow. He kept one cow to add to his living gained principally by carting. The defender is a member of the Board of Health Committee of Burghead, and the action by this carter and owner of one cow is for £250 of damages against this chairman of the Board of Health Committee of the place, because one day at a meeting of the committee, consisting of two gentlemen besides himself, he stated that a case of typhoid fever had been reported to him by Dr Petrie Hay, Forres, who had said it was probably to be traced to the milk supplied from pursuer's dairy. The chairman of the Board of Health, making that statement at a meeting of the board—the number being three, himself one of them—of the import of a conversation, as he understood, with a doctor, leads to a claim for damages to the extent of £250. Well, the thing is extraordinary on the face of it, and has rather a ridiculous aspect. The Sheriff has given him £100. I do not know how many cows that would buy for him, but the damage to his business from this statement at a meeting of the committee, for there is nothing else, the Sheriff assesses at £100. Well, anything more extraordinary or approaching the ridiculous I do not remember, at least recently, to have met with. But let us look at the thing upon its merits. It seems that the statement was noted in the minutes of this committee of three—noted apparently that the chairman had stated the import of this conversation with the doctor. It contains no reflection upon the pursuer's character or the character of his cow—not the least. There is no imputation of any offence or moral delinquency of any kind; it is a simple statement that the doctor had represented to him in conversation that he was inclined to believe that typhoid fever was to be traced to the milk which had been got in his shop. Well, people should always be cautious in speech no doubt, but this does not strike my mind as an occasion for an extraordinary caution. A neighbour's character is not involved in any way. The subject is not of extreme delicacy, and there is not a call for any extraordinary caution in speech. The chairman of the Health Committee stated what he understood to be the import of the conversation he had with the doctor. I think it was an occasion rather for perfect freedom of speech. There is no occasion for anybody to tell a falsehood to the prejudice of his neighbour. There is no occasion which will justify or give privilege in doing that; but the suggestion is that the chairman of the Board of Health Committee was telling a wilful falsehood to the prejudice of his neighbour in order to affect the milk business of this carter who kept the one cow. That is extraordinary on the statement of it. He may have misapprehended the import of the doctor's opinion on the conversation he had with him, but to say that he was a man who wanted to destroy, by telling a wicked falsehood, the business of this carter by a malicious statement in regard to the milk he supplied is extraordinary on the face of it. There is no other suggestion of malice. What could it be? He was not a competitor in the milk business. He did not keep a cow. It is not suggested that he wanted to transfer the business from the pursuer to another, and therefore proceeded to defame the character of the pursuer's cow. The only thing that can be suggested is that he had misapprehended the import of the conversation he had with the doctor. I am not so sure that he did. I take it from the doctor, because he says so, that he did not really blame the milk,

and that he did not mean to convey this impression in the intercourse he had with the pursuer, but I as certainly believe that he did convey that impression to the defender; that the defender honestly took that impression, and quite honestly repeated it in what he believed to be the discharge of his duty, and what I think was in the discharge of his duty if he had taken that impression. I think it was his duty, and I would not be content by saying that it was not proved that he acted maliciously; I should find as a matter of fact that he did not act maliciously, but acted in the discharge of his duty in making the statement he did in the honest belief that the statement was true. I think that is according to the fact and according to the evidence. I am not impugning the doctor in any way when he says that his suspicion did not attach to the milk, and that he did not mean in his conversation with the defender to convey that impression. But I think he did convey that impression. I am certain of it, and unless the defender was perjuring himself for no earthly purpose, and was telling a wilful falsehood for no earthly purpose that I can conceive, he must have taken that impression. He swears that he did, and I believe him. That makes an entire end of the case. I think it was a ridiculous exaggerated case from the first from the statement on record and the evidence in support of it, and I am of opinion that it entirely fails on its merits. I think the defender here acted honestly and in the discharge of his duty in making in this committee a statement of a harmless character in itself, and imputing no delinquency whatever to anybody. We all know—it is matter of common knowledge—that where there is an outbreak of typhoid fever there is suspicion directed to the milk supply, because it has been comunicated through that source; and suspicion was more likely to be raised here because there was fever—and a very bad fever—in the pursuer's house at the time. It was measles, not typhoid, but fancy an action being brought against anybody who had made a mistake, and said so-and-so was ill of fever, when it was only measles—saying a man has got gout when it was only rheumatism. There is no use saying we must be very cautious; you must not say a man has a bad cold when he has not a cold at all; it is something else of a more harmless description. I think the defender, so far as my opinion goes, passes out of this case without any reflection, even which would impute rashness to him. There may be suffering. I cannot believe for a moment that there has been such suffering as pursuer says; that his milk being examined had sent all his customers away from him is not credible on the statement in the least, but where we have a violent epidemic of that sort—even where we have an epidemic of crime—there may be suffering by innocent people who are suspected without any due grounds. But that is not a ground of action of damages against those who are not actuated by malice and not telling falsehoods to injure others, but in the honest discharge of their duty with whatever ability they may be able to bring to its discharge. I am clearly of opinion that the judgment ought to be altered, with expenses to the defender in both Courts.

Lord Rutherfurd Clark—I concur in the judgment your Lordships are about to pronounce. The statement which the defender made, and which is complained of by the pursuer, was made by the defender in the discharge of his duty, and I think was made by him in the honest belief that it was true. I see no evidence of actual ill-will or malice, and I do not think there is any proof from which we can imply any such. I am therefore of opinion that the case for the pursuer is not established.

Lord Lee—In this case the statement complained of as defamatory was made by the defender as convener of the Water and Drainage Committee of the local authority of Burghead at a meeting of that committee. The record discloses this fact, and therefore it is clear that the defender was in a privileged position, and that the issue to be proved by the pursuer required that he should establish that the statement was made maliciously.

It is no doubt well settled that malice may be inferred from recklessness. But I do not think it is correct to say that recklessness amounts to malice, or necessarily implies malice. The correction of the Sheriff-Substitute's interlocutor in *Denholm* v. *Thomson*, 8 R. 31, shows that it was considered necessary in that case to affirm malice in point of fact, and not sufficient to say, as the Sheriff-Substitute had said, that the defenders "acted with a recklessness amounting to malice in the legal sense." There is also a recent case in the First Division in which this point was considered, and considered more fully than the report indicates. I refer to the case of *Ritchie* v. *Burton*, 10 R. 813. It may be gathered from the opinion of Lord Deas, however, correcting an expression he had used in the case of *Watson* v. *Burnet*, and also from the opinion of the Lord President, that it was not thought sufficient to support the verdict that there was evidence of recklessness. It was dealt with as a question upon the evidence whether the recklessness was such as, combined with the other circumstances, justified the jury in finding malice proved. The Lord President's examination of the evidence was directed to the object of showing that there was not mere recklessness, but such a repetition of the slanderous expressions as might be held to imply ill-will, and to exclude the idea that the defender in his letters was merely expressing in good faith his view of the pursuer's conduct.

Upon the evidence in the present case I concur in holding that it is entirely insufficient to prove or to suggest that the defender acted otherwise than honestly, and within his privilege and duty, in reporting to the committee what he understood Dr Hay to have said.

I therefore concur in the proposed judgment.

The Court issued the following interlocutor:—

"The Lords . . . recal the interlocutor of the Sheriff-Substitute of 28th June 1888: Find that the pursuer is a carter, and carries on the business of a dairyman at Burghead, and the defender, chemical manufacturer there, is chairman of the Water and Drainage Committee of the local authority: Find that in the month of June 1887 a serious and alarming outbreak of typhoid fever occurred in the village of Burghead, and that on the 22nd day of that month the defender at a meeting of the said committee made

the statements contained in the 3rd article of the pursuer's condescendence of and concerning the pursuer in the hearing of the parties therein named: Find that the said statements were unfounded in point of fact: Find that the defender in making said statements acted in his official capacity as chairman of the Water and Drainage Committee of the local authority of Burghead, and solely for the information of the committee, and that he made them in *bona fide* and belief that they were true: Therefore sustain the fourth and fifth pleas-in-law for the defender, assoilzie the defender from the conclusions of the action: Find him entitled to expenses in the Inferior Court and in this Court: Remit, &c., and decern."

Counsel for the Appellant—Balfour, Q.C.—Shaw. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondents—D.-F. Mackintosh—Guthrie. Agents—Gibson & Paterson, W.S.

Friday, November 30.

SECOND DIVISION.

MACDONALD *v.* MACKESSACK.

Process—Decree of Summary Ejection from Agricultural Subject for Failure to Stock—Reduction on the ground of Irregularity in Proceedings—Competency of Action in Sheriff Court.

A Sheriff Court decree for sequestration of the effects of an agricultural tenant for past rent was granted of consent. Thereupon the landlord moved for a plenishing order upon the tenant, and for his summary ejection in case of failure. The tenant by minute stated that he was proceeding to stock. The Sheriff, in respect of that statement, pronounced no formal order, but remitted to a man of skill to see the stocking carried out, and to report within a month. Upon his reporting that there was no stock of any kind upon the place, the Sheriff pronounced decree of summary ejection. *Held* (*diss.* Lord Young) that as there had been no formal order upon the tenant there had been no default, and that the decree ought to be reduced.

Question—Whether an action of ejection from an agricultural subject on account of failure to stock is competent in the Sheriff Court.

In July 1887 Robert Mackessack, Esquire of Ardgye, Alves, Elgin, presented a petition in the Sheriff Court of Elgin, against Robert Macdonald, his tenant in Cardenhill, Alves, who held a nineteen years' lease from Whitsunday 1887, at a yearly rent of £14, praying, *inter alia*, for warrant to sell the sequestrated effects on the farm for arrears of rent, and in the event of the subject of hypothec being exhausted, "or the premises being insufficiently furnished and hypothecated after any sale hereunder, to ordain the defender to stock and replenish the said premises so as to afford sufficient security for payment of any remaining rent payable or to become payable as aforesaid; and failing his doing so, within such time and at the sight of such person as the Court shall appoint, to grant warrant summarily to eject the defender."

Upon 27th October 1887 the tenant by minute consented to decree, and upon the same day the Sheriff-Substitute (RAMPINI), in respect of this minute, granted warrant for the sale of the whole or a sufficient part of the sequestrated effects to satisfy the arrears due.

Before a sale took place the tenant applied for *cessio*, and on 12th November 1887 decree of *cessio* was pronounced. On 10th December 1887 the trustee sold the stock on the farm under the *cessio*. The landlord lodged a claim with the trustee for £37, 17s. 9d., and on 15th March 1888 the whole proceeds of the estate, under deduction of trustee's commission and expenses, were paid over to the landlord by the trustee. The amount so paid was £20, 15s. 6d., which sum included the past rent, for which decree was craved in the landlord's petition, and also a portion of the current year's rent (Whitsunday 1887 till Whitsunday 1888) of the farm of Cardenhill.

Upon 27th December 1887 the landlord lodged a minute in the following terms—"BROWN, for the pursuer, stated that in respect the trustee under the *cessio* of the said Robert Macdonald had recently sold off and displenished the said farm of Cardenhill, the event referred to in the prayer of the petition, viz., 'the subject of the hypothec being exhausted,' had now happened, and the Court is now moved to ordain the defender to stock and replenish the said farm and premises, so as to afford sufficient security for payment of rent now due or to become due at the term of Whitsunday next; and failing his doing so within fourteen days at the sight of Harbourne Marius Straghan Mackay, land surveyor, Elgin, or within such other time and at the sight of such other person as the Court shall appoint, to grant warrant summarily to eject the defender and his goods, gear, and effects from the said farm and premises, and to authorise the pursuer to re-let the same for such periods, and for such rent as may appear best, all in terms of the prayer of the petition." To that minute the tenant upon 18th January lodged the following answer—"That he was proceeding to lay down a crop for the incoming season and was proceeding to stock the said farm of Cardenhill in a husbandlike manner as craved for in said minute." And upon 19th January 1888 the following interlocutor was pronounced—"Having advised the minute and answers, in respect of the statement in the latter that the defender is now in process of laying down a crop for the incoming season, and of stocking the farm of Cardenhill, remits to Mr Harbourne Marius Straghan Mackay, land surveyor in Elgin, to see the same carried out *quam primum*, and to report to the Court not later than 19th of February next."

Upon 18th February 1888 Mr Mackay reported as follows—"In terms of remit from the Sheriff-Substitute of Elginshire, I to-day visited the possession of Cardenhill, occupied by Robert Macdonald. It contains about 23 acres of arable land divided into six lots. Of this land one lot should have been sown out with young grass, but this has not been done. About 12 acres should

have been ploughed, and there is only a little over 4 acres. The turnip shift last season was not properly laid down, and having got no artificial manure the crop was a failure. There is no stock of any kind upon the place. The ploughing has been done by John Grant, Burnside, a neighbour and a brother-in-law of the tenant; but even although he should plough the remainder, the land is in such a poor condition and out of regular rotation, and there being no dung of any kind upon the place, this crop cannot in my opinion be laid down in a satisfactory manner by the present tenant." And upon 22nd February 1888 the following interlocutor was pronounced — "The Sheriff-Substitute having heard parties' procurators on the report by Mr Mackay, and in respect of the statements therein contained, grants warrant to eject, in terms of the prayer of the petition; also authorises the pursuer to re-let, and interdicts, all as prayed for: Finds the defender liable in expenses; modifies the same to the sum of Three pounds three shillings sterling, and decerns against him therefor; and allows extract of this decree to go out after twelve o'clock on Saturday first."

No appeal was taken from the Sheriff-Substitute's interlocutor, but Macdonald, the tenant, raised an action in the Court of Session to have the decree of ejection reduced.

In this action it was, *inter alia*, averred by the defender Mackessack that the pursuer's tenancy was constituted by an entry in the estate books, and that he held his tenancy under a set of regulations and conditions of let applicable to the whole estate. By article 16 thereof it was provided, that in the event of one whole year's rent of any farm remaining unpaid, or if the tenant should be sequestrated, or made bankrupt, the lease should, in the option of the proprietor, *ipso facto* cease and determine.

The pursuer Macdonald averred in answer— "... The entry in the estate books referred to was made by the landlord's factor; the pursuer did not sign the landlord's books, nor the regulations and conditions referred to. No copy of said regulations and conditions was furnished to the pursuer or seen by him at or before the date of said lease, and he never agreed to said regulations and conditions, and, in particular, he never agreed to article 16 thereof."

The pursuer pleaded—"(2) The pretended decree in question having proceeded upon an incompetent application, and the Court having no jurisdiction in the circumstances to pronounce said decree, the same is inept, and should be reduced. (3) Said pretended decree being unfounded and unwarranted, and the proceedings complained of being irregular and oppressive, the pursuer is entitled to have the same reduced and set aside."

The defender (the landlord) pleaded—"(1) The pursuer, being an undischarged bankrupt, is bound to sist his trustee as a party to the present action, and, failing this being done, or caution being found for expenses, the present action should be dismissed. (3) The pursuer has no title or interest to sue. (5) The decree of the Sheriff having been competently pronounced, and no suspension thereof having been brought, the defender is entitled to absolvitor. (6) In respect that the pursuer has incurred an irritancy, the defender should be assoilzied."

Upon 6th July 1888 the Lord Ordinary (LEE) pronounced the following interlocutor:—"Repels the first and third pleas-in-law for the defender: Finds that the decree of ejection complained of was incompetent, and was not pronounced of consent of the pursuer: Therefore repels the defences; reduces, decerns, and declares in terms of the conclusions of the summons, &c.

"*Note.*—(1) I repelled the plea that the pursuer must sist his trustee or find caution, because the action in substance is an action to defend the pursuer in the possession of his farm by restoring him against a decree of ejection which is said to have been incompetently and illegally pronounced. The case, I think, falls fairly within the principle of the decision in *Stephen* v. *Skinner*, 22 D. 1122.

"(2) Upon the merits of the action two questions were discussed—(Firstly) Whether the decree of ejection could be maintained on the ground that it was founded on and justified by the conventional irritancy alleged in the answer to Cond. 1; and (secondly) whether it was good as a decree by default, or on the ground that the pursuer by his minute consenting to decree, in terms of the leading conclusion of the petition, was barred from objecting to it.

"The former of these questions it is clear must be answered in the negative. The Sheriff Court proceedings show that the decree of ejection was not in fact founded on the irritancy, or upon any allegation that it had been incurred, so that even if the Sheriff Court had jurisdiction to pronounce decree of ejection upon such a conventional irritancy not declared, the ejection could not be sustained upon that ground. It appears very doubtful, however, whether in this case a process of summary ejection was competent before the Sheriff, for the case was not one in which the pursuer was possessing without any title—*Horn* v. *M'Lean*, 8 S. 329; *Nisbet* v. *Aikman*, 4 Macph. 284.

"But on the question whether the decree can be sustained as a decree by default, there was, it was thought, more to be said. It was contended that the Sheriff's interlocutor of 19th January, remitting to a man of skill to see the defender's proceedings carried out, 'and to report to the Court not later than 19th February next,' followed by the report of 18th February, proved that the pursuer was in default. The decree bears to be 'in respect of the statements therein contained,' viz., contained in Mr Mackay's report. But the pursuer's position, as shown in the minutes and answers, was that he was proceeding to stock the farm, the stock which had been upon it having been sold for behoof of the landlord and other creditors in the way explained on record. Now, the report, although it states that there was no stock on the farm on 18th February, does not instruct that there was no stock upon the 19th, and does not negative distinctly the statement that the tenant was 'proceeding to stock,' &c. In short, the Sheriff Court proceedings do not show any default committed. I think that in the absence of any definite order there was a miscarriage in point of procedure, of which the pursuer is entitled to take advantage.

"With regard to the case of *Scott*, 7 S. 481, I think it does not apply here; there is nothing in the proceedings to show that the pursuer consented to decree of ejection, or that he is barred

in any way from maintaining his objections to the decree."

The defender reclaimed, and argued—(1) The case of *Stephen* v. *Skinner*, May 31, 1860, 22 D. 1122, relied upon by the Lord Ordinary in repelling the first plea-in-law, was not in point, because there the case had never been tried at all; it had proceeded upon a decree in absence, and the trustee, who had declined to sist himself, had a personal interest adverse to that of the suspender. (2) The Sheriff had jurisdiction. It was a question whether before 1877 the Sheriff could eject summarily for a legal irritancy. He could for a conventional irritancy, or for desertion, and, by custom perhaps, for legal irritancy in urban subjects. He could perhaps summarily eject for non-stocking even in agricultural subjects, on the ground that that was equivalent to desertion. But all such questions had been set at rest by the Sheriff Court Act of 1877, which gave the Sheriff the same power to deal with heritable subjects as the Court of Session had, provided only the value of the subject in dispute did not exceed the sum of £50 by the year, or £1000 value, and the action was not one of adjudication or of reduction—Bell's Prin. 1258; Bell on Leases, ii. 8; A. of S., December 14, 1756; *Ross M'Kye* v. *Nabony*, December 4, 1780, M. 6214; *Tait* v. *Gordon*, July 3, 1828, 6 S. 1055; *Horn* v. *M'Lean*, January 19, 1830, 8 S. 329, and 2 Deas & And. 182; *Thomson* v. *Handyside*, December 27, 1833, 12 S. 557 (Lord President Hope); *Wright* v. *Wightman*, October 30, 1875, 3 R. 68; Sheriff Court Act 1877 (40 and 41 Vict. cap. 50), sec. 8. (3) There was no prescribed or statutory order which the Sheriff had neglected to pronounce. He had given the tenant due warning to stock by the terms of the remit to Mr Mackay, and as the tenant had failed to stock after such warning he was entitled to pronounce decree of summary ejection. The landlord had asked that a formal order should be pronounced, and it was only on account of the tenant's minute that the order had taken the form of a remit to Mr Mackay.

The respondent argued—(1) Though nominally pursuer he was really defending his possession, and the Lord Ordinary had exercised a wise discretion in allowing him to proceed without finding caution—*Stephen, supra.* (2) The Sheriff had no jurisdiction. The petition was not founded upon a conventional irritancy nor upon the Act of Sederunt of 1756, and these were the only grounds upon which the Sheriff had jurisdiction in such cases—*Horn, supra.* The Sheriff could pronounce a decree ordering the tenant to stock his farm, but he could not carry it out—*Horn, supra; M'Dougall* v. *Buchanan*, December 11, 1867, 6 Macph. 120; Dove Wilson's Sheriff Court Practice, pp. 484-487. (3) Even if the Sheriff had jurisdiction the proceedings here had been irregular. No order to stock had been pronounced. Such an order should have been made upon the tenant after Mr Mackay's report, but as it had not been made there had been no default, and the decree of ejection pronounced because of presumed default fell to be reduced.

At advising—

Lord Justice-Clerk—This is an action of reduction of a decree pronounced in the Sheriff Court at Elgin in a process between Mr Mackessack, proprietor of Ardgye, and one of his tenants Mr Macdonald. It appears from the proceedings that the tenant had fallen into arrears to a considerable extent, and the landlord brought an action against him in the Sheriff Court, one of the conclusions of which was to have the stock on the farm made good for the rent due under the landlord's hypothec. The tenant consented to decree being pronounced, and accordingly the Sheriff gave power to sell so much of the tenant's effects as would meet the landlord's claim. Then the landlord lodged a minute in which he stated that—"In respect that the trustee under the *cessio* of the said Robert Macdonald had recently sold off and displenished the said farm of Cardenhill, the event referred to in the prayer of the petition, viz., the subject of the hypothec being exhausted, had happened, and the Court is now moved to ordain the defender to stock and replenish the said farm and premises so as to afford sufficient security for payment of rent now due or to become due at the term of Whitsunday next, and failing his doing so . . . to grant warrant summarily to eject the defender." Now, if the order asked had been granted probably this case would never have arisen, but the tenant appeared on 19th January and stated that he was proceeding to lay down a crop for the incoming season, and was proceeding to stock the said farm in a husbandlike manner, and in respect of this statement by the defender's agent the Sheriff did not pronounce an order upon the tenant to stock within an indefinite period at the sight of a man of skill, but remitted to Mr Mackay, land surveyor, to see what was being done, and to report not later than 19th February. Upon 18th February Mr Mackay reported that a certain part of the farm had been ploughed, but that even if the remainder should be ploughed, the land was in such poor condition, and there was such absence of manure of any kind upon the place, that the crop could not in his opinion be laid down in a satisfactory manner by the present tenant. He also reported that there was no stock of any kind upon the place, but the report does not state in clear terms whether or not any steps were being taken to stock it.

This action of reduction has been raised by the tenant on the ground that he had been summarily ejected without having had any order served upon him to stock within a definite time under pain of summary ejection. The Lord Ordinary thought that that ground of reduction must receive effect. He based his judgment upon the ground that as there had been no order to stock there could be no decree on account of default, and after the most careful consideration I have come to think that the interlocutor pronounced by his Lordship was the only one he could have pronounced in the circumstances. It is perfectly plain on the face of the proceedings that the failure to fix and to certiorate the defender of any definite time within which he must stock was entirely an oversight of the Sheriff, who was misled by the tenant himself to pronounce the interlocutor he did, but he did not so word his interlocutor as to put the tenant in default, and therefore the tenant could not be summarily ejected as being in default. It would be somewhat dangerous to sanction the idea that a tenant may be summarily ejected for non-fulfilment of an order to stock without intimation of a definite term at which if he fail to stock he may

be summarily removed. There was here a remit to a man of skill to see that the stocking was carried out, but there was no notice to the tenant that if he had not stocked before a certain date he would be summarily ejected. There was no definite intimation made to him from which he could draw the distinct conclusion that failure to stock would be followed by summary ejection. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Young—This case has received and deserves a good deal of consideration. The question was argued to us whether the action brought by the landlord was a competent process for the Sheriff Court. Perhaps it is not necessary in the view expressed by your Lordship, and shared in, I understand, by my other brethren on the bench, to decide that question, but in the view I take of this matter it is necessary for me to express my opinion upon it. The question is whether a tenant upon failure to stock may be ejected by summary application to the Sheriff, the alternative view being that action must be by declarator in this Court. If by statute only the latter method were competent, of course it would be necessary to resort to that method, although I should even then regret the necessity, as application to the Sheriff is so obviously a more apt remedy than a declarator. In the analogous case of a tenant of a house failing to furnish it, as his implied if not express obligation, it is settled that the landlord's remedy is ejection by summary application to the Sheriff. I am, in the absence of any distinct authority to the contrary, disposed to hold that the remedy of a suffering landlord in such a case as this is also a summary application to the Sheriff, and that it would be a denial of justice to the landlord to say that he can only proceed by declarator in this Court.

A further question remains, which is important although merely formal, and a more formal matter it would be impossible to conceive. The Lord Ordinary here has based his judgment upon the fact that the warrant of ejection was not preceded by a formal order to stock the farm within a definite time, failing which there would be summary ejection. This was undoubtedly the proper course to pursue; it was the course prayed for in the prayer of the petition. I stop to point out that after all the warrant of ejection would not have been pronounced for a breach of an order of Court—that is, for contumacy, but for a breach of the contract with the landlord, ascertained and found to have been committed after a reasonable opportunity had been given for fulfilling it. Now, attending to the circumstances of this case, we see that the tenant was ascertained to be in, and continued to be in, that breach of contract after not only reasonable and fair but full and ample opportunity had been given to him to fulfil it. After the farm had been displenished by the trustee in the *cessio* a minute was given in on behalf of the landlord upon 27th December 1887 stating that fact and moving the Court to ordain the tenant to stock and farm, and failing his doing so within fourteen days, at the sight of Mr Mackay, to grant warrant for his summary ejection, with the warning that if he failed to do so he would be ejected. As your Lordship has observed, if that course had been exactly followed, and if the Sheriff had ordered the farm to be stocked in terms of the minute, and ejection had followed, there would probably have been no such action of reduction as the present. But the course would have been followed but for the interposition of the tenant himself. Now, what was that interposition? It was at the stage when the proper form would have been to give an opportunity to the tenant to stock within fourteen days, and the order to that effect would have been pronounced when he interposed with the minute of 18th January stating that he was proceeding to lay down a crop for the incoming season, and to stock the farm in a husbandlike manner. In effect he said—"What is the use of making an order upon me? I am doing what is wished. Don't trouble yourself about it; I am doing it as fast as I can. I don't want a formal opportunity which such an order would signify." Well, what does the Sheriff do? It would have been more regular if he had said—"I won't attend to your minute; it may be a trap. I will pronounce a formal order." But he does attend to it, and in the very spirit in which it was intended. Instead of the order thereby demonstrated to be in the tenant's view superfluous, he remits to Mr Mackay to see whether the tenant is doing what he professes to be doing, and to report if it has been done. Upon 18th February—a month afterwards, and not fourteen days as asked by the landlord—Mr Mackay reports that the farm is totally displenished, and that there is not a trace of either stock or dung upon it, and thereupon the Sheriff pronounces the order for ejection. There was no appeal. There was no attempt to review the judgment, but this reduction is brought because the warrant was pronounced without being preceded by a formal order to stock. This is not candid or proper conduct on the part of the tenant, and we ought to give no countenance to it. He has no right to remain in the farm except under the contract, and one of the conditions of his contract is that it should be so stocked as to give to the landlord security for the rent, and if he failed, and continued to fail, to comply with the condition, after due and sufficient notice, he was liable to be ejected. I think therefore there are no grounds here for reducing this decree.

Lord Rutherfurd Clark—I give no opinion upon the question whether this summary ejection was competent before the Sheriff. Upon the authorities quoted it would be difficult to hold that the action was competent unless we are further to hold that there has been a change in procedure because of the recent Sheriff Court Act of 1877. I agree with Lord Young that if competent it would be a better form of process to proceed by summary action before the Sheriff rather than by declarator of reduction in this Court. But assuming the competency of the proceedings, I think they were not regularly carried out, and that the tenant therefore is entitled to decree of reduction.

Lord Lee—I concur with your Lordship in the chair and with Lord Rutherfurd Clark, and upon this simple ground, that the case was not ripe for a decree by default. In arriving at this conclusion I assume that an action of ejection founded on an irritancy of the contract of lease would be competent in the Sheriff Court if the question

were properly raised. The Sheriff Court Act of 1877 expressly provides that declarators of heritable right up to a certain value are to be competent in the Sheriff Court. Here there was a peculiarity which, I should say, required declaratory words to be employed in the prayer of the petition. What the landlord desired was warrant to sell the stock and crop to pay the rent for 1886, and only after that does the petition go on to ask a further decree ordering the tenant to stock the farm so as to give security for the rent to become due for crop 1887, and for ejection in case of failure. I think that that was a case in which it was essential to justice that the irritancy should be regularly declared, and that the proceedings should be so conducted as to make it quite clear that the irritancy had been incurred.

The Court refused the reclaiming-note and adhered to the Lord Ordinary's interlocutor.

Counsel for the Defender (Reclaimer)—D.-F. Mackintosh—Graham Murray. Agents—Macpherson & Mackay, W.S.

Counsel for the Pursuer (Respondent)—R. Johnstone—Orr. Agent—Robert Stewart, S.S.C.

Saturday, December 1.

FIRST DIVISION.

MARTIN AND OTHERS *v.* STEWART.

Pupil — Tutor — Guardianship of Infants Act 1886 (49 *and* 50 *Vict. c.* 27), *sec.* 2.

Sec. 2 provides—"On the death of the father of an infant, . . . the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, . . . the Court may, if it shall think fit, from time to time, appoint a guardian or guardians to act jointly with the mother." By sec. 8 "guardian" means "tutor," and "infant" means "pupil."

Where a father had died without making any nomination of tutors or curators to his pupil child, the Court, on the application of the next-of-kin of the pupil on the father's side, appointed the brother of the widow to act jointly with her as tutor to the pupil.

The late John Stewart, shipowner and insurance broker, 3 Fenchurch Avenue, London, died on 25th August 1888 in London, survived by his wife Mrs Charlotte Ferguson or Stewart, and by an only child Elizabeth Stewart, born 10th October 1877.

Mr Stewart was a Scotsman by birth, and died domiciled in Scotland, his principal residence being his mansion-house of Larghan, Coupar-Angus. His free personal estate was about £20,000, and his real estate about £9200 in value. Mr Stewart left no nomination of tutors or curators to his child, and the present petition was accordingly presented by Mrs Ann Stewart or Martin, his sister, and certain others, the next-of-kin of the said pupil on her father's side, for the appointment of tutors to act along with Mrs Stewart in terms of the Guardianship of Infants Act 1886. They averred that Mr Stewart died intestate; that he and his wife never entered into any marriage-contract; that the said Elizabeth Stewart was his sole heir; that she was in delicate health both mentally and physically, and would not likely ever be able to manage her own affairs or to make a will. They further averred that Mrs Stewart was without experience in business, and was not qualified to take sole charge of winding-up the deceased's London business. They suggested as a suitable person for the office of tutor, *inter alios*, James Adam Young, the eldest son of another sister of the pupil's father, who had acted as Mr Stewart's manager, and was therefore conversant with his business. Mr Young's name appeared in the petition as one of the petitioners, but he wrote to the petitioners' agent requesting him to withdraw his name, as it was there "not only without my knowledge and consent, but against my clearly expressed wishes."

Among the parties called as respondents was William Ferguson, farmer and manure merchant, Perth, a brother of Mrs Stewart.

Mrs Stewart lodged answers, in which she denied the allegations regarding the pupil's mental condition, but admitted that she suffered from certain delicacies of constitution, including defective sight and slight curvature of the spine.

The respondent further averred—"She has more knowledge and experience regarding her husband's business than any of the petitioners. She assisted him largely in his business correspondence (his hand having been injured by an accident), and in matters of personal business he habitually consulted her. Further, in realising the deceased's estate the respondent will have the assistance and advice of all those on whom her husband most relied, being (1) the said Mr James Adam Young, his nephew and confidential clerk and his probable successor in business, who is ready to give his services without seeking any appointment as tutor; (2) the said Mr Peter Hunter, who has for twenty years held a power of attorney from the deceased in connection with the management of his business; (3) Messrs Linklater & Company, the deceased's London solicitors; and (4) Mr Charles Boyd, solicitor, Coupar-Angus, his solicitor in Scotland. The respondent on 12th October last applied for appointment to the office of executrix-dative *qua* relict of the deceased, and in that capacity she will find caution for the whole amount of the moveable estate. Her own personal interests are co-incident with those of the pupil. In these circumstances the present petition to have a tutor appointed to act along with the respondent, or to have her ordained to find caution is unnecessary and vexatious. Any appointment made under the petition would lapse by the pupil's attaining to minority in less than a year."

Argued for the petitioners—Two questions were involved—the present custody of the child, and the custody of her estate. The widow was well qualified for the first office, but not for the second, in which she required the assistance of a business man.

Argued for the respondent—The widow was qualified to act alone, and nothing was alleged

against her which if she had been appointed by her husband would have caused the Court to remove her from office. Whoever was appointed to wind up the deceased's estate would require to call in professional aid.

At advising—

Lord President—The Court are of opinion that in the present case someone ought to be appointed to act along with the widow as tutor to the pupil. They desire if possible to adopt some nominee of the petitioners, and had it not been for what has taken place no more suitable person than Mr Young could have been found. It has, however, been explained that Mr Young has an interest somewhat adverse to that of the pupil, and in that state of matters his appointment would not be desirable. If the respondent is prepared to name any suitable person, the Court would be inclined to receive favourably her nomination.

The Court appointed Mr Ferguson, farmer and manure merchant, Perth (above mentioned), to act as tutor along with Mrs Stewart.

Counsel for the Petitioners—Vary Campbell—W. Campbell. Agent—Thomas Hart, Solicitor.

Counsel for the Respondents—D.-F. Mackintosh—M'Lennan. Agent—P. H. Cameron, S.S.C.

Saturday, December 1.

FIRST DIVISION.

AITKEN AND OTHERS, PETITIONERS.

Company—Liquidation — Supervision Order in Voluntary Winding-up—Companies Act 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 147.

By this section it is enacted that "when a resolution has been passed by a company to wind up voluntary, the Court may make an order directing that the voluntary winding-up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just."

A petition was presented for the winding-up of a company by the Court, and was duly intimated, served, and advertised in terms of an interlocutor, by which also a provisional appointment of a liquidator was made. Thereafter at an extraordinary meeting of the company an extraordinary resolution was passed for winding-up the company voluntarily, and a liquidator was nominated. He thereupon presented a note in the process under the petition, craving that the voluntary winding-up of the company might be continued subject to the supervision of the Court, that the appointment of the provisional liquidator might be recalled, and his own appointment as liquidator confirmed. The Court *granted* the prayer of the note.

On the 15th November 1888 a petition was presented to the Court by Thomas Aitken and others, creditors, directors, and shareholders of the Leith Heritages Company (Limited), praying for the winding-up of the said company by the Court. On 16th November the Court ordered intimation service, and advertisement, and appointed Mr Molleson, C.A., provisionally official liquidator of the estate and effects of the company. The petition was thereafter intimated, served, and advertised in terms of the interlocutor.

On 29th November an extraordinary general meeting of the company was held, at which the following extraordinary resolutions were passed: —"(1) That it has been proved to the satisfaction of the Leith Heritages Company (Limited) that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same. (2) That the Leith Heritages Company (Limited) be wound up voluntarily." Further resolutions were also passed as follows—"(1) That the meeting proceed to appoint a liquidator for the purpose of winding-up the affairs of the company, and distributing the property thereof in terms of the Companies Act 1862, and the Acts amending and extending the same. (2) That John Frederick Moffatt, chartered accountant, Edinburgh, be and is hereby appointed liquidator of the said company. (3) That it be an instruction to the liquidator to apply or concur in applying to the Court of Session to have the voluntary liquidation of the said company continued subject to the supervision of the Court. (4) That a committee of shareholders be appointed to advise with the liquidator in relation to all matters or questions arising in the liquidation, and that the following gentlemen be and are hereby appointed a committee accordingly, viz., Thomas Aitken, Esquire, residing at No. 5 Grosvenor Crescent, Edinburgh; Robert Clark, Esquire, printer, Edinburgh; and James Macdonald, Esquire, Solicitor in the Supreme Courts of Scotland, Edinburgh."

Following on these resolutions Mr Moffat, the liquidator appointed at the meeting on 29th November, presented a note in the process under the petition, in which, after setting forth the facts above narrated, he craved the Court, *inter alia*, to order the voluntary winding-up to be continued subject to the supervision of the Court, to recall the appointment of Mr Molleson, and to confirm his appointment as liquidator.

By section 147 of the Companies Acts 1862 it is provided—"When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding-up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just."

In support of the application the following authorities were cited—Buckley on the Companies Acts (5th edition), 316; *Owen's Patent Wheel Company*, 29 L.T. 672, 22 W.R. 151; *Simons' Reef Company*, 31 W.R. 328.

The Court, without further proceeding or intimation, on 1st December 1888 pronounced the following interlocutor:—

"Direct and ordain that the voluntary winding-up of the Leith Heritages Company (Limited), resolved on by the extraordinary resolutions passed at the extraordinary

general meeting of the company held on 29th November 1888, be continued, but subject to the supervision of the Court, in terms and with the powers conferred by the Companies Acts 1862 to 1886: Recal the appointment of James Alexander Molleson as provisional official liquidator of the estate and effects of the said company: Of consent confirm the appointment of the petitioner, the said John Frederick Moffatt, as liquidator of the said company, in terms of and with all the powers conferred by the said Acts: Also confirm the appointment of Thomas Aitken, 5 Grosvenor Crescent, Edinburgh, Robert, Clark, printer, Edinburgh, and James Macdonald, S.S.C. there, as a committee to advise with the liquidator in relation to all matters or questions arising in the liquidation: Declare that any of the proceedings under the said voluntary winding-up may be adopted as the Court may think fit: And declare that the creditors, contributories, and liquidator of the said company, and all other persons interested are to be at liberty to apply to the Court as there may be just occasion: Further, direct and ordain that unless and until it shall be otherwise directed and ordained by the Court, the liquidator shall not effect any compromise with any contributory except with the special leave of the Court: Find the said Thomas Aitken and Robert Clark and William Halden Beattie and David M'Gibbon, the petitioners, entitled to the expenses of the petition, and direct the same to be expenses in the liquidation, and remit to Lord Kinnear, Ordinary, in terms of the 6th section of the Companies Act 1886, to proceed in the subsequent proceedings in the winding-up; and decern."

Counsel for the Petitioners and for Mr J. F. Moffatt, C.A. — Graham Murray. Agents — Davidson & Syme, W.S.

Saturday, December 1.

FIRST DIVISION.

[Sheriff of Lanarkshire.

GUDGEON *v.* OUTRAM.

Reparation—Slander—Issue—Innuendo.

The following article appeared in a newspaper—"Fire at Ayr Farina Mills. Singular conduct of the manager. . . . It appears that the proceedings at the fire were somewhat unusual. The alarm was given, and the fire brigade turned out, but on their arrival at the gate of the establishment they were refused admittance by the manager Mr Gudgeon, who said they could manage the fire themselves. Superintendent M'Kay, the chief of the police, and some of his men were also refused admittance, although the fire was breaking through the roof of the buildings. Superintendent M'Kay and his men eventually got into the premises by climbing over the wall, and the fire brigade seem to have got in by forcing open the gate. . . . Mr Gudgeon ordered Superintendent M'Kay to take away the hose, but the Superintendent said he had no power to do so, and the fire brigade commenced to play on the flames, which were soon got under."

In an action of damages by the manager against the proprietors and publishers of the paper for alleged slander through the publication of the above article, *held* that the pursuer was entitled to an issue, but that an innuendo was necessary, to the effect that in so acting the manager had endeavoured to prevent the fire from being subdued, so as to cause the destruction of the works and stock therein.

Robert Gudgeon, manager of the Ayr Farina Mills, sued Messrs George Outram & Company, printers, publishers, and proprietors of the *Glasgow Evening Times* and the *Glasgow Weekly Herald*, for £2000 as damages for alleged slander.

On 17th September 1888 a fire occurred at the Farina Mills, Ayr, and the defenders published articles commenting on the occurrence in both their papers. The articles were in practically identical terms, and the following is the article which appeared in the *Glasgow Weekly Herald*:—"Fire at Ayr Farina Mills. Singular conduct of the manager. A fire occurred on Monday in Messrs Hyland & Company's Farina Mills, Ayr, and before the flames were got under, damage to the extent of £150 was done. It appears that the proceedings at the fire were somewhat unusual. The alarm was given, and the fire brigade turned out, but on their arrival at the gate of the establishment they were refused admittance by the manager Mr Gudgeon, who said they could manage the fire themselves. Superintendent M'Kay, the chief of the police, and some of his men were also refused admittance, although the fire was breaking through the roof of the buildings. Superintendent M'Kay and his men eventually got into the premises by climbing over the wall, and the fire brigade seem to have got in by forcing open the gate. They were followed by the crowd. Mr Gudgeon ordered Superintendent M'Kay to take away the hose, but the Superintendent said he had no power to do so, and the fire brigade commenced to play on the flames, which were soon got under. The Farina Mill is rather isolated, and is situated on the banks of the Ayr. The fire originated in the drying stove, in which a high temperature is kept up."

The pursuer averred, *inter alia*—"(Cond. 6) The said articles, immediately above quoted, are false, and are slanders and libels of, against, and concerning the pursuer, and falsely, calumniously and injuriously represented and represent to the public that the pursuer had endeavoured to cause destruction of the said works and stock by fire, or at all events had endeavoured to prevent the fire being subdued and so cause destruction of the premises and stock, and had committed or endeavoured to commit the crime of fire-raising, and the crime of causing further destruction by fire to said works and stock as aforesaid and so defraud the insurance companies with whom the same were insured, or one or more of said crimes or offences. In any event, the pursuer is falsely and calumniously represented thereby as culpably acting in violation of his duty as manager in connection with

and regarding the said fire. By these paragraphs, and by the representations thereby conveyed to the public, the pursuer's feelings have been deeply injured, and his reputation and business position have also been, and may still further be, very injuriously affected, to his serious loss and damage. The works, &c., under his charge may have increased rates to pay for insurance, or insurance companies may decline such risks altogether, in consequence of the said articles, and so cause the pursuer to lose his occupation, or at all events materially injure his position."

To which the defenders answered—"Denied. The defenders entirely repudiate the construction which the pursuer seeks to place upon the notices referred to."

The pursuer pleaded—"(2) The defenders having falsely and calumniously accused the pursuer of committing, or endeavouring to commit, the crimes or offences libelled, the latter is entitled to solatium and reparation therefor. (3) The articles complained of by the pursuer having been published in regard to him by the defenders, and intended and understood to bear the actionable meaning put upon them by the pursuer in his condescendence, he is entitled to solatium and reparation therefor from the defenders."

The Sheriff-Substitute (GUTHRIE) allowed a proof before answer.

"*Note.*—I cannot say that it would be clearly unreasonable and unnatural for a jury to find that the innuendos here stated are implied in the report in the defenders' newspapers. That was the only point argued."

The pursuer appealed to the First Division of the Court of Session, and proposed the following issues for the trial of the case:—"(1) Whether the said articles, or part thereof, are of and concerning the pursuer, and are false and calumnious, and to the loss, injury, and damage of the pursuer? (2) Whether the said articles, or part thereof, are of and concerning the pursuer, and falsely and calumniously represent that he, being the manager of Thomas Hyland & Company's works in Ayr, had endeavoured to prevent the fire at the said works referred to in the said articles from being subdued, to the loss, injury, and damage of the pursuer?"

The appellant argued—The article was obviously enough calumnious, if false, without the addition of any innuendo. The first issue should therefore be allowed—*Mackay* v. *Wicks*, March 6, 1886, 13 R. 732. As to the second issue, the article could bear the innuendo put upon it, and when so innuendoed was undoubtedly slanderous.

The respondent argued—The article was not necessarily libellous at all, and therefore the first issue should be disallowed. With regard to the second issue, the innuendo sought to be put on the article was strained and unnatural. "Singular conduct" was not a libellous expression, especially as the article represented the pursuer as giving a perfectly proper reason for his conduct, viz., "that they could manage the fire by themselves." At all events the issue as it stood was ambiguous, as it was not calumnious to say that the pursuer had endeavoured to prevent the fire from being subdued.

The second issue having been amended at the bar by the addition after the word "subdued" of the words, "so as to cause the destruction of said works and stock therein," the Court pronounced this interlocutor:—

"Disallow the first issue: Approve of the second issue as amended at the bar, and appoint the same to be the issue for trial of the case."

Counsel for the Pursuer—Comrie Thomson—Dickson. Agents—Gill & Pringle, W.S.

Counsel for the Defender—Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, December 4.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

ROSS *v.* COWIE.

Prescription—Triennial Prescription—Continuous Account.

A joiner sued the executrix of a person deceased for payment of an account extending over many years, and which *ex facie* was capable of division into three parts—(1) a portion for jobbing work; (2) a portion said to have been incurred for work and materials supplied in a building contract; (3) a portion consisting of a few small items for jobbing during the last seven years of the deceased's life. The whole was charged as a continuous account. *Held*, in a question whether it or part of it was prescribed, that it must all be treated as a continuous account, and that the executrix was not entitled to treat the first and second portions as running a separate period of prescription.

Process—Triennial Prescription—Proof before Answer.

In an action upon a joiner's account, the defender averred that two small items, at the interval of a year from each other, had been inserted merely to prevent the account from prescribing, and were not properly due by him for work done on his behalf. Proof before answer of this averment *allowed*.

This was an action by John Ross, joiner, Stonehaven, against Mrs Jane Cowie, executrix-dative *qua* relict of Alexander Cowie, sometime feuar there, for a sum of £379, 4s. 6½d. as the balance of an unpaid account for joiner work done on behalf of the deceased Alexander Cowie.

Cowie died on 25th September 1887.

The pursuer's account bore to begin at June 1875, and end at 4th May 1886. It was made up in the following manner—Under date June 1875 were sums amounting in all to £23, 2s. 6d. for jobbing work in a house in Stonehaven belonging to Cowie. From 22nd June 1876 to 28th May 1877 were entered sums amounting to £350, 19s. 3½d. for timber supplied, and for workmen's time at certain concrete houses in Stonehaven which Cowie had erected. Included in this account were two sums—one of £50, said in the account to have been paid on 22nd June 1876 to John Lindsay & Son, Montrose, being first instalment for concrete work, the other, £29, in the account said to have

been paid to James Garvie & Sons for doors supplied by them. The whole entries subsequent to 28th May 1879 amounted in all to £3, 9s. 7d., made up of small jobbing items said to have been incurred in 1879, 1881, 1883, 1884, 1885, and 1886. They were all small jobbing entries. The last two items in the account were—August 15, 1885, To new pail and handle, 3s. 9d.; May 4, 1886, To attendance at sale of furniture, 2s. 6d. The pursuer gave credit for £100, £20, and £30, said to have been paid to account.

The defender averred—"(Stat. 2) The items of the account libelled under date June 1876, amounting to £350, 17s. 3½d., have reference to work on two concrete houses in Ann Street, Stonehaven, erected by the said Alexander Cowie. These houses were erected at a cost of upwards of £1000, and the work performed on them by the pursuer was not of the nature of a jobbing or running account, and is entirely different in its character from the few small subsequent items which are of a regular jobbing nature. It is usual and customary for such work to be done under contract, and to be settled for whether done under contract or otherwise on its completion, and the whole other departments of the work except the joiner work were contracted for. The account prior to and under date June 1876, amounting in whole to £373, 19s. 9½d. falls to be treated as a separate and independent account from the subsequent items, and the pursuer has himself so treated it by charging interest on it separately to the extent of £131, 15s. 2d., and the account prior to and under date June 1876 is not a continuous or running account with the few small items amounting in the next ten years only to £3, 9s. 7d., and the account prior to and under date June 1876 falls by itself under the triennial prescription and is prescribed. It is not known and not admitted that the £100 here referred to were paid in the manner stated. Admitted that no formal contract was entered into for the execution of the work, and *quoad ultra* the counter averments are denied." He also averred that the last two items of the account were not due and resting-owing, and had been inserted with a view to obviate the plea of prescription.

The defender pleaded, *inter alia*—"(1) The whole account, or at least that part of it prior to and under date June 1876, is liable to and has suffered the triennial prescription, and can be proved only by the writ or oath of the defender."

The Sheriff-Substitute (DOVE WILSON) on 20th February 1888 pronounced this interlocutor:—"Finds that the portion of the account libelled, which is said to have been incurred prior to 23rd May 1879, can be proved only by the writ or oath of the defender, and appoints the cause to be enrolled for further procedure.

"*Note.*—The earlier portions of the account for which the action has been brought are unquestionably prescribed, unless it can be made out that the later portions are mere continuations of them. It appears to me, however, that the later portions are of quite a different character, and that it would be a mere evasion of the prescription statutes to say that they were done under the same employment as the earlier. The later portions of the account are for trifling bits of jobbing work of a few shillings each, such as one might order from the nearest carpenter without anything in the shape of contract or arrangement. The middle portion of the account—that incurred in 1876 and 1877—was for the building of two houses at a cost of some £350, which undoubtedly had been the subject of special contract and arrangement; and it seems to me that it is not possible to speak of the account for the trifling repairs and supplies as being a continuation of the employment to build. The first portion of the account—that incurred in June 1875—has more analogy with the last portions, but it is separated from them by an interval of more than three years, as well as by the house building contract.

"The defender treats the account for building the houses as falling under the triennial prescription. I should rather myself have thought that it fell under the quinquennial, but whether it fell under the one or under the other it seems to me to have no sort of connection with the other portions of the account, and if this view be sound it is plain that it can be proved only by writ or oath.

"There are two large items in the account, one of £50 and one of £29, which apparently are claimed as having been cash advances on behalf of the defender's author. If they were they would be equivalent to loans to him, and are therefore also proveable by writ or oath only. I may add that it would appear to me to be exceedingly unfortunate were any other result to be reached. The defender's husband, who knew all about the work, is dead, and the defender at an interval of ten years from the conclusion of the transactions would necessarily be quite unable to obtain materials for her defence."

The Sheriff (GUTHRIE SMITH) affirmed this interlocutor, "with this qualification, that the pursuer is at liberty to re-form the account by exscerpting the payment of £50 to Laidlaw & Sons, and £29 to Garvie & Son, and any other disbursements made by him on behalf of the deceased Alexander Cowie; further, in respect it appears that two sums of £30 and £20 were received in loan from the deceased by the pursuer; . . . . appoints the parties, with a view to a proof on these points, to amend respectively the revised condescendence and revised defences."

Proof *prout de jure* was then allowed on the points specified in the interlocutor of the Sheriff.

The pursuer appealed to the Court of Session, and argued—The defender's plea of prescription should be repelled—*Ayton* v. *Steddart*, Feb. 4, 1882, 9 R. 631; Ersk. iii. 7, 17; *North British Railway Company* v. *Smith Sligo*, Dec. 30, 1873, 1 R. 309; *Whyte* v. *Currie*, Dec. 1, 1829, 8 S. 154; *Wotherspoon* v. *Henderson's Trustee*, July 10, 1868, 6 Macph. 1052; *Vallance* v. *Forbes*, June 27, 1879, 6 R. 1099; *Fisher* v. [illegible], March 5, 1836, 14 S. 660. The averments as to £50 and £29 were not, as the Sheriff-Substitute thought, allegations of loan; they were averments that the pursuer, by mandate from the deceased, had advanced money for him. That could be proved by parole—*Grant* v. *Fleming*, December 10, 1881, 9 R. 257.

The respondent argued—The quinquennial prescription applied to the second part of the account. It applied to bargains about moveables, and was entirely applicable to such a case. Triennial prescription applied to the various parts of

the account separately. They were separate accounts. It could not be said that there was here any formal contract for the erection of these contract houses, and no written contract was produced, but it was a separate piece of business performed upon a separate subject from that sued for in the other parts of the account, and fell under the quinquennial prescription. The continuity of the account was broken—*Wotherspoon, supra cit.; Stewart* v. *Scott*, February 28, 1844, 6 D. 889; Bell's Prin. 629; Erak. iii. 7, 20.

At advising—

Lord Lee—This is an action for payment of a joiner's account, commencing in June 1875, and purporting to be continued subsequent to May 1877 by sundry charges for work done and materials supplied in May 1879, in September 1881, in March 1883, in July 1884, in August 1885, and in May 1886.

The Sheriff-Substitute and the Sheriff have held that the whole account prior to 23rd May 1879 is subject to the triennial prescription, and upon the ground that the charges subsequent to June 1875 must have been the subject of special contract and arrangement, in which view there would be a period of more than three years between the charges in 1875 and the later portion of the account.

I think that the account cannot be so dealt with upon the record as it stands. There is nothing in the character of the account for June 1876 and for the period from 9th August 1876 to 28th May 1877 which is at all inconsistent with the pursuer's allegation that it was incurred for work done and materials supplied by the pursuer in the ordinary course of his business, and upon what he calls a running account. The joiner work upon the buildings referred to is not alleged to have been done under any special contract. Both the work and the materials are charged in detail according to time and price. I therefore think that the Sheriff-Substitute's interlocutor of 20th February, and also the interlocutors of the Sheriff proceeding upon the same view of the account, must be recalled.

There is, however, another view in which the account is said to be prescribed. It is pointed out that if the items charged on 15th August 1885—"to new pail and handle, 3s. 9d."—and 4th May 1886—"attendance at a sale of furniture, 2s. 6d."—should be struck out, prescription has run. For the action was not raised for more than three years after the preceding items under date July 1884.

It is alleged by the defender that these two last items are not due, and have been inserted with the view of obviating the plea of prescription. This raises a point which was referred to by Lord Neaves in the case of *Wotherspoon*, 6 Macph. 1052, and I think that the course there suggested should in substance be followed by allowing the parties a proof before answer as to these items. I think this proof must be taken before the plea of prescription is disposed of.

Another question is raised as to two entries in the account charging sums of £50 and £29, as paid to other tradesmen by the pursuer on behalf of the defender for work done by them upon the buildings on which the pursuer was employed to do the joiner work, and prepare the plans and specifications.

The pursuer produces receipts for these sums as paid by him, and I think that there is authority for holding that parole proof is competent on the question whether the disbursements, so instructed, were made upon the authority of the deceased as a customer of the pursuer—*Annand's Trustees*, 7 Macph. 526; *Grant* v. *Fleming*, 9 R. 257.

On these grounds I think that we should recal the interlocutor of 20th February 1888, and whole subsequent interlocutors, and remit to the Sheriff to allow the parties before answer a proof of their averments on record as to the last two items charged in the account, and thereafter to proceed in the cause as may be just.

Lord Rutherfurd Clark and the Lord Justice-Clerk concurred.

The Court allowed a proof before answer as to the averment contained in the defender's fourth statement regarding the two last items of the account.

Counsel for the Pursuer—Comrie Thomson—Rhind. Agent—William Officer, S.S.C.

Counsel for the Defender — Gloag — Sym. Agent—William B. Rainnie, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, December 7.

(Before the Lord Justice-Clerk, Lord Rutherfurd Clark, Land ord Lee.)

M'FARLANE (P.-F. OF SHERIFF COURT AT DUNFERMLINE) *v.* BIRRELL.

Justiciary Cases—Truck Act (1 *and* 2 *Will. IV. cap.* 37), *secs.* 2 *and* 23—*Deduction from Wages for House Rent.*

Section 2 of the Truck Act (1 and 2 Will. IV. cap. 37) prohibits any contract between an employer and an artificer, by which provision is made for the expenditure of wages due to the latter.

Section 23 provides "that nothing herein contained shall extend, or be construed to extend, to prevent any employer . . . from demising to any artificer, &c., the whole or any part of any tenement at any rent to be thereon reserved . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent: . . . Provided always, that such stoppage or deduction . . . shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."

A workman was employed by a coal company, and occupied a house belonging to them upon the conditions specified in certain regulations issued by the company, which provided, *inter alia*, that "all houses,

gardens, &c., leased or granted to workmen by the said company are to be held as leased or granted only during the period of the workman's engagement under article 1. Immediately on the expiration of said engagement, the workman must remove from the subjects let to him, and leave the same in good order. Failing removal, he will thereby become bound to pay as rent, for the subjects occupied by him, the sum of one shilling for each day or part of a day he shall occupy the same after the expiration of his said engagement, without prejudice nevertheless to the said company ejecting the said workman from the said subjects. The said company shall be entitled to retain the wages due to the workman until the terms of this article are fulfilled, and shall also be entitled to deduct from said wages such sums as shall become payable by the said workman under this article." Throughout his employment the workman signed pay-tickets, which, after acknowledging receipt of wages, contained the following words, namely, "and I hereby authorise you to deduct from my wages in future, so long as I am in your employment, the amount of my house rent." At the termination of his employment the workman did not remove from his house. His wages were retained until he removed, and ultimately a portion was deducted in part satisfaction of the debt which he had incurred by occupying the house after the term of removal.

A complaint was brought against the manager of the company under the Truck Act, and the Sheriff-Substitute assoilzied. In an appeal upon a case stated —*held* that the written agreement contained in the pay-ticket did not authorise the deduction of rent from wages after the employment had ceased, and further that the payment stipulated for by the regulations after the termination of the employment was of the nature of liquidate damages for breach of the contract of lease, and was not rent within the meaning of section 23 of the Truck Act.

George Birrell, general manager for the Dunfermline Coal Company of the Muircockhall Colliery, in the parish of Dunfermline, was charged in the Sheriff Court of Fifeshire, at Dunfermline, at the instance of James M'Farlane, Procurator-Fiscal of Court, upon a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and Criminal Procedure (Scotland Act 1887, which set forth "that he did contrary to the Act 1 and 2 Will. IV. chap. 37, sec. 2, on or about the 23rd day of January 1888, at the colliery office, Muircockhall aforesaid, contract with James Lowe, miner, residing at Townhill, of the burgh of Dunfermline, working at said colliery during the fortnight ending 8th February 1888, that the said Dunfermline Coal Company should be entitled to retain the wages due to the said James Lowe until his removal on the expiration of his engagement with said company from premises that had been leased or granted to him by said company for the period of his said engagement, and should also be entitled to deduct from said wages such sum as should become payable by the said James Lowe until such removal from said premises, and did thereafter, contrary to said section of said Act, enforce or seek to enforce said contract."

The Sheriff-Substitute (Gillespie) on 7th May 1888, having repelled certain objections taken to the relevancy of the complaint and heard evidence, found the respondent not guilty.

The Procurator-Fiscal took an appeal to the High Court of Justiciary on a case stated. In the case the following facts were set forth as proved—"The said George Birrell was general manager for the Dunfermline Coal Company at their Muircockhall Colliery, and the said James Lowe was a miner in the employment of the said company, and lived in a house belonging to the company. The Dunfermline Coal Company, which recently took over the business of another coal company called the West of Fife Coal Company, are members of the Fife and Clackmannan Coal Owners' Association. That association adopted in 1874 certain regulations and conditions of employment, copies of which have since been regularly kept posted up by the Dunfermline Coal Company and their predecessors in conspicuous places at their collieries, and their employees have been requested to make themselves acquainted with their contents. Article 4 of the regulations is as follows:—'All houses, gardens, &c., leased or granted to workmen by the said company are to be held as leased or granted only during the period of the workman's engagement under article 1. Immediately on the expiration of said engagement the workman must remove from the subjects let to him, and leave the same in good order. Failing removal, he will thereby become bound to pay as rent for the subjects occupied by him, the sum of one shilling for each day or part of a day he shall occupy the same after the expiration of his said engagement, without prejudice nevertheless to the said company ejecting the said workman from the said subjects. The said company shall be entitled to retain the wages due to the workman until the terms of this article are fulfilled, and shall also be entitled to deduct from said wages such sums as shall become payable by the said workman under this article.' Throughout his employment at the colliery Lowe signed pay-tickets in the following terms:—'Received payment of £ , being in full of all wages due to me, and I hereby authorise you to deduct from my wages in future, so long as I am in your employment, the amount of my house rent, water, and school rates, the usual charges for medical attendance, and for sharpening and keeping in order my working tools, also the price of coals supplied, and any cash that may have been advanced to me 'Muircockhall Colliery, 1888.'

"The engagement of the said James Lowe was by the fortnight, and on or about 25th January 1888 he contracted with the said George Birrell to continue in the employment of the said company for the fortnight ending 8th February as formerly upon the conditions specified in said article 4 of the regulations. In January last the men employed at the Dunfermline Coal Company's collieries gave in notices that their engagements would cease on Saturday 11th February 1888, which was the pay-day for the fortnight ending 8th February. On the morning of 11th February 1888 a notice to the following effect was posted up by the instructions of the

said George Birrell, viz., 'that 12s. would be deducted from the wages of the workmen living in the colliery houses.' The sum of 12s. was fixed by the advice of the law-agent of the Coal Owners' Association in order, on the one hand, to vindicate rule 4, and, on the other hand, not to press too heavily on the men by the retention of a larger sum from their wages. Upon Lowe applying at the office for his wages, payment thereof was refused by the cashier, acting under the instructions of the said George Birrell, except under deduction of 12s. as above mentioned, which was to be retained for rent to become due until the house occupied by Lowe should be vacated in terms of said rule 4. Lowe refused to accept of his wages under said deductions, but after some negotiations between the law-agents for the coal owners and for the miners, Lowe's wages, less 12s., were on 15th February (along with the wages of several other men, from whom similar deductions were made) handed by the Coal Owners' law-agent to the miners' law-agent, and afterwards received by Lowe. The 12s. kept back was ultimately paid to Lowe on his resuming work about three weeks after, he being charged only the ordinary rent for his house during the strike, as if he had been in the employment of the Dunfermline Coal Company throughout." The ground of the Sheriff-Substitute's judgment was stated to be "that article 4 of the said general regulations, with the agreement contained in the fortnightly pay-tickets, signed by Lowe, did not constitute a contravention of the statute referred to."

The questions of law submitted for the opinion of the Court of Justiciary were—"(1) Whether the complaint set forth any relevant case of contravention of the statute libelled? (2) Whether the said article 4 and its proposed enforcement by the said George Birrell were within the prohibition contained in the second section of the said statute. (3) Whether the said article 4 and its proposed enforcement by the said George Birrell were within the exceptions recognised by the 23rd section of the said statute?"

By the Truck Act (1 and 2 Will. IV. cap. 37), which is entitled "An Act to prohibit the payment in certain trades, of wages in goods, or otherwise than in the current coin of the realm," section 2, it is enacted—"That if in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void." By section 9 it is enacted—"That any employer of any artificer in the trades hereinafter enumerated who shall, by himself, or by the agency of any other person or persons, directly or indirectly enter into any contract or make any payment hereby declared illegal, shall for the first offence forfeit a sum not exceeding ten pounds nor less than five pounds, and for the second offence any sum not exceeding twenty pounds nor less than ten pounds, and in the case of a third offence any such employer shall be and be deemed guilty of a misdemeanour, and being thereof convicted, shall be punished by fine only, at the discretion of the Court, so that the fines shall not in any case exceed the sum of one hundred pounds." By section 23 it is enacted—"That nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer . . . from demising to any artificer, workman, or labourer employed in any of the trades or occupations enumerated in this Act, the whole or any part of any tenement at any rent to be thereon reserved; . . . nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent: . . . Provided always, that such stoppage or deduction . . . shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer."

Argued for the appellant—The only defence available to the respondent rested upon section 23 of the Act 1 and 2 Will. IV. cap 37. To succeed in that defence the respondent must show (1) that what was deducted in this case from the workman's wages was rent within the meaning of the section, and (2) that there was a contract in writing to submit to that deduction. He failed on both points. (1) The word "rent" in the section meant rent in respect of lawful occupation. What was in question here was not such rent, but pactional damages in respect of the workman continuing to occupy in defiance of his landlord without right. (2) There was no written contract authorising the deduction. The contract founded on was the receipt for wages. By the receipt the workman authorised the respondent "to deduct from my wages in future, so long as I am in your employment, the amount of my house rent." That could not refer to anything falling due after the employment ceased. Nor could it refer to anything falling due "as rent" under the special stipulations of article 4 of the regulations, for that article was not referred to. It referred only to ordinary house rent during the employment.

Argued for the respondent—(1) What was deducted was rent within the meaning of section 23 of the Act. Article 4 of the regulations, under which it became payable, set forth that the workman should be bound to pay it "as rent." The expression "rent" was applicable, and was in practice applied, to a payment to be made after the termination of the occupation of a subject as fixed by agreement—Juridical Styles, i. (Heritable Rights), p. 579. The manner in which the word was used in section 23 showed that such an interpretation was contemplated. The words "any such rent" used in the section meant "rent for any period." (2) The deduction was provided for by written agreement. The "house rent" authorised to be deducted by the receipt was "house rent" falling due under the contract of service. That contract, as set forth in the case, was made "upon the conditions specified in said article 4 of the regulations."

At advising—

Lord Rutherfurd Clark—James Lowe was employed as a collier by the Dunfermline Coal Company, and it appears that while he was in their employment he leased a house belonging to the company at a certain rent. His engagement was by the fortnight, and was made in terms of

article 4 of the regulations adopted by the company in 1874. From that article it appears (first) that the house which he occupied was leased to him only during the period of his employment; (second) that he was bound to remove from it immediately on the expiration of his engagement; (third) that he was bound to pay a shilling a-day for each day that he should occupy it after the term of removal; and (fourth) that the "company shall be entitled to retain the wages due to the workman until the terms of this article are fulfilled, and shall also be entitled to deduct from said wages such sums as shall become payable by the said workman under this article." The effect of this last stipulation is that the wages earned at the termination of his engagement were not payable till he removed from his house, and thus there was left in the hands of the employers a fund from which they could deduct such moneys as were due by him if he did not remove at the appointed term.

Lowe gave notice that his engagement should cease on Saturday, 11th February 1888, but he did not then remove from his house. The stipulation which I have just quoted was enforced against him. His wages were retained until he removed, and ultimately a portion was deducted in part satisfaction of the debt which he had incurred by occupying the house after the term of removal. A complaint was brought for breach of the Truck Act. The Sheriff-Substitute assoilzied. A case has been stated, and we are now asked to determine whether his judgment was right.

It is plain—and indeed it was admitted—that the agreement contained in the regulations is a breach of the 2nd section of the Truck Act. For it is a contract between an artificer and his employer, by which provision is made for the expenditure of wages due to the artificer. But the respondent maintains that it is taken out of the operation of the 2nd section, in respect that it is an agreement permitted by the 23rd, as being an agreement for the deduction of rent from wages due to the artificer.

In order to make out this defence two things are requisite—(First) that the agreement shall be in writing, and (second) that the rent which is to be deducted from the wages shall be rent within the meaning of the statute.

The written agreement on which the respondent relies authorises the employer "to deduct from my wages in future, so long as I am in your employment," house-rent, taxes, &c. I am unable to hold that this is an agreement to deduct rent from wages after the employment has ceased. It is in operation only so long as the employment continues, and it ceases with the employment, for the words "so long as I am in your employment" qualify the verb "deduct," and in my opinion limit the agreement to the period of the employment.

This is perhaps sufficient for the decision of the case. But we may, I think, also consider the general question which was argued to us.

The 23rd section enacts that nothing contained in the statute shall prevent an employer "from demising to any artificer a tenement at any rent to be thereon reserved, and from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent." The question is, What is the meaning of the word "rent" as it is used in this section? Does it cover the sum stipulated for the occupation of the tenement after the period of removal, and when the right to occupy has ceased.

The words of the statute are, "demising a tenement at any rent to be reserved thereon." To demise is a technical phrase of English law. I take its Scottish equivalent to be, to let on lease, and the parties were agreed that this was its meaning. It therefore appears from the very words of the statute that the rent, and the only rent which may be deducted from wages, is the rent which is reserved on a demise or due under a lease. Money which is not due under a lease is not rent within the meaning of the statute. Rent is the money payment reserved on the demise or payable by the lease for the possession under the demise or lease. There can be no rent where there is no lease, and no rent can become due after the lease has come to an end.

The respondent maintained that the sum deducted from wages satisfied these conditions. It is called rent by the contracting parties. That is not material, for it does not become rent merely because it is so named. The true plea in defence is that it is due under a lease and for the occupation of the subject let, and therefore that it is rent within the meaning of the statute.

But when the agreement is examined it is plain that the money is not due under a lease. It did not begin to become due until the only lease which existed came to an end, and though it may be due in respect of the occupation of the subject which had been let, it is not due in respect of occupation under a lease. It is due because the lease had come to an end, and because the tenant continued in the illegal occupation of the subject. It is due no doubt by contract, but the contract under which it is due is wholly apart from the lease. For it did not come and could not come into operation until the lease with which it was associated had terminated. For these reasons I cannot hold the money which was thus payable to be rent in any ordinary or legal sense of that word, or to be rent within the meaning of the Act.

If we pursue the inquiry we can easily determine what it truly is. We are not told the amount of the rent payable by Lowe, but it is plain enough that a shilling a-day was greatly in excess of it. If it were not, the stipulation would not effect its purpose, viz., to enforce removal by making it too costly for the tenant to remain in possession. The stipulation is penal in substance though not in form, and the money due under it is in fact and in law nothing else than liquidate damages for a breach of the contract of lease.

I hold therefore that there has been a violation of the Act. The Legislature permitted the employer to deduct rent according to the ordinary meaning of that term, in order that he might recover from the artificer what was due in respect of his occupation of the tenement under his lease. I do not think that it was intended that the statute should be used as a means of enforcing removal or recovering damages.

Lord Lee—I concur, and would only add that there is a narrower ground on which I arrive at the same result.

By the 23rd section of the statute it is enacted that nothing therein contained shall extend to prevent any employer making or contracting to make any stoppage or deduction from the wages of any artificer, workman, or labourer employed in any of the enumerated occupations.

My opinion is, that in order to be within that section, and so saved from the operation of the statute, the rent referred to in the contract must be rent due by a person "employed."

The payment in respect of which the deduction referred to in this case was to be made was not rent due by a person employed, but a sum alleged to be due in name of rent by a person who had ceased to be employed as such artificer or workman, and in respect of his having thereby become bound to remove or pay that amount.

I think that such a contract is not saved by clause 23 from the operation of the statute.

Lord Justice-Clerk—I concur in the opinion of Lord Rutherfurd Clark in its entirety. I think it is plain that the object of the form of regulations adopted at this colliery was if possible to bring this practical arrangement for a charge of 1s. per day within sec. 23 as being "rent." With that view article 4 of the regulations was framed. I think it is plain that the sum is not rent in the sense of sec. 23, but is a deduction intended to cover a sum for the retaining of his house by the miner when he has no right to it as a tenant, he having ceased to be in the employment, and therefore having no right to remain. But sec. 23 only refers to an arrangement under which, as part of the contract, the employer provides a house for the workman, and becomes entitled to deduct rent which has become due at the date of the deduction, and nothing more. It does not empower the employer to deduct for future occupation of a house, whether by agreement for lease or otherwise. The consent in the receipt given by the workman in this case, that the employer shall deduct from his wages his "house rent," is a perfectly competent contract under sec. 23. It is nothing more than an arrangement that the house rent which has become due shall be kept by the master at settling time. It means no more. If it did mean more—if it meant a consent to deduction as specified in article 4 of the regulations—it would not fall under sec. 23, and would be illegal under sec. 2. I therefore think that the first two questions should be answered in the affirmative, and the third in the negative.

The Court found that article 4 of the regulations and its proposed enforcement by the respondent were prohibited by the 2nd section of the statute, and were not within the exceptions recognised by the 23rd section.

Counsel for the Appellant—D.-F. Mackintosh—Wallace. Agent—James Auldjo Jamieson, W.S.

Counsel for the Respondent—J. A. Reid—Shaw. Agents—Wallace & Begg, W.S.

COURT OF SESSION.

Friday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

STRANG *v.* BAIN.

Horse—Loan—Injury while in Borrower's Custody—Reparation—Onus—*Discharge of* Onus.

When an article is lent in good condition and is returned damaged, the *onus* is on the borrower to show (1) that all due care was taken of the article, and (2) that it was not used for any other purpose than that for which it was lent.

While the borrower of a horse was driving it along a road the horse fell, and sustained severe injuries. In an action by the owner against the borrower it was proved that the road where the accident occurred was level and free from stones; that at the time of the accident the defender had been driving at a moderate pace and with tight reins; that the horse had general weakness of the fore parts, and that he had also at various times suffered from the effects of bad shoeing. *Held* that the defender had observed reasonable care in using the horse, and that the accident was not caused by his fault, and the defender therefore *assoilzied*.

William Bain, Wharrie House, Hamilton, raised an action in the Sheriff Court of Lanarkshire at Hamilton against Robert Strang, Strathmore, Hamilton, concluding for payment of £35, 18s. 3d., the value of a cob lent by the pursuer to the defender, and which the pursuer averred had been injured through the recklessness or negligence of the defender. In the proof allowed by the Sheriff-Substitute the following facts were established—On 3rd June the defender got the loan of the pursuer's horse to drive himself and his friend, a Mr Begg, to Blackwood, about nine miles from Hamilton. With the pursuer's consent the horse was yoked to a two-wheeled cart, although before that time it had been driven by the pursuer in a four-wheeled dog-cart. The horse performed the journey to Blackwood in safety, but when returning in the evening he fell and seriously injured his knees.

The account of the accident as given by the defender is as follows:—"The horse was in good condition when we got it, and went quietly to Blackwood. We drove direct to Blackwood from Hamilton. We stabled at the farmhouse, and started to return about seven minutes past nine in the evening. It was in the beginning of June. It was not dark. The horse came down about a hundred or a hundred and fifty yards on the Hamilton side of Avon Bridge. That would be about a quarter-past ten. I cannot say the distance between Blackwood and Hamilton. I think it must be about nine miles. Avon Bridge is just at the entrance to Hamilton. I was driving when the horse fell. I was driving carefully. Mr Begg and I were alone in the machine. We were both pitched out. The machine was damaged, and so was the

horse. It was a dog-cart. I should say we were driving six or seven miles an hour when the horse fell. I was not driving with a loose rein. The horse had leather padding on his sole. There was no stone in his foot. When I examined the ground I thought it was a stone that had made him fall. I examined the ground to see if there were loose stones just at the place where the horse fell. I did not see any loose stones. I saw a scar on the road. I saw nothing in the state of the road which would account for the horse coming down. . . . I have been in the habit of driving for twenty-three years, or thereabout, occasionally. As a rule, when I have occasion to hire, I always drive. I have a knowledge of horses in a general way. When the accident happened I was certainly driving as carefully as I could. I was thrown or pulled out of the machine. I had most decidedly a firm hold of the reins when the beast stumbled. I think it was the tumble forward pulling the reins that pulled me out. There was no indication whatever of a stumble before falling. It tumbled forward without the slightest warning."

Begg's evidence corroborated this account. He deponed—"Coming home, when near to Avon Bridge, the horse came down. We were not driving quickly at the time. We were going at what you might call a dog's-trot—a good trot. Mr Strang was driving. He made an examination to see if there was anything on the road which could account for the horse coming down. I think he said he had found a slip, as if the horse had placed his foot on a stone. I do not know that there were any loose stones. There was nothing that I saw in the state of the road to account for the horse coming down. My opinion was that the horse had fallen asleep. I do not think it was going at a trot of six or seven miles an hour. It was not much more than a walk. We were not driving with a loose rein. Mr Strang had a good catch of the horse any time I saw him. The horse was cut on the knees, and bleeding. . . . Before coming to the spot where the accident happened, Mr Strang said, as he did not like to take the horse in heated, he would give it plenty of time and go slowly home. This was immediately after going down the hill, 300 or 400 yards before where the accident happened. There was nothing suggested itself to me at the time as a reason for the horse stumbling. Mr Strang seemed to be driving as carefully as he had been doing all day."

Donald Bain, the pursuer's brother, deponed as follows—"I have also seen it going lame from a shoe being put on too tight. It does come to this, that while my brother had the horse, we had frequently to complain of it going lame. It seemed to be an unfortunate horse in that respect, but there was nothing at all wrong with itself. For a month or two before the accident it was shod with leather pads on its soles. From the fact that it was rather big in the frog of the foot, stones got in, and Mr Copeland, the shoer, advised padding to prevent this. Any time it went lame it was caused by improper shoeing."

The pursuer deponed—"Four or five months after my purchase (of the horse) he was attended by Mr Hamilton, the veterinary surgeon. He was lame. I do not know the cause. He was attended in our own stable. He was three to four weeks lame. I never heard such a thing that the illness was from slipping the shoulder. I do not know what slipping the shoulder is. I am aware there was a dispute as to the lameness. Some said it was in the foot; others said it was in the shoulder. Mr Hamilton said at the time he could not understand where the horse had got lame, but it must have occurred by pulling too hard, or something of that kind. Mr Hamilton operated upon the shoulder."

James B. Hamilton, veterinary surgeon, deponed—"I attended the horse once while with Mr Bain. It was very shortly after Mr Bain purchased it. He was then suffering from a little overexertion. He was a good while in the stable. We found it necessary to blister him, and until the marks of the treatment had gone away I think he was not sent out. That would be about six weeks. We blistered him on the shoulder. It was not a case of slipping the shoulder. Shoulder-slipping is a very different matter. I could not confuse the two. I do not think that ailment depreciated the value of the horse after he got better. It was a sprain on the muscles from too long a journey by a young horse, and I believe the muscles would be as good as ever. I had the horse a fortnight or three weeks before I sold it to Mr Bain."

David Cran, horse-dealer, deponed—"I had seen the horse before, and I thought he had been what we call 'junked' in the fore—that is, the muscles strained. It was not a slipped shoulder. It was just general weakness of the fore parts."

The pursuer pleaded, *inter alia*—"(2) That as the cob had been rendered useless for the pursuer's purposes by the injuries it had sustained through the defender's fault, he was bound to pay the pursuer the damage sustained by him."

The defender pleaded, *inter alia*—"(2) That as the horse had not been injured through the recklessness or negligence of the defender, he was not responsible for any loss which the pursuer had sustained."

The Sheriff-Substitute (BIRNIE) pronounced the following interlocutor:—"Finds that the pursuer's horse was injured while on loan to the defender, and that the defender has not proved he used all reasonable care: Finds in law that the defender is liable in damages, &c.

"*Note.*— . . . The law is that a borrower must take all reasonable care, and prove that he has done this. In *Wilson* v. *Orr*, 1879, 7 R. 266, the Lord Justice-Clerk Moncreiff said—'The hirer of an article under the contract of location is under an obligation to restore the commodity in like good condition as that in which he received it. If the subject of the contract perish without fault on the part of the hirer, it perishes to the owner, and the hirer is sufficiently discharged of his obligation if he have taken reasonable care of it. But if the subject of the contract be not restored in like good condition as that in which it was received, there is a certain burden of proof laid on the hirer. He must show the cause of injury or death, and at least produce *prima facie* proof that the cause was one for which he was not responsible.' And Lord Gifford says the same burden lies on all parties who under any other contract get the entire use, custody, and control of another person's property.

"The point is narrow, as the direct evidence is that the defender was driving carefully, and with a tight rein, and as Mr Begg's surmise that the horse had fallen asleep is inconsistent with his evidence that it was driven at a fair pace until within three hundred or four hundred yards of the spot where it fell, but I cannot hold that the defender has acquitted himself of the burden thrown on him. There is nothing to account for the horse falling. The road was practically level, there was no stone in the neighbourhood, and the horse's feet were soled with leather so that a stone would not so probably cause it to stumble. Nor has the defender attempted to prove that the horse was liable to fall, or that a horse will fall without cause if driven with proper care." . . .

On 24th May 1888 the Sheriff adhered to this interlocutor.

The defender appealed, and argued that the evidence showed that the horse was weak on its fore legs, and so had a tendency to fall; the evidence further showed that the defender had taken all possible care of the horse, and the accident was not caused by carelessness or recklessness on his part. The law was settled in the cases of *Pyper* v. *Thomson*, February 4, 1843, 5 D. 498; *Pullars* v. *Walker*, July 18, 1858, 20 D. 1238; *Wilson* v. *Orr*, November 22, 1879, 7 R. 266.

The respondent argued that the *onus* of showing that all reasonable care had been taken of the horse lay on the defender. He had received the horse in a sound condition and had returned it severely injured; and apart from the account given by himself and his friend of how the accident occurred, there was no evidence to support their story. In these circumstances it could not be said that the defender had discharged the *onus* that lay upon him, and he was accordingly liable in the sum sued for—*Robertson* v. *Ogle*, June 23, 1809, F.C.

At advising—

Lord President—In this case the defender borrowed a horse from the pursuer for the purpose of driving from Hamilton to a place called Blackwood, about nine miles therefrom, and back again. It was argued that the loan of the horse was not entirely a gratuitous matter, as it was thought that a Mr Begg, who was accompanying the defender, might be a possible purchaser, as he was looking out for a horse at the time. I do not think, however, that this suggestion has been in any way established by the evidence, so, in dealing with the case, I shall view the loan as an entirely gratuitous one. But there are certain conditions which rule a contract such as that now before us, and one of these is that the article lent must not be used for any other purpose than that for which its owner loaned it; and another is that the borrower shall take all reasonable care of the article lent. Now, as to the first of these conditions, we have the evidence of the defender and also of his friend, Mr Begg, both as to what took place on the road to Blackwood, and also as to what happened there, and on the way back, up to the time when the accident occurred—[*His Lordship here read the passages quoted above from the evidence of the defender and the witness Begg*]. From all this it appears that the horse was, from the time when the defender received it down to the moment when the accident occurred, being used by the defender for the purpose for which it was lent to him by the pursuer. But further, if we are to believe the evidence of the defender and his friend Mr Bain—and there is not the slightest suggestion that their account of what took place is not entirely to be relied on—then it is, I think, clear that at the time when the accident occurred the defender was taking all reasonable care of the horse, and that this unfortunate occurrence was not attributable to any carelessness or neglect upon his part.

It has, however, been urged by the defender as accounting for the accident that the horse was suffering from a chronic weakness of the forearm, and that this weakness was known both to the pursuer and to Mr Hamilton, the veterinary surgeon, from whom the pursuer purchased the horse, and who attended him for lameness shortly after the pursuer bought him. On this matter Mr Bain in cross-examination says—[*His Lordship here read the passage from the evidence of the pursuer above quoted*]; and Mr Hamilton's account of what he did for the horse is as follows—[*His Lordship read the passage from Mr Hamilton's evidence quoted above*]. Now, we have in addition to this the evidence of the pursuer's brother Donald, who was well acquainted with the horse, and who tells us that it sometimes went lame from bad shoeing. He says—[*His Lordship here read the passage from Donald Bain's evidence quoted above*]; and we have also the account given by Cran, the horse dealer, who says—"I had seen the horse before, and I thought he had been what we call 'junked' in the fore—that is, the muscles strained. It was not a slipped shoulder. It was just general weakness of the fore parts." Now, in the face of all this evidence it is not possible to doubt that this horse had a weakness of the fore parts, and that he had also at various times suffered from the effects of bad shoeing, an evil which if repeated is certain to leave permanent bad effects. It being clear, then, that this horse had a weakness of the fore parts, and also that it had on various occasions gone lame from bad shoeing, I think we have in these two circumstances quite sufficient to account for the horse falling in the manner described by the defender and his friend, and I do not think that we require in the present case to consider further the question of *onus*, nor to call upon the defender (in order that he may escape liability) to show exactly how this accident occurred.

While, therefore, I agree with the Sheriff-Substitute and the Sheriff that this is a narrow case, I am not prepared to adhere to their interlocutors, as I think that the defender has shown that he exercised reasonable care in the use of this horse, and that the accident was not caused by his fault.

Lord Mure—I agree in the result arrived at by your Lordship, and for the reasons stated. It is a matter of common experience that in spite of every care which can be taken of them, horses do sometimes come down, although it is not possible satisfactorily to say why. The Sheriffs both give it as their opinion upon the evidence that the defender at the moment of the accident was driving carefully, and yet they both decide against him, and so make him responsible for what has taken place. I agree with what your Lordship has said, that this is a very narrow case,

but looking to what was known about this horse both by the pursuer and by Hamilton as to the weakness in his forearm, and also as to what was stated by the pursuer's brother Donald about his going lame occasionally when he was not carefully shod, I think we have in these two causes, or in one or other of them, sufficient to explain the accident. The probability is that the horse had a sudden attack of weakness, which would quite account for his falling in the manner described by the defender. Upon these grounds I agree with your Lordship that the interlocutors of the Sheriff-Substitute and of the Sheriff ought to be recalled.

Lord Shand—As regards the law applicable to a case like the present I think that the Sheriff-Substitute has laid that down very clearly; the *onus* is undoubtedly on the borrower to show that the injury was not caused by carelessness. The question therefore which we have to determine is, did the defender in driving this horse use all reasonable care? The Sheriff-Substitute thinks that the defender has not succeeded in showing that he did so, but I am of the opinion expressed by your Lordships. Both the defender and his friend agree in saying that at the time of the accident the horse was being carefully driven, and with a tight rein, while the condition of the horse showed that he had not been driven too fast. When the horse stumbled and fell no stone could be discovered on the road to account for the accident, and yet the Sheriffs have both found that reasonable care was not used by the defender when he was driving. To my mind the evidence does not support this finding, and I think the reasonable inference to be drawn from it is that the accident was caused partly from the chronic weakness from which it suffered, and partly also from bad shoeing. It is to be kept in mind also that this horse was in the habit of being run in a four-wheeled machine, while on the day of the accident he had, with the pursuer's knowledge, been put into a two-wheeled cart. I therefore agree with your Lordships in thinking that we ought to reverse the interlocutor appealed against.

Lord Adam—I agree with your Lordship that when an article, or a horse, is borrowed in good condition and is returned damaged, the *onus* is certainly on the borrower to show that he used all reasonable care in the use of the article lent, but it goes no further. That being so, the question comes to be, whether it is proved that the defender here took all reasonable care of this horse? If we believe the defender and his friend every care was taken of this animal, and as there is no suggestion that they are not to be believed, the defender ought, in my opinion, to be assoilzied. I do not think that it falls upon him to prove the specific cause which occasioned the loss, seeing that he has shown that he satisfied us that he used all reasonable care. No stone could be found upon the road, or in the horse's foot, to occasion his falling, but from the evidence we know enough of him to see how this accident might have and probably did occur.

The Court recalled the interlocutor appealed against, and found that the defender had proved that he observed reasonable care in using the horse, and that the accident and injury were not caused by the fault of the defender, and therefore assoilzied the defender.

Counsel for the Appellant—Guthrie Smith—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for the Respondent—Vary Campbell—Salvesen. Agent—W. R. Patrick, Solicitor.

Friday, December 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HAMILTON *v.* HARDIE AND OTHERS (GAVIN HARDIE'S EXECUTORS).

Executor—Confirmation—Domicile—Confirmation of Executors Act 1858 (21 *and* 22 *Vict. c.* 56), *sec.* 9—*Sheriff Courts* (*Scotland*) *Act* 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 41.

The Sheriff Courts Act 1876, sec. 41, *inter alia*, provides that where it is desired to include in the personal estate of anyone dying domiciled in Scotland personal estate situated in England, the fact that a deceased person died domiciled in Scotland "shall be set forth in the affidavit to the inventory, and it being so set forth therein, shall be sufficient warrant for the sheriff-clerk to insert in the confirmation, or to note thereon, and to sign a statement, that the deceased died domiciled in Scotland, and such a statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland."

A testator died in England possessed of personal property both in England and Scotland. The executors nominated by his settlement, which was in Scottish form and *ex facie* valid, declared that he died domiciled in Scotland, and obtained confirmation from the commissary. Confirmation was opposed by a person who claimed to be one of the next-of-kin, and who averred that the deceased died domiciled in England; that the settlement had been procured from him under constraint, and made no provision for her, although for eighteen years before his death he had allowed her an annuity of £500; and that confirmation in England would facilitate the action which she intended to take to have the settlement set aside. No allegation of impecuniosity was made against the trustees, and it was not suggested that the estate would suffer by their administration. In an appeal, *held* that in view of the provisions of the statute warrant to issue confirmation had been properly granted, and that no sufficient reasons had been alleged for staying confirmation.

The Confirmation of Executors Act 1858, sec. 9, provides—"From and after the date hereof it shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland any personal estate or effects of the deceased situated in England or in Ireland, or both: Provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by

his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile." . . . .

The Sheriff Courts Act 1876, sec. 41, provides that "where, under the provisions of the ninth and subsequent sections of the Confirmation of Executors Act 1858, it shall be desired to include in the inventory of the personal estate of any person dying domiciled in Scotland personal estate situated in England or Ireland, it shall not be necessary to have a special proceeding before the sheriff with the view to his pronouncing therein an interlocutor finding that the deceased died domiciled in Scotland. That fact shall be set forth in the affidavit to the inventory, and it being so set forth therein shall be sufficient warrant for the sheriff-clerk to insert in the confirmation, or to note thereon, and sign a statement, that the deceased died domiciled in Scotland, and such statement shall have the same effect as a certified copy interlocutor finding that the deceased person died domiciled in Scotland." . . . .

Gavin Hardie of Lancefield, Lanarkshire, died at Ealing, near London, on 25th May 1888, predeceased by his wife and children. He executed a general disposition and deed of settlement on 24th February 1888, which was prepared by a Scottish conveyancer, and was executed in Scottish form. As the deed was signed at Ealing, it was, as an additional solemnity, also attested in English form. By it he nominated and appointed Gordon Kenmure Hardie, and certain others, his executors, who thereafter made up an inventory of the deceased's personal estate, and applied to the Sheriff-Substitute of Lanarkshire for confirmation in common form.

Miss Augusta Hamilton, Kensington Gardens, London, who claimed to be one of the next-of-kin of the deceased, lodged a caveat in the Sheriff Court of Lanarkshire at Glasgow, craving that any application for the appointment of executors to the deceased should be intimated to her.

The Sheriff ordered the caveator to lodge objections, and the executors answers thereto.

The objector averred that the testator about 1852 executed a will in English form, which conferred substantial benefits upon her, and which was not revoked or altered until the making of the settlement now founded on, and that she believed this will was in existence; that in 1882 the testator, who was advanced in years and in delicate health, went to visit Mr G. K. Hardie, who detained him at his house, obtained influence and control over him, and thereafter prevented him meeting his relatives and friends; that while in a state of testamentary incapacity the present settlement was procured from him, in which the objector was completely ignored and unprovided for; that for the last eighteen years the testator had allowed the objector's mother £480 per annum, and herself £90 per annum; that over £20,000 of the inventory was situated in England, where the testator had his domicile.

The executors denied that the testator had not a Scottish domicile, or that he was in any way feeble or incapable of managing his affairs when the settlement in question was executed. They averred that at the time of his death he was domiciled in Lanarkshire. They denied the various other allegations of the objector, with the exception of the allowance given by the testator to her and her mother, which they alleged to be entirely voluntary on the testator's part.

The objector pleaded, *inter alia*—"(2) The testator having been domiciled for many years in England, and upwards of four-fifths of his moveable estate being there, the title of the trustees should have been confirmed there. (4) The application for confirmation in this Court was incompetent, in respect that the deceased did not die domiciled in the county of Lanark, and in respect that Edinburgh is the only Court in which confirmation is competent when the deceased dies domiciled furth of Scotland."

The executors pleaded, *inter alia*—"(3) The deceased being at the time of his death domiciled in the county of Lanark, the respondents, as executors foresaid, are entitled to apply for confirmation in this Court."

On 20th July 1888 the Sheriff-Substitute (Spens) granted warrant to the Clerk of Court to issue confirmation in favour of the executors-nominate of the deceased Gavin Hardie under his deed of settlement of 24th February 1888.

"*Note.*—The deed of settlement of Gavin Hardie is executed in the Scottish form, and is *ex facie* valid. In it the deceased describes himself as of Lancefield, his origin is Scottish, and the bulk of his property appears to be in Scotland. The objector does not appear to be one of the next-of-kin, and she has therefore no title or interest to oppose confirmation. In these circumstances I see no reason for refusing to grant warrant to confirm the executors-nominate."

The objector appealed to the Court of Session, and argued—That looking to the very prolonged absence of the testator from Scotland she was entitled to have some inquiry instituted as to where his domicile really was. The Sheriff had decided this on the affidavit without any inquiry. The objector was one of the next-of-kin of the deceased. She was not a competitor for the office of executor. Looking to the amount of the estate as per inventory situated in England, the inventory should be returned there. Besides, English procedure was, in the initial stages, more favourable for the appellant, as certain pleas could be stated for her in England which could not be advanced here—Williams on Executors, p. 342; Alexander's Com. Prac., p. 1; Sheriff Court (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 41.

The respondents argued that the testator had never lost his Scottish domicile; the bulk of his money was in Scotland, his settlement was in Scottish form, and his executors were Scotsmen—*Graham* v. *Bannerman*, February 28, 1822, 1 Sh. 339. The appellant had not made out any good case for staying confirmation, which was only an administrative title. All her rights were fully preserved to her, and she could bring a reduction of the settlement if so advised.

At advising—

Lord President—The respondents in this appeal are the executors of the late Mr Gavin Hardie of Lancefield, who were nominated in a deed of settlement executed by him on 24th February of the present year. The deed, though executed at Ealing, near London, was drawn by a Scottish conveyancer, and it was executed in

Scottish form, but it was also attested in English form according to the law of the place of signing, which was in the circumstances a very proper proceeding. The application for confirmation was made to the Sheriff of Lanarkshire under the authority of the Confirmation of Executors Act 1858, and especially sec. 9 there—[*His Lordship here read the section quoted above*]. Now, that statute, so far as regards the finding by the Sheriff of the domicile of the deceased, has been to some extent altered by the Sheriff Court Act of 1876, which by its 41st section provides as follows—[*His Lordship here read the section above quoted*]. Now, whatever one may think of the expediency of the provisions of this Act we are bound to give effect to them. The language of the statute is somewhat loose, but it seems to imply that the facts set forth in the affidavit and inventory are to be a sufficient warrant for the Sheriff-clerk inserting in the confirmation that the deceased died domiciled in Scotland, and the Sheriff-clerk has in the present case proceeded accordingly. The appellant, however, appeared and opposed the confirmation upon various grounds. She says that she is one of the next-of-kin of the deceased, and that there was a previous will under which she took a considerable benefit, but that by the present will she is deprived of that benefit, and that the present will was obtained from the deceased when he was incapable of managing his affairs. She further avers that the testator was not a domiciled Scotsman at the date of his death, and that as a large part of the testator's moveable property included in the inventory is situated in England the inventory should have been returned there. But the will is *ex facie* valid, and although the appellant says it is reducible on the ground of incapacity, yet this application for confirmation has now been going on for six months, and nothing has been done by the appellant in the way of setting aside this will.

In these circumstances the question comes to be, whether we can, on the averments made by the appellant, stop this confirmation, and I can only say that I see no grounds for doing so. The averments which have been made with regard to the domicile of the testator are extremely vague, and as we had occasion to observe on a somewhat recent occasion, the allegation which it would be necessary to make in order to stop confirmation would be, not that the testator had at the date of his death an English domicile, but rather that the testator had actually changed his domicile, and the evidence of such a change would require to be both clear and distinct.

In the present case I cannot see any sufficient ground for our interference with the course of this confirmation, especially as there is no allegation of impecuniosity against these executors, nor is there any suggestion that this estate can in any way suffer by being administered by the respondents. It was urged that the respondents are not domiciled Scotsmen, but by being confirmed executors to a domiciled Scotsman they will be under the jurisdiction of this Court.

Upon these grounds therefore I am for adhering to what the commissary has done.

Lord Mure—I am of the same opinion. What the appellant wishes us to decide is, that it is incompetent on her averments for the executors-nominate to take out confirmation in Scotland, but that they ought to be ordained to proceed to the English Courts as more convenient for the appellant, because certain pleas could be more effectively stated for her there than they could be here. It does not, however, appear to me that any sufficient grounds have been stated to warrant us in staying this confirmation, and I am therefore not disposed to interfere with what the commissary in the circumstances has done.

Lord Shand—The course which the appellant proposes here is certainly somewhat of a novelty, as she seeks to be allowed to lead proof of the domicile of the testator with a view of determining in what part of the United Kingdom confirmation is to take place. Now, all that confirmation gives is a title to administer the deceased's estate, and to my mind no good or sufficient ground has been suggested why the parties who have been nominated should not be allowed to act. But it was further urged that this lady would obtain some incidental advantage if these confirmation proceedings were allowed to go on in England, because fuller evidence was there admissible in the initiatory stages of the proceeding.

In the present case everything has been done in proper form, and the deed in question is *ex facie* regular and formal. But it was urged that by statute executors-nominate are not bound to find caution. Now, if at any time a serious objection was taken to a will, and an action of reduction was commenced, and it was urged that the executors-nominate were impecunious, and might squander the estate, then upon such averments the Court might in its discretion stop confirmation for the purpose of protecting the estate. But all that is suggested here is, that this lady might get certain questions in which she is interested more cheaply decided in England than she can do in this country. The only averment of the appellant which appeared to be of any importance was that for eighteen years prior to the deceased's death he was allowing her and her daughter an annuity of £500, and yet in his later deed he makes not the slightest provision for her. This is somewhat peculiar, and may require some explanation, but I cannot see in it, or in any of the other averments of the appellants, anything to warrant us in refusing to these executors an administrative title.

Lord Adam concurred.

The Court refused the appeal.

Counsel for the Appellant—Sir C. Pearson—Baxter. Agent—Andrew Fleming, S.S.C.

Counsel for the Respondents — J. A. Reid. Agents—Murray, Beith, & Murray, W.S.

Tuesday, December 11.

SECOND DIVISION.

[Lord Fraser, Ordinary.

PIGGOTT *v.* THE GOVERNORS OF THE FETTES TRUST.

Reparation—Public School—Dismissal of Foundationer by Headmaster—Damnum sine injuria—*Educational Endowments (Scotland) Act* 1882 (*45 and 46 Vict. c. 59*), *sec.* 14.

The rules of a public college, issued under the Educational Endowments (Scotland) Act 1882, provided, *inter alia*—"Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College. Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject."

A foundationer of the College suffered from a disease, and the Headmaster, believing, on medical advice, that it was leprosy, and was contagious, dismissed him from the College, and forthwith laid a report before the Governors, who approved of the proceedings taken. In an action by the foundationer against the Governors of the College, *held* that the master had acted under the rules, and that there being no averment of *mala fides* the action could not be maintained.

Under the Educational Endowments (Scotland) Act 1882 a scheme had been issued for the administration of Fettes College, and approved by Order of Her Majesty in Council, 3rd April 1886.

The 45th rule or section provides—"Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College. Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject."

In July 1884 Michael Christison Piggott was admitted as a scholar on the foundation of Fettes College, Edinburgh. He thereby became entitled to free board and education in said College for six years from the date of his admission, the estimated value of which was about £130 per annum. Upon 19th September he entered the College, and resided continuously there until 7th April 1887. Shortly after his entrance he became affected with a disorder, which was declared to be leprosy by the medical officers of the College, who, however, did not consider it necessary for the pursuer to leave the College at the time.

In the spring of 1887, however, eczema broke out in the school, and when this happened the medical officers considered it no longer safe to allow the boy to remain at school with the other boys, because it was thought possible that he might communicate the leprosy to them through the medium of the other skin disease. They therefore informed the Headmaster of the state of the facts, and the Headmaster summarily dismissed him from the College.

Piggott raised this action against the Governors of Fettes College. He averred that he had been examined by the medical officers of the College before his entrance. That twice before he entered the College he had been attacked by suppurations in his legs, which ran for some time and healed, leaving white cicatrices. He denied that his complaint was leprosy, and that there was danger to the other boys; and he stated that the Headmaster, by compelling him to leave the College, and by forfeiting his foundation, had inflicted on him a very serious injury. He had been deprived of board and education for the remainder of the period of six years for which he had been admitted—namely, about three and a-half years, and had had to commence business with an imperfect education.

He pleaded—"(1) The defenders being bound in terms of the contract libelled to provide the pursuer with board and education for a period of six years, and having failed to implement said contract, they are liable to compensate the pursuer for the loss thereby sustained."

The defenders pleaded—"(2) By the terms of section 45 of the scheme condescended on, the Headmaster was entitled to dismiss the pursuer."

Upon 24th November 1888 the Lord Ordinary (Fraser) assoilzied the defenders and found no expenses due to either party.

"*Opinion.*—It is not necessary to define very strictly what is the nature of the relationship between the Governors and youths whom the former have elected to the foundations of Fettes College. It is contended by the pursuer that by his admission to the College as a foundationer a contract was entered into between him and the Governors which the latter could not terminate at their pleasure. Such a case is not presented for decision at present; and no opinion is therefore called for in regard to it. The pursuer of this action was admitted to the benefit of a foundation in September 1884. A scheme for the administration of the Fettes Endowment was approved, by Order of Her Majesty in Council, on the 3rd of April 1886. This scheme is applicable to all persons who had any right or privilege under the governing bodies in charge of Educational Endowments in Scotland, such as the Fettes College, at the time when the Act 45 and 46 Vict. cap. 59, was passed—See section 14. Therefore any rules laid down in that scheme are applicable to the present case. The 45th rule or section is as follows:—'Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College. Any boy may also be dismissed sum-

marily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject.' This is not expressed with that clearness and precision that might have been expected in the circumstances of this endowment. The Lord Ordinary puts a different construction upon that rule from that put upon it by the Headmaster of Fettes College. It is stated by the defenders upon record that the Headmaster told the pursuer to leave the Institution for the reasons assigned in the record. This proceeding on the part of the Headmaster was *ultra vires*. The 45th rule of the scheme gave him no authority to order the pursuer away from the Institution. The only persons who could do so were the Governors, acting, no doubt, upon the report of the Headmaster. The first part of the rule states that 'any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for continued idleness or breach of discipline.' And then the rule proceeds to say that 'any boy may also be dismissed summarily for' two causes mentioned—viz., immorality, or whenever there are circumstances rendering it 'necessary in the interests of the school.' Dismissed by whom? Clearly by the same parties as were to dismiss according to the first part of the rule, viz., the Governors. No doubt the circumstances (other than immorality) must be according to the judgment of the headmaster; but the ultimate judges of the matter are the Governors, and the rule concludes with these words:—'In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject.' The rule is very inartistically expressed, but the Lord Ordinary cannot hold it to mean that the headmaster should have the absolute power of dismissal whenever he considered that the interests of the College required that a particular boy should be sent away. It would be a very extraordinary thing to confer such a power as this on any headmaster, when the first part of the rule limits the discretion of the Governors to dismissal for continual idleness and breach of discipline. The ambiguity arises from not embodying in one sentence the statement that they could dismiss for idleness, breach of discipline, and when it was required for the interest of the school.

"But practically the Governors have made the dismissal in the present case according to the statements in the record. All difficulty is obviated upon this head by the Governors coming forward and adopting and defending the action of the Headmaster. They do not plead that the Headmaster acted without their authority or subsequent approval, and therefore that they are not liable in damages. They adopt what he has done, and the Lord Ordinary is willing to hold that this subsequent adoption is equivalent to their approval of the conduct of the Headmaster as if it had been given before the dismissal of the pursuer.

"Now, the only other point in the case is, whether or not, assuming that there was no absolute right of dismissal at pleasure, was there sufficient ground in the circumstances of this case to bring it within rule 45? The boy was ill with leprosy when he entered the Institution, although at that time the disease remained dormant. It broke out at intervals afterwards, and the Headmaster said nothing about it, not being willing to do anything that might blight the prospects of the pursuer as a student in the College. This was acting with all kindness for the youth, and no one can blame the Headmaster for taking a course at once considerate and humane. But, then, at the same that the pursuer was dismissed, his leprosy again came to the front; and there being an epidemic of other disease among the boys, it was absolutely necessary to take action so as to prevent the whole of them becoming lepers by contagion. A learned argument was submitted to the Lord Ordinary by the pursuer's counsel to the effect that leprosy was not contagious. Upon this matter the Lord Ordinary is incapable of pronouncing any opinion; but the existence of such a disease in the midst of a community of boys like that at Fettes College was calculated to create such terror as to impair the usefulness of the Institution, and therefore the Headmaster (approved of afterwards by the Governors) was justified in sending the pursuer away. But here again the Lord Ordinary must add that he is not reviewing the action of the Governors or the Headmaster upon the merits. Their *bona fides* is not impugned. They had a right to dismiss a foundationer when they thought it was 'necessary in the interests of the school.' Having come to the conclusion that it was necessary, no court of law can, in the absence of an averment of want of *bona fides*, interfere with their judgment."

The pursuer reclaimed, and argued—The Lord Ordinary was right in his reading of the rule, but it was not a good defence to say that the Governors had adopted the action of the Headmaster. The rule provided certain procedure before a boy was dismissed, and if that was omitted the boy was deprived of a safeguard which had been given him. The pursuer was a foundationer, and the 45th rule expressly stated that a foundationer was not to be deprived of the benefits of the College except by the action of the Governors in dismissing him. Even allowing that the Headmaster acted in *bona fide*, and no allegation of malice or personal ill-feeling was made against either him or the Governors, this was not a case for his discretion, and he should have awaited the result of a report to the Governors. All that was asked was damages. There was no plea for reinstatement of the pursuer in the College. The grounds on which the pursuer asked for a proof were that there was no sufficient reason for his dismissal in 1887. It was known to the Headmaster and the medical men of the College so long back as 1884 that the pursuer suffered from this skin disease; nothing was said about it, and no harm had resulted from it. Even if it was leprosy, that disease was not contagious—*Fitzgerald* v. *Northcote and Another*, Michaelmas Term, 1865, 4 Foster and Fin. 656; *Hutt and Another* v. *The Governors of Haileybury College*, June 19, 1888, 4 Time's Rep. 623.

Counsel for the respondents were not called upon.

At advising—

Lord Justice-Clerk—There is no doubt that

this case is an unfortunate one. The pursuer seems to have been able by his exertions to entitle himself to a place upon the foundation of Fettes College, but he has not been able to obtain the full benefits of the institution. It appears upon the record, upon the pursuer's own admission, that he was afflicted from time to time with running suppurations in his legs which might or might not be dangerous to the other boys at the school, but the fact that he had these suppurations is unquestionable. These suppurations once more became active. In these circumstances the Headmaster finds that eczema had broken out in the school, and he came to the conclusion that he could not allow the pursuer to remain, and accordingly removed him from the school. It is not alleged that he acted in this manner otherwise than upon a report from the medical men of the College that that was the proper course to take. The facts being that we have here the pursuer's admission that these suppurations existed, and further, that the Headmaster acted upon the advice of those whose advice he was bound to follow, what is the legal conclusion? If the Headmaster was so advised, and if he had the power, then it was his duty to remove him from the school.

In respect to the Headmaster having the power, the Lord Ordinary says that in his opinion he had not the power, but that his only duty was to make a report upon the matter to the Governors, and that the Governors, after taking the report into consideration, might have dismissed the pursuer. I think that that view of the Headmaster's duty under the 45th rule is erroneous. What is the meaning of the words—"Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school. In all such cases the Headmaster shall forthwith lay before the Governors a full report upon the subject." This plainly means that the right and duty of exercising authority under this part of the 45th rule rests upon the Headmaster as being the only person who can deal summarily with the matter, and that it is not meant that he should first of all lay a report before the Governors of the College in order that they might take action. After he has exercised his authority, and ordered the boy to be removed from the school, he must then lay a report before the Governors in order that they may take his action under review for approval or condemnation. But the dismissal is his own act, and is done summarily, and here the authority was exercised because the master considered it for the benefit of the whole school. If that is so, I do not think it necessary that I should consider the suggestion in the Lord Ordinary's note that the Governors had homologated the action of the Headmaster. The pursuer has not put foward any case on the ground that the Headmaster was actuated by *mala fides*, and on the whole matter I do not think that it would be right for us to send this case to a jury for their consideration whether the Headmaster had good grounds for exercising his discretion or not.

Lord Young—I am of the same opinion, and I agree that the construction of the 45th rule which your Lordship has expressed is the right one, and therefore I think that the Lord Ordinary's construction of that paragraph is erroneous. His Lordship does not think that this rule is expressed with that clearness and precision that might have been expected in the circumstances, and he puts a different construction upon it from that put by the Headmaster. I confess I do not think that it is wanting in clearness and precision, and I agree with the construction which the Headmaster puts upon it. The rule is divided into two parts—"Any boy shall be liable, at the discretion of the Governors, to dismissal and to forfeiture of any benefit derived from the endowment for such continued idleness or breach of discipline as shall on report from the headmaster disqualify him, in the opinion of the Governors, for continuing a member of the College." That is the first part of the rule, and by it the headmaster may report to the Governors that a boy has been guilty of continued idleness or breach of discipline, and that he is of opinion he ought to be dismissed, and if the Governors concur in this opinion they may dismiss him. The other part of the clause is in these words—"Any boy may also be dismissed summarily for immorality, or whenever, in the judgment of the headmaster, summary dismissal is necessary in the interests of the school." There is no reference to the Governors there. The dismissal is to be summary, and whenever it shall seem right to the headmaster in the exercise of his judgment, and in that case the report he is to make is provided for in these words—"In all such cases the headmaster shall forthwith lay before the Governors a full report upon the subject." That is, he shall make another and a different report from that provided for by the first part of the clause.

This is an action against the Governors of Fettes College for a breach of their contract with the pursuer. It is not a personal action at all, and that is quite plainly stated by the pursuer in his first plea-in-law—"The defenders being bound, in terms of the contract libelled, to provide the pursuer with board and education for a period of six years, and having failed to implement said contract, they are liable to compensate the pursuer for the loss thereby sustained." Any contract between him and the defenders must have been made according to the statutory scheme for the government of the College, and his complaint is that he has been summarily dismissed by the Headmaster before the time had expired for which the contract was to subsist, and that this action was approved of by the Governors of the College, because they erroneously believed that the pursuer was suffering from a disease which made his presence at the College dangerous to the other boys. I do not think that that is a relevant ground for an action of damages at all. It might be a different thing if there was any personal charge against the Headmaster of malice in acting as he did, but I do not see any relevant charge here at all. The case was taken on the footing that the Headmaster was acting conscientiously and exercising his judgment to the best of his ability. We must take it as the fact that the medical officers of the school had considered the case, and had reported to him that it was no longer safe as regarded the health of the other boys that the pursuer should be allowed to remain. It was upon this report that the master acted.

It was said that a legal wrong had been done

to the pursuer if upon a trial he could satisfy a jury that the doctors had given a wrong opinion upon his case. But such a contention would lead to this, that every headmaster would be subjected to claims for damages by boys who had been dismissed in an action in which the question at issue was whether a medical opinion was correct or not. I cannot take that as a relevant ground of action at all, even although there may have been a serious mistake on the part of the medical men. I think it would be a mere farce to send this case to a jury upon the issue for the pursuer whether the doctors of Fettes College had given a wrong medical opinion or not. I think the Headmaster acted according to the contract made with the pursuer. He kept him for a short time, and when he was found to be suffering from a highly infectious disorder he dismissed the boy in the interests of the school, and laid a report of what he had done before the Governors, who approved of his proceedings. There is no ground of action here.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court adhered.

Counsel for the Appellant—Jameson—Orr. Agent—J. D. Macaulay, S.S.C.

Counsel for Respondents—Glosg—Maconochie. Agents—J. & F. Anderson, W.S.

Wednesday, December 12.

FIRST DIVISION.

STEEL'S TRUSTEES *v.* STEEL AND OTHERS.

Succession—Vesting—Fee and Liferent—Clause of Survivorship.

A testator in his trust-disposition and settlement, after providing an annuity to his wife, directed his trustees to hold the fee of the subjects liferented by his wife, and the whole residue of his estate, for behoof of his children in certain proportions. The provisions in favour of his sons he directed should be payable to them as follows—£2000 to each twelve months after his death, and the remainder twelve months after the death of his wife. The provisions to his daughters were to be held for them in liferent, and for their children in fee, and failing any of his daughters without issue, the share of such deceaser was to form part of the residue of his estate. He further provided that "in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid." The testator died in 1841, and his wife in 1852. A son died without issue in 1861, and three daughters died thereafter without issue. *Held* that the testamentary trustees of the said son had no claim to any part of the fee of the shares liferented by the three daughters whom he predeceased, in respect that the fee of the shares liferented by the daughters did not vest in the sons till the death of the liferentrices.

Observations per Lord President on *Haldane's Trustees* v. *Murphy*, 9 R. 269.

By his trust-disposition and settlement, dated 25th December 1833, Robert Steel, merchant in Port-Glasgow, conveyed his whole estate, heritable and moveable, to trustees for certain purposes. After providing for payment of his debts, and bequeathing a liferent of his house and furniture, and an annuity of £400 to his wife and some small legacies, the testator in the sixth place appointed his trustees to hold the fee of the subjects liferented by his wife, and the whole residue of his estates, heritable and moveable, for behoof of the lawful children procreated of his body, in the following proportions, and subject, *inter alia*, to the following declarations and provisions:—"For and on account of each of my sons four shares or portions, and for and on account of each of my daughters three shares or portions of said residue—that is to say, for every sum of four pounds sterling set apart for a son, a sum of three pounds sterling shall be set apart for a daughter, . . . and I provide and appoint that the provisions hereby made in favour of my sons shall be payable to them as follows, viz., the sum of two thousand pounds sterling, subject to the eventual deduction after mentioned, to each of my said sons upon the expiry of twelve months after my death, and the remainder upon the expiry of twelve months after their mother's decease . . . and I provide and appoint that the provisions hereby made on account of my daughters shall be held by my said trustees for behoof of my said daughters respectively in liferent for their liferent alimentary use allenarly of the annual proceeds of the capital of the said provisions, . . . and for behoof of the heirs of the bodies of each of my said daughters respectively, but still subject to the said powers and faculties conferred on my trustees afterwritten, in such proportions and under such conditions and restrictions as they, my said daughters respectively, shall appoint by a writing under their hands, which failing, equally among them in fee, and failing any of my said daughters without heirs of her body, then the share of such deceaser or the residue thereof, so far as not disposed of under or by virtue of these presents, shall form part of the residue of my estate . . . and I provide and appoint that in case of the decease of any of my sons before receiving payment of their provisions, leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate divisible as aforesaid."

By a codicil dated 28th July 1840 the testator recalled the provisions made by him to his son Robert in his trust-disposition and settlement, and directed his trustees to hold and pay the same to his other children proportionally according to the other shares or portions of the residue of his estate before destined to them, and under the same conditions. The codicil also contained the following provisions—"Further, I declare that

my son William shall only be entitled to call up one thousand pounds upon the expiry of twelve months after my death, and the remainder shall lie with my trustees until his whole provisions are payable . . . Further, should any of my children interested die upwards of twelve months after the death of my wife without leaving lawful issue, and any part of the shares of my estates before destined to them and their issue in that event devolve upon my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient."

After the testator's death the children of the testator other than his son Robert, by deed of declaration and renunciation renounced the provisions to which they became entitled in respect of the recal and direction contained in the codicil, and gave full power to the testator's trustees to carry the whole directions of the trust-disposition and settlement, as regarded the provisions of his son Robert Steel, into full and complete effect.

The testator died in 1841, and his wife in 1852. They were survived by the following children—(1) James Steel, (2) Robert Steel, (3) William Steel, (4) Mrs Elizabeth Steel or Johnstone, (5) Mrs Jane Steel or Willan, (6) Catherine Steel, (7) Margaret Steel.

William Steel died unmarried on 27th April 1861, leaving a trust-disposition and settlement by which he directed the residue of his estate to be divided equally among his sisters and their respective heirs, executors, and representatives whomsoever.

Mrs Johnstone died without issue on 23rd October 1875.

Mrs Willan died on 8th June 1878 survived by her husband and several children. She left a settlement under which her husband was sole executor, and her children were entitled to equal shares of her estate.

Catherine Steel died unmarried on 24th March 1885, and Margaret Steel died unmarried on 12th April 1884. On Mrs Johnstone's death in 1875 the share which had been retained for her was dealt with by her father's testamentary trustees upon the assumption that no part thereof had vested in the deceased William Steel, and was therefore divided by them in the following manner, viz., 4-17ths each thereof were paid to her two surviving brothers, who granted a formal discharge therefor, dated 1st and 3rd June, and registered in the Books of Council and Session 7th June 1876, and 3-17ths each thereof were added to the shares of her three surviving sisters. On Miss Catherine Steel's death in 1883 a partial division of her share was made on the same assumption, but no discharges were granted.

A question having arisen with regard to the right to the fee of the shares of the residue which were liferented by Mrs Johnstone and Mrs Catherine and Margaret Steel, which with accrued income amounted to upwards of £18,000, including what had already been paid, a Special Case was presented for the judgment of the Court. The first parties to the case were the testamentary trustees of Robert Steel; the second parties were his surviving children James Steel and Robert Steel; and the third parties were the husband and children of the deceased Mrs Willan, and the testamentary trustees of William Steel.

It was contended by the second parties that the division of the fee of Mrs Johnstone's share was rightly made, and that the said William Steel had not a vested right in any part of the fee of the shares of the testator's estate liferented by his said three sisters; that no part of the fee of said shares vested until the death of the liferentrices, and that accordingly the capital set free by their death should be divided among themselves and the family of the said Mrs Willan in the following proportions:—(*a*) James Steel, 4-11ths; (*b*) Robert Steel, 4-11ths; (*c*) The Rev. Robert Willan, the Rev. William Willan junior, and Miss Willan, 3-11ths equally between them.

It was contended by the third parties that the fee of the said shares liferented by the testator's said three daughters vested *a morte testatoris*, or at all events on the expiration of twelve months after the date of the death of the testator's widow, subject to defeasance in the event of the liferentrices leaving issue; that therefore the said William Steel at the date of his death had a vested interest in a part of the fee of the shares of the testator's estate liferented by his said three daughters, subject to defeasance in the event of the said liferentrices leaving issue, which event never occurred; and that the capital of said shares should be divided as follows—(*a*) James Steel, 4-15ths; (*b*) Robert Steel, 4-15ths; (*c*) the testamentary trustees of William Steel, 4-15ths; (*d*) Mrs Willan's family equally between them, 3-15ths.

The question submitted to the Court was—"Did a part of the fee of the shares of the testator's estate liferented by Mrs Johnstone, Miss Catherine Steel, and Miss Margaret Steel vest in the said William Steel at the testator's death, or otherwise at a period prior to the death of the said William Steel, subject to defeasance in the event of the said liferentrices leaving issue, or was vesting postponed till the death of the said liferentrices respectively?"

Argued for the second parties—1. There was no vesting of the fee of the shares liferented by the daughters in the sons till the death of the liferentrices without issue. That was clearly the result of the clause, which provided that the share of a son who died without issue before receiving payment of his provisions should, so far as unpaid, fall back into residue. That was equivalent to a clause of survivorship, and provided for a destination-over of the fee of the shares liferented to the residuary legatees who might survive any of the liferentrices dying without issue. "Provisions" in that clause must mean all provisions to sons, not merely the original or primary provisions to which they were entitled. Otherwise, on the argument of the other side, there would be nothing to postpone vesting as regarded the eventual provisions till twelve months after the testator's death. This would lead to the strange result that if a son died after the testator, but before the periods of payment specified in the deed, there would be no vesting in him of any part of the primary provisions, but there would be vesting of the eventual provisions, though these might not be payable till long after the periods of payment mentioned in the deed. The natural view was, that the fee of the shares liferented did not vest in the sons till the death of the liferentrices

without issue. 2. It might further be maintained, apart from the clause of survivorship, that the effect of a destination to A in liferent, and his issue in fee, whom failing to B in fee, was to suspend vesting in B till the death of A without issue. If that were sound there was no vesting in the sons of the shares in question till the death of the liferentrices—*Macalpine* v. *Studholme, &c.*, March 20, 1883, 10 R. 837; *Murray* v. *Gregory's Trustees*, January 21, 1887, 14 R. 368; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269, *per* Lord President, p. 278.

Argued for the third parties—1. The clause relied on by the second parties, rightly read, did not suspend vesting as to the shares liferented by the daughters. The question really turned on the meaning of "provisions" in that clause. It meant original provisions. That reading was supported by the manner in which the word was used in the previous clauses of the deed. "Before receiving payment" meant before the terms of payment mentioned in the deed. The testator contemplated that those of his sons who survived the periods of payment should have a vested right in the shares destined to them. If the clause of the deed referred to were read in the light of the codicil that view was strengthened. 2. The second proposition of the second parties was unsound. It was not necessary to say anything against the decision in *Bell* v. *Cheape*, 7 D. 614, or enter into the difficult questions in the case of *Haldane's Trustees*. There was nothing here at all analogous to *Bell* v. *Cheape*. There was no gift over to anyone by name. The effect of the provision here was no more than to bar intestacy. There was no question of invoking or calling in anyone at all. If a daughter died without issue her share was to form part of residue. The gift to a daughter was a contingent gift. The only thing to lift her share out of residue was her having children. That view is strengthened by the clause of giving, which contained a universal gift to children as a class in manner thereafter mentioned. In *Bell* v. *Cheape* there was a fresh gift *nominatim*. In *Taylor* v. *Gilbert* the gift was to certain members of a family, certain of whom failing, to certain persons who had got the original provisions. That was *a fortiori* of the present case, because here there was no gift *nominatim*, but the shares of the daughters were left in the residue, and therefore vested in the sons subject to defeasance—*Taylor* v. *Gilbert's Trustees*, November 8, 1887, 5 R. 49, and July 12, 1878 (H. of L.), 217; *Chalmer's Trustees*, March 16, 1882, 9 R. 743; *Snell's Trustees* v. *Morrison, &c.*, March 20, 1877, 4 R. 709.

At advising—

Lord President—The settlement of the late Robert Steel of Port-Glasgow disposed of the residue of his estate as follows:—(1) The whole fee of residue, including subjects liferented by his widow, is to be held by his trustees for behoof of his children in the proportions of four shares to each son and three shares to each daughter—that is to say, for every sum of £4 set apart for a son, a sum of £3 shall be set apart for a daughter. (2) The sons' provisions are to be payable to each of them to the extent of £2000 twelve months after the testator's death, and the remainder twelve months after the widow's death. (3) The daughters' shares are to be held by the trustees for the liferent alimentary use allenarly of the daughters, and for behoof of the heirs of the bodies of each of them respectively in fee, and failing any daughter without heirs of her body, the share of such deceaser shall form part of the residue of the testator's estate.

There were three sons and four daughters, all of whom seem to have been of full age at the date of the settlement in 1833. But one of the sons having incurred his father's displeasure is cut off from his share of the succession by a codicil in 1841, which also contains this provision—"Should any of my children interested die upwards of twelve months after the death of my wife without leaving lawful issue, and any part of the shares of my estates before destined to them and their issue in that event devolve upon my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient." It is obvious that "children" at the outset of this clause must mean "daughters," and that the phrase "two sons interested" is explained by the exclusion of one of the three sons by a previous clause of the same codicil.

The testator died in 1841 and the widow in 1852. The son William died in 1861 leaving no issue, and was survived by all his brothers and sisters. The other two sons still survive. The daughters are all dead, and only one of them, Jane (Mrs Willan), left issue.

In these circumstances, and but for the effect of a clause in the settlement to which I have not yet adverted, I should have little difficulty in holding that though William Steel died before any of his sisters, his testamentary disponees would be entitled, along with his surviving brothers or brother, to a share of the part of the residue set free by the death of those of his sisters who died without issue, on the ground that the whole residue vested in the sons on the death of the testator, or at all events twelve months after the death of the widow, subject only to defeasance in so far as the daughters left issue.

I think the result of all the cases on this subject may be summarised thus—Where a fund is settled on daughters of the testator for their liferent use allenarly, and their children, if any, in fee, whom failing to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last named person or persons will depend on these considerations, whether the person so called to the succession, if only one, was a known and existing individual at the death of the testator, or, if more than one, whether the persons so called were all of them known and existing at that date, or if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the liferenters or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event, which will determine who are the persons called, or the individuals composing the class are ascertained. But when the person or persons called are known, or the individuals composing the class are ascertained at the death of the tes-

tator, then the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters or any of them leaving issue.

There was a great division of opinion in the case of *Haldane's Trustees*, 9 R. 269, as to the construction of the settlement. But it appears to me that all the Judges, or almost all of them, assumed the soundness of the rule I have endeavoured to formulate. This is clearly shown in the opinion of Lord Moncreiff (Justice-Clerk), who was one of the majority. His Lordship puts the question thus—"Does the testatrix mean by 'my own nearest heirs,' those who are or may be 'my own nearest heirs' at her death, or those whom the trustees shall find to be 'my own nearest heirs in moveables,' when the obligation comes to be fulfilled. If the first of these interpretations is the sound one, it would raise a very strong probably a conclusive, presumption of the testator's intention that vesting was to take place at her own death, and if, on the other hand, the persons to whom the trustees are to pay the residue are those whom they shall find to be at the time of payment the nearest heirs of the testatrix, in moveables, it is equally clear that the right cannot vest till the period of payment comes."

I am anxious to make it clear that the cause of the dispute in *Haldane's Trustees*, and of the difference of opinion among the Judges, was not any doubt as to the legal principle applicable to such cases, but turned entirely on the words of the particular deed which fell to be construed, because I think there was in the arguments in this case some evidence that the import and effect of that previous case has not been thoroughly appreciated or understood.

In connection with the report of the same case I am desirous of correcting what appears to be a serious blunder in a paragraph of my own opinion, on p. 278. My words as reported are—"It cannot be disputed that if the residue of an estate is destined to A in liferent and his issue in fee, and failing his having issue, then on the expiry of the liferent to B no right vests in B till the death of the liferenter without issue. This was authoritatively settled in the case of *Bell* v. *Cheape*." Now, this as it stands is not sound law, and nothing of this kind was settled in *Bell* v. *Cheape*. But the blunder consists in this, that after the words "on the expiry of the liferent to B" there ought to be added, "and his heirs, executors, and assignees," which makes the proposition good law, and truly represents the judgment in *Bell* v. *Cheape*, for that judgment proceeded on the ground that B's heirs and executors were called as conditional institutes after B, and were entitled to succeed in place of B if he predeceased the death of the liferenter and the term of payment. I am not at all prepared to ascribe the occurrence of this blunder to the reporters, for my opinion was in writing, and I do not doubt that the omission of the words occurred in the transcription of the manuscript.

The provisions of Mr Steel's deed of settlement, so far as I have hitherto considered them, point to one conclusion only, that the sons took a vested interest in the whole residue of the estate *a morte testatoris*, subject only to defeasance in the event of the daughters leaving issue. But there is a clause in a later part of the deed which throws a new light altogether on the intentions of the testator. It provides and appoints "that in case of the decease of any of my sons before receiving payment of their provisions leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall back into and make part of the residue of my estate, divisible as aforesaid."

Both of the branches of this clause seem to me to be inconsistent with any vesting in the sons prior to the terms of payment of the different parts of their provisions, *i.e.*, of the residue. I do not of course construe the words "before receiving payment" as referring to the fact of payment being made, but only to the time when payment ought to be made, or, in other words, to the term or terms of payment specified in the deed.

But the plain meaning of the clause is, that if a son dies before the arrival of the term of payment of any part of his provision, that part falls to his issue, if he any has, as conditional institutes, and if he has no issue, then it falls back into the general residue of the testator's estate, and belongs to the residuary legatees who survive the term of payment.

The result, in my opinion, is that William Steel's testamentary disponees are entitled to take all that became payable to him twelve months after the testator's death, and all that became payable to him twelve months after the death of his mother, because he survived these terms, but they have no right or interest in any part of the residue, which became payable to the sons only after the said William Steel's death.

Lord Mure concurred.

Lord Shand—It seems to me that this case is not attended with any serious difficulty.

Several clauses of the deed of settlement and of the codicil have been referred to in the argument. So far as regards those contained in the codicil, they do not seem to me to have any bearing upon the question we have to determine. The question, I think, depends entirely upon the terms of the settlement itself. The provisions of that deed are as follows—In the first place, the testator provides a liferent of a part of his estate to his widow if she should survive him, and the fee of the subjects so liferented, and "the whole rest, residue, and remainder" of his estates he appointed his trustees to hold for behoof of his children in certain proportions, which have been already mentioned by your Lordship. There is therefore a provision of a liferent of a part of the estate, and a clear destination of the fee to the children in certain proportions.

In regard to the shares of the residue destined to daughters, it is provided that they shall have a mere liferent of them, but that in the event of their leaving children, the children shall take the fee of the shares liferented by their mothers respectively, and failing children, then that the share of each daughter shall fall back into residue —that is, shall belong to the sons, who accordingly have right in that case to an enlarged amount of the fee of the testator's estate. The only other provision which need be noticed is

the provision that the sons' shares shall be paid to them at certain fixed dates—part twelve months after the testator's death, and part twelve months after their mother's death should she be the survivor.

If these provisions stood alone I have no doubt that there would have been vesting of the fee *a morte testatoris* in the sons. For, so far as I have gone, the deed simply comes to this—and it is an ordinary case of testamentary provision—that there is a provision of a liferent to the testator's widow if she survive him, while the fee of the estate is to be held for the children, the daughters having a liferent only of their shares with a fee to their children, if any, and the sons having each a right of fee, which would be enlarged by the death of a daughter or daughters without issue.

The only element which it might be suggested would postpone vesting is the mention of certain dates of payment. But it is settled that that does not suspend vesting. Accordingly I have no doubt that the fee would have vested *a morte testatoris* unless the clause to which your Lordship last adverted had the effect of suspending vesting till the term of payment of each part of the provisions arrived. But I am equally clearly of opinion with your Lordship that the clause in question has that effect. The clause is as follows —"In case of the decease of any of my sons before receiving payment of their provisions" (which really means, as your Lordship has said, before the terms of payment), "leaving heirs of their bodies, the provisions of such deceasers, so far as unpaid to them, shall fall and devolve to the heirs of their bodies respectively in place of their parents, and in case of the decease of any of my sons before receiving payment of their provisions, without lawful issue, then the provisions of such deceasers, so far as unpaid, shall fall into and make part of the residue of my estate, divisible as aforesaid."

The question to be determined is, what is the meaning of the word "provisions" as occurring in that clause? and we have had an argument upon that point. The word occurs twice, and one thing is clear, that in both branches of the clause it must mean the same thing. On the one hand it has been maintained that the word "provisions" has a limited meaning, and refers to what I may call the primary provisions only, viz., the sons' immediate shares, which are payable twelve months after the death of the testator and twelve months after the death of his widow, and that the words are not to be extended further. If that be so, and the primary provisions only are to fall into residue in the event of a son predeceasing either of the terms of payment of his own share without issue, it follows that the provisions liferented by daughters would vest *a morte testatoris*. But that construction would lead to the anomalous result that if a son died before twelve months had elapsed after the death of his father or his mother without leaving issue, his share, so far as not due when he died, would drop into residue, but that the share of residue which would fall to him on the death of a sister, and which might not be payable till many years afterwards, would be held to have vested *a morte testatoris*. That is a construction which I cannot adopt. Accordingly, I think the word "provisions" in the clause now under consideration must be held to apply not only to what I have called the primary bequest, but to everything which fell to any of the sons under the deed, including what would come to them owing to the death of a sister without issue. I think that this is the natural meaning of the term, which is broad enough to cover all the benefits given to the sons. There is no reason for suggesting that one class of provisions or part of the residue should be in one position, and another part in a different position.

Accordingly, taking that view of the deed, and applying the term "provisions" to all parts of the residue, whether primary or eventual, given to the sons, I think there was no vesting in William Steel of any share of the daughters' provisions till each daughter died without issue, for the simple reason that in the case of any son predeceasing the term of payment without issue there was a destination-over of the share he would have taken had he survived, for the deed directed that such share was to fall into residue, and so be divisible among the other sons.

I have said that there is nothing in the codicil bearing upon this point. There is one passage to the effect—"That my son William shall only be entitled to call up £1000 upon the expiry of twelve months after my death, and the remainder shall lie with my trustees until his whole provisions are payable." I should rather be disposed to read that as a special direction applicable to the provisions payable at the two dates mentioned in the settlement. In regard to the subsequent clause—"Should any of my children interested die upwards of twelve months after the death of my wife without leaving lawful issue, and any part of the shares of my estates before destined to them and their issue in that event devolve upon my sons, I direct my trustees to pay the same to my two sons interested as soon after the death of the persons so dying as may be convenient"—it appears to me that that clause was added for the purpose of supplying a want in the original deed, viz., a provision as to the term of payment of the shares of daughters dying after the testator without issue. But this has no material bearing upon the point involved in the case.

Lord Adam—Having had an opportunity of seeing and considering the opinion of your Lordship in the chair, I have only to express my entire concurrence with it.

The Court pronounced this interlocutor—

> "Find and declare that no part of the fee of the shares of the testator's estate liferented by Mrs Johnston, Mrs Catherine Steel, and Miss Margaret Steel vested in William Steel at the testator's death, or at any period prior to the death of the said William Steel, and decern."

Counsel for First Parties — Orr. Agents — Morton, Neilson, & Smart, W.S.

Counsel for Second Parties—Gloag—Fleming. Agents—Wallace & Begg, W.S.

Counsel for Third Parties — Balfour, Q.C.— C. K. Mackenzie. Agents — Hope, Mann, & Kirk, W.S.

Friday, December 14.

FIRST DIVISION.

[Lord Lee, Ordinary.

MORRISON & MASON *v.* THE SCOTTISH EMPLOYERS LIABILITY AND ACCIDENT ASSURANCE COMPANY (LIMITED).

Insurance—Policy—Construction—Reparation—Liability at Common Law and under the Employers Liability Act 1880.

A policy of insurance contained the following clause—"The company, so far as regards injuries caused during the period covered by the premium so paid as aforesaid, or any further period in respect of which the company shall accept a premium or premiums, shall pay to the employer all sums which such employer shall become liable for under or by virtue of the Employers Liability Act 1880, as and for compensation for personal injury caused to any workman in their service while engaged in the employer's work in either of the occupations and at any of the places mentioned in the schedule hereto."

During the currency of the policy a workman in the employment of the policy-holder recovered damages against him at common law. In an action of indemnification by the policy-holder against the company, *held* that the policy only covered risks under the statute, and as the pursuer had been found liable to the workman at common law the defenders were entitled to absolvitor.

Messrs Morrison & Mason, contractors, Glasgow, on 21st July 1885 effected an insurance with the Scottish Employers Liability Accident Assurance Company, and the policy of assurance contained, *inter alia*, the following clause:—"The company, so far as regards injuries caused during the period covered by the premium so paid as aforesaid, or any further period in respect of which the company shall accept a premium or premiums, shall pay to the employer all sums to which such employer shall become liable for under or by virtue of the Employers Liability Act 1880, as and for compensation for personal injury caused to any workman in their service while engaged in the employer's work in either of the occupations and at any of the places mentioned in the schedule hereto." Appended to the policy were, *inter alia*, the following conditions:—"(1) Upon the occurrence of any accident, notice of it shall within three days of its occurrence be given to the company. The fullest particulars of the cause of the accident must be carefully preserved, so that in the event of legal proceedings such may be produced or be open to inspection. The employer on receiving notice of a claim shall within three days send on the same or a copy thereof to the company, with such further certified information as to the time at and the circumstances under which the injury was caused, and the nature and extent thereof, and the name and occupation of the claimant, and such other information as the company may by their rules or otherwise require; and he shall cause to be supplied to the company such further certified information as to, and such evidence of, the circumstances connected with such claim as the company may from time to time apply for. (2) On receiving from the employer notice of any claim the company may take upon themselves the settlement of the same, and in that case the employer shall give them all necessary information and assistance for the purpose. The employer shall not, except at his own cost, pay or settle any claim without the consent of the company, but if any proceedings be taken to enforce any claim in respect of which such notice shall be given, the company shall have the absolute conduct and control of the same throughout in the name and on behalf of the employer, and shall in any event indemnify the employer against all costs and expenses of and incident upon any such proceedings, and the employer shall, at the cost of the company, render them every assistance in his power to enable them to resist any claim wholly or in part, or to defend any such proceedings."

Upon 4th August 1885, and during the currency of the said policy, a workman named Martin, in the employment of Morrison & Mason, sustained injuries while in their service which necessitated the amputation of his right leg. He thereupon raised an action on the ground that they had designed and supplied him with a scaffolding of insufficient and faulty construction, and he obtained a verdict in his favour of £200 damages.

Morrison & Mason raised the present action against the Assurance Company founding upon the policy of assurance in their favour, and concluding for a *cumulo* sum, which included the sum of £200 found due to Martin, and the expenses of the action at his instance against them. They averred that the policy covered liabilities incurred by them to their workmen both at common law and under the statute, and that Martin's injuries were of such a kind as they became liable for by virtue of the Employers Liability Act or alternatively at common law. Martin's wages at the date of the accident averaged £2, 10s. sterling per week, and the sum of £200 sterling was less than three years' wages of Martin, and did not exceed the sum equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during those years in the like employment, and in the district in which he was employed at the time of the injury.

The defender averred that although they did insure at common law within certain limits, and issue policies to that effect, the policy in question only covered risks under the statute, and that they had drawn the pursuer's attention to that circumstance at the time when it was taken out. No claim or notice was ever made or action raised in the Sheriff Court by Martin under the Employers Liability Act, and the time for doing so had long expired. The ground of his action against the pursuers was personal fault, and the action being at common law the damages obtained was not a risk covered by the policy founded on. The injuries for which the pursuer became liable to Martin were not injuries for which they became liable under or by virtue of the statute.

The pursuers pleaded, *inter alia* (1 and 2), that

as they had become liable under the statute, and alternatively at common law, for compensation for personal injury to a workman in their service, and as the defenders had by their policy of assurance agreed to indemnify the pursuers in all sums for which they might so become liable, the pursuers were entitled to decree.

The Lord Ordinary (LEE) assoilzied the defenders.

"*Opinion.*—This action is founded on a policy of insurance by which the defenders undertook, in consideration of a premium of £600, to pay to the pursuers, as employers of labour 'all sums which such employer shall become liable for under or by virtue of the Employers Liability Act 1880 as and for compensation for personal injury caused to any workmen in their service while engaged in the employers' work in either of the occupations and at any of the places mentioned in the schedule hereto.'

"On 4th August 1885, and during the period covered by this policy, John Martin, a mason in the service of the pursuers, sustained personal injuries while engaged in the pursuers' work, and on 4th February 1886 Martin raised an action of damages in the Court of Session against the pursuers, alleging that the accident occurred in consequence of the insufficiency of a scaffolding, through the pursuers' fault.

"The action came to depend before me, and an issue was adjusted for the trial of the cause in the following terms:—'Whether on or about the 4th day of August 1885 the pursuer, while working in the employment of the defenders, on a scaffolding fixed to a retaining wall, on the Glasgow and Cathcart Railway, near Dixon's Avenue, was injured in his person in consequence of the insufficiency of said scaffolding, and the falling thereof, through the fault of the defenders, to the loss, injury, and damage of the pursuer. Damages claimed, £1000.'

"The trial resulted in a verdict for the workman, and against the present pursuers, with £200 of damages, and an attempt to set aside the verdict as contrary to the evidence was unsuccessful.

"The defence in the present case raises no question that Martin suffered his injuries while in the pursuers' service, and engaged in their work in one of the occupations, and at one of the places, mentioned in the schedule appended to the policy. But the defenders dispute their liability to indemnify the pursuers, on the ground that the employers' liability for the above sum was not 'under or by virtue of the Employers Liability Act 1880.'

"It is admitted that the workman's action was not founded on the Employers Liability Act. He had given no notice under the statute, and raised his action in the Court of Session as for compensation at common law. The common law was sufficient for his purpose, because he alleged and proved that the accident arose from the insufficiency of a scaffolding for which the pursuer Mr Morrison was personally responsible.

"But it is contended for the pursuers that the policy is not exclusive of risks of liability arising at common law, but covers all risks of liability for injuries to workmen for which the employer insuring is responsible. The argument is that the statute merely extends and amends the common law, and that the meaning of the reference in the policy to the Employers Liability Act is to make it clear that the policy applies to cases in which the employer is liable under the statute as well as to cases where there is liability at common law, or at all events, if there be liability under the statute as well as at common law it is of no consequence that the claim of the workman is constituted under the common law, for it is the nature of the accident and not the nature of the workman's action that must decide the question.

"I am of opinion that it depends upon a construction of the policy of insurance whether it covers a case of liability both at common law and under the statute.

"Allegations are made by the defenders pointing at an inquiry into prior communings as showing that the pursuers understood that the policy applied exclusively to claims arising out of the Employers Liability Act. It is stated that they refused an offer to cover common law risks for an extra premium. The pursuers, on the other hand, also propose to refer to the terms of the proposal and relative prospectus as showing that 'Table B' mentioned in the policy includes 'all accidents of occupation' even at common law. I think that the question of construction must be decided upon the terms of the policy alone, and that it is incompetent to inquire into extrinsic circumstances in order to control or explain the policy.

"It was contended for the defenders that liability on the part of an employer under or by virtue of the Employers Liability Act 1880 is purely statutory, entirely new, and quite distinct from and exclusive of liability at common law. In support of this argument there was cited the case of *The Queen* v. *The Judge of the City of London Court*, 14 Q.B. Div. 905. I am bound to say that although the judgment of the Master of the Rolls in that case reserves the question whether these causes of action are new, the opinions appear to show that the defender's view is that which is taken in England. But a different view of the statute has been taken in Scotland, and has been applied in practice ever since the case of *M'Avoy* v. *Young's Paraffin Oil Company*, in 1881, 9 R. 100. In the case of *Morrison* v. *Baird & Company*, 10 R. 271, I explained the grounds on which, in my opinion, the view of the Act taken in *M'Ilroy's* case, necessarily leads to the conclusion that the ground of action under the statute was not distinct from or exclusive of an action at common law. I adhere to the views then expressed, and as my judgment was affirmed in the Inner House, and the practice is now quite settled in Scotland (so much so that cases founding both on the common law and on the statute are tried under one issue), I cannot in the Outer House hold this question to be open.

"The result is that an employer's liability for injuries suffered by workmen in his employment, always arises out of fault for which he is responsible. It may be that he is responsible for that fault only by reason of the statute, or that he is responsible for it both under the statute and at common law. But it is always fault on his part, actually or constructively, that is the ground of liability. That there may be liability at common law as well as under the statute in some of the cases enumerated in the first section of the Em-

ployers Liability Act appears to me to be clear. This may be illustrated by the first sub-section of clause one, as qualified by sub-section 1st of clause two. It is thereby enacted, *inter alia*, that a workman shall have the same right of compensation as any third party, in the case of injury from any defect in the machinery or plant used in the business of the employer, provided the defect arose from or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the machinery and plant are in proper condition. Excepting in so far as this enactment refers to injuries caused by the negligence of a fellow servant, the liability of the employer in such a case exists not less under the common law than under the statute.

"Now, as this is precisely the kind of case that was raised by the issue in the action at Martin's instance against the pursuers, viz., defect in plant, arising from the negligence of the employer, the question is whether the employer in such a case became liable under the Act for the sum awarded. I think that he became liable under the Act, as well as under the common law, to make compensation.

"But is this enough to give the employer a claim against the insurance company under this policy? My opinion is that it is not. I think that in all such cases it is for the assured party to establish his claim; and that in this case he can only do so by showing that his liability to Martin for the sum found due arose under or by virtue of the Employers Liability Act 1880. I think that he has failed to show this, not because Martin's claim was not constituted under that Act, but because the Act was not required to create the liability, and was not in any sense the cause of the risk which in Martin's case the pursuers incurred. If advantage had been taken of the Act, and liability for the sum in question had been attached to the employer under it, that might have been conclusive against the company, for it would have been no answer to them to say that the employer was also liable at common law. But seeing that the Act was not in fact made the ground of liability, and was not required in law, my opinion is that the risk was not covered by the terms of the policy."

The pursuer reclaimed, and argued—That although the workman had laid his action at common law, yet he could have brought it under the statute, and as the sum to which he had been found entitled was less than three years' wages which he would have recovered under the statute, the pursuers were entitled to reparation as if the action had been brought under the statute. It was not the form of action but the nature of the accident which regulated the liability. The statute introduced no new liability; it only shut out the defence of *collaborateur* which was open to the master before, and it amended and extended the common law. In order to succeed, the defenders would require to read into the policy after the words "Employers Liability Act 1880" the word "only"—The Employers Liability Act 1880 (43 and 44 Vict. cap. 42); *Life Association of Scotland* v. *Foster*, January 31, 1873, 11 Macph. 358; *M'Avoy* v. *Young's Paraffin Company*, November 5, 1881, 9 R. 100.

Argued for the respondents—The action by Martin against the pursuers was laid at common law. It was brought in the Court of Session, and it was admitted that no notice such as was required by the statute had been served either by Martin on them or by them on the defenders. The policy here did not cover common law risks, but only those under the statute.

At advising—

Lord President—The defenders here are a company who call themselves "The Scottish Employers Liability and Accident Assurance Company, Limited," and they issue policies of indemnification for the masters of workmen who suffer injuries which entitle them to compensation "under or by virtue of the Employers Liability Act 1880."

The pursuers Messrs Morrison & Mason took out a policy of assurance from this company which bore that they (the pursuers) had applied to the company for an indemnity against such claims as were mentioned in the policy for compensation for personal injuries caused to workmen in their service in any of the occupations mentioned in the schedule and that they had paid to the company the premium claimed for such indemnity for twelve calendar months from the 21st July 1885. During the currency of the policy a workman raised an action of indemnity for an accident which occurred while he was in the employment of the pursuers, and by which he sustained injuries which necessitated the amputation of his right leg. The grounds of this action were that the pursuer Morrison had personally designed and supplied him with an insufficient scaffolding, and particularly that the scaffold supports should have been larger and of a different construction, and that the bolts which fastened the scaffold supports were round and should have been wedge-shaped. In the proceedings which followed, Morrison admitted that he designed both the figures and the bolts, and that they had been made to a design prepared by himself.

Now that action was not laid on the "Employers Liability Act," and did not require to be so; because what the injured party alleged was personal fault on the part of his employer, and accordingly the question which we have to determine is, whether the liability which the present pursuers incurred to their workmen in consequence of the accident to which I have just referred was one of that class of risks for which the defenders undertook to indemnify the pursuers, and that of course must depend upon the construction which is to be put upon the terms of this policy, which by its first clause provides as follows—[*His Lordship here read the clause in the policy quoted above*]. This is the only part of the policy to which it is necessary to make any reference, as it is the only part upon which any question is raised. Now the contention of the defenders is, that they are only liable under this clause to indemnify the pursuers for sums which they have to pay "under or by virtue of" the statute; while the pursuers on the other hand maintain that although the damages which they had to pay to the workman Martin were as a matter of fact recovered by him by an action at common law, yet if they were capable of being recovered by him under the statute, that then was a risk covered by the terms of the policy, and

that the pursuers are entitled to prevail. Now, in order to interpret this clause, it is necessary to consider the new liability introduced by this statute, and I think we find that new liability described in sec. 31 in these words—"Where after the commencement of this Act personal injury is caused to a workman, the workman, or in case the injury results in death, the legal personal representatives of the workman and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or not in the service of the employer, nor engaged in his work." It seems to me that the novelty introduced by the statute is that a workman in the employment of an employer at any kind of work is to have his remedy for injuries sustained while in that employment and working in that employment, as if he were a stranger to the work and not a workman at all; in short it is to give the workman the same remedy against his employer as if he were a member of the public. But this liability is accompanied with some safeguards for the employer, which are narrated in sec. 4, and which are, that an action under the Act cannot be maintained unless notice is given within six weeks of the occurrence of the accident, and unless the action is commenced within six months, or in case of death within twelve months from the time of death.

Now, the liability for which this company undertakes by the policy now before us to indemnify an employer of labour is thus expressed—it is for "all sums which such employer shall become liable for under or by virtue of the Employers Liability Act 1880." There are also certain conditions attached to this policy which form part of it, and by which it is provided that notice of any accident is to be given to the company within three days of its occurrence, and that when any claim is made upon an employer the company may take upon themselves the settlement of the same; and if proceedings are taken to enforce the claim, the company are to have the absolute conduct and control of the same, and the employer is to render the company all the assistance in his power in defending the proceedings. Now, clearly these conditions, which are attached to this policy, are of the same kind as are set forth in sec. 4 of the statute, and their object is to secure to the company the earliest notice of all claims which are to be made against them. While, therefore, I cannot congratulate the draughtsman of this policy upon the language he has selected to express the intentions of the parties, I think, perhaps, sufficient appears to make it clear that what was contemplated by the terms of this policy was a liability arising under the Employers Liability Act, and no other. But the liability to which the pursuers have been subjected is not "under and in virtue of" that Act. It is a liability to which they might have been exposed at common law, even if this statute had never been passed, and that being so, he cannot hold the present claim to be within the indemnity provided by this policy. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I am quite of the opinion expressed by your Lordship. The action brought by Martin against the pursuers was laid at common law, and not under the Employers Liability Act, and the sum to which the jury found him entitled was recovered by him under this common law action. That being so, it is impossible that the pursuers can prevail on this policy, which by its language declares that the risk which the company undertook to indemnify them for was sums which as employers of labour they became liable for "under or by virtue of the Employers Liability Act."

Lord Shand—The question here is as to the construction which is to be put upon the clause of this policy which was read by your Lordship, and in determining this construction it is necessary to keep in view the distinction which arises between a liability to indemnify at common law and under the statute.

As to claims which arise at common law, it is clear that there are some which are capable of being so enforced which might not fall under the statute, as, for example, claims based upon the personal fault of the employer. Again, common law liabilities are not limited in amount, and we know that juries often award large sums to injured parties or their representatives in special circumstances.

On the other hand, it is a most important consideration for a company like the defenders here to have some idea from time to time as to their liabilities, otherwise it would be impossible for them prudently and successfully to conduct their business. They accordingly append to their policies certain conditions which form part of the contract, and which, along with the terms of the policy, not only limit the liability of the company to such sums as the insurer becomes liable for under or by virtue of the statute, but also requires him to intimate to them within three days the occurrence of any accident upon which a claim may be founded, and also requires the insurer to give the company every assistance in resisting the claim.

Looking then to the terms of this policy, it appears that the only claims which can be made under it are for indemnity for sums for which the insurer became liable "under or by virtue of the Employers Liability Act 1880." The words in the body of the policy to which your Lordship has referred make this quite clear, and we have it established beyond all doubt by a specimen of another kind of policy which has been exhibited to us by the defenders, and which is issued by them when the insurer wishes to cover his risks both under the statute and at common law.

It was urged by the pursuers that although this action by the workman was as a matter of fact brought at common law, yet as it might quite competently have been brought under the statute, that therefore they were entitled to prevail. I do not think, however, that we are at liberty to assume this, or to take it for granted that if this action had been brought under the statute the same result must necessarily have followed. This argument may further be tested by assuming the converse case. Suppose an action brought under the Employers Liability Act, could the company have evaded liability by maintaining that the action might have been equally well brought at common law? I do not think such an answer could competently have been made. Holding

therefore as I do that this policy was only intended to cover risks under the statute, and this not being one of that class, I think that the defenders are entitled to be assoilzied.

Lord Adam—The sum for which the pursuers seek indemnity was a sum of damages for which they became liable at common law, and not in any way under the statute. That being so, it is impossible to bring the claim now sought to be established in any way under the words of the policy. Certain difficulties arise on the construction of this policy owing to the unfortunate selection of language used to express the intentions of the parties, and various readings of these words have been submitted to us. As was pointed out by your Lordship, a new risk was introduced into the law by the Employers Liability Act, and it seems to me, that although badly expressed, what the parties intended by the language of this policy was to indemnify the employer of labour for all sums which he became liable for under the statute, and that not being the nature of the present claim, the pursuer here cannot prevail.

The Court adhered.

Counsel for the Pursuers—D.-F. Mackintosh, Q.C.—Guy. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders—R. Johnstone—Shaw. Agents—Macpherson & Mackay, W.S.

Friday, December 14.

SECOND DIVISION.

[Sheriff of Ross, &c.

MACFARLANE *v.* MATHESON.

Public Rates — Assessment — Liability for Rates on Unpaid Rents—Valuation (Scotland) Act 1849 (17 *and* 18 *Vict. c.* 91), *secs.* 31, 33—*The Crofters Holdings (Scotland) Acts* 1886 *and* 1887, 49 *and* 50 *Vict. c.* 29, *sec.* 6, *and* 50 *and* 51 *Vict. c.* 24, *sec.* 2.

A landed proprietor refused to pay certain public rates on the ground that the rents to which they were applicable had not been paid by her tenants. In an action at the instance of the collector of public rates for the parish, *held* (*diss.* Lord Lee) that as the assessment had been duly levied on the basis of the valuation roll the proprietor was liable to pay them.

The Crofters Holdings (Scotland) Act 1886, sec. 6, sub-sec. (4), provides—"When an application is lodged with the Crofters Commission to fix a fair rent, it shall be in the power of the Crofters Commission, either under the same or under another application of the crofter, to sist all proceedings for the removal of the crofter in respect of non-payment of rent until the said application is finally determined, upon such terms as to payment of rent, or otherwise as they shall think fit."

The Crofters Holdings (Scotland) Act 1887, sec. 2, provides—"Any crofter who has made or shall make an application to the Crofters Commission to fix a fair rent for his holding, and against whom legal proceedings have been taken for payment of rent, may apply under the same or any subsequent application to the Crofters Commission for an order prohibiting the sale of the crofter's effects upon the said holding by virtue of any decree for payment of such rent, and the Crofters Commission, if satisfied that such sale would have the effect of defeating, in the case of such crofter, the intention of the principal Act (the Crofters Act 1886), may, upon such terms as to payment of rent or otherwise as they shall think fit, grant an order prohibiting such sale till the application to fix a fair rent has been finally determined."

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. c. 91), sec. 31, provides—"In all cases where any lands or heritages shall be separately let at a rent not amounting to four pounds per annum, and the names of the occupiers thereof shall not have been inserted in the valuation roll, the proprietor of such lands and heritages shall be charged with and have to pay the whole of the assessments on such lands and heritages separately let as aforesaid, but every such proprietor charged with and paying such assessments shall have relief against the tenants and occupiers of such lands and heritages for reimbursement thereof if and so far as such assessments may by law be properly chargeable upon such tenants or occupiers."

Section 33—"Where in any county, burgh, or town, any county, municipal, parochial or other public assessment, or any assessment, rate, or tax under any Act of Parliament is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the valuation roll in force for the time under this Act in each county, burgh, or town shall from and after the establishment of such valuation therein be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly."

This was an action at the instance of John Finlayson Macfarlane, inspector of poor for the parish of Stornoway, and collector of public rates there, for the sum of £222, 7s. 7d., against Lady Mary Jane Matheson, Lewis Castle, Stornoway, proprietrix in liferent of the Island of Lewis. He averred that for the year from Whitsunday 1887 to Whitsunday 1888 the defender was duly assessed by the parochial board in the sum of £764, 7s. 7d. public rates in respect of her proprietorship and occupancy of various subjects. To account of this sum the defender on 14th May 1888 paid a sum of £542, 0s. 3d., leaving a balance still due by her to the pursuer of £222, 7s. 4d., which was the sum sued for.

The defender admitted these statements, and averred that she had been assessed in rates on the assumption that the rental of her tenants who paid less than £4 per annum would produce a sum of £168, 2s. 6d. sterling, but she had only recovered £102, 2s. of that sum; with regard to tenants who pay rents of £4 per annum and upwards, she had been assessed on the assumption that the rates applicable thereto would amount to £508, 16s. 8d., but notwithstanding all her efforts she had only been able to collect

rents representing an assessment of £352, 9s. 10d.

It was admitted that she had paid the assessments applicable to the rents collected, and that these were included in the sum of £542, 0s. 3d. She further averred that any legal proceedings she might adopt against her tenants who were in arrear of rent would, in terms of the Crofters Holdings (Scotland) Act 1887, be liable to be prohibited till the crofter's application to fix a fair rent had been determined. There was no immediate prospect of their application to fix fair rents being entertained and determined.

The pursuer admitted this statement, with the explanation that the defender had not attempted to sue any of her tenants who were in arrear of rent, and that until she did so the Crofters Commission had no power to sist the proceedings.

The defender pleaded—"The defender not having recovered payment of the sums sued for in respect of rates from her tenants who pay less than £4 per annum, and in respect of rents from those who pay £4 per annum and upwards, she is not bound to pay rates in respect of the sums not recovered by her as aforesaid, and she is entitled to be assoilzied with expenses."

The Sheriff-Substitute (FRASER) decerned against the defender for the sum sued for.

"*Note.*—The defender duly paid the rates effeiring to the amount of rents received by her as well as those exigible from her as proprietrix and occupant of the different subjects mentioned in the account appended to the petition. The rates due and now sought to be recovered are those effeiring to rents not paid, and the only question between the parties is whether she is bound to pay rates on or in respect of these unpaid rents. In my opinion she is. The rates unpaid were, along with those which have been already paid, duly and timeously assessed. No objection was then made by or on her behalf, and it appears to me that it is now too late to object or resist payment.

"The parochial board is not responsible for, and indeed has nothing to do with, the collection or payment of any rents. If the defender has from any cause failed to obtain payment of any portion of those due to her, the loss must, so far as the board and the other ratepayers are concerned, fall upon her. There may be hardship in having thus to pay rates on rents not received, and which probably never will be wholly received, but in the interest of the general ratepayers the pursuer cannot take that into account. He is bound to recover if he can, and has no alternative but to use the means for enforcing payment. If he were to fail in this—his duty—or if the defender were relieved, the result would necessarily be increased rates for the following year, of which she would have to bear her share.

"It is said that under the Crofters Act the defender's unpaid rents are liable to be in part reduced or entirely swept away. That is true, but it is one of the risks which as a proprietrix she runs. It does not appear, however, that she has yet attempted by legal measures to recover, or that the Crofters Commission have reduced or swept off or interfered with the past year's unpaid rents.

"On the grounds above indicated I am reluctantly obliged to hold that in law the defender is bound to pay, and I give decree accordingly."

The defender appealed to the Court of Session.

It was stated at the bar that the defender was unable to pay the rates, as in spite of all efforts the rents of the estate had not been recovered, and she had no other means by which to pay them. As she was only proprietrix in liferent she could not use the ordinary means of raising money to meet this claim which would be open to a fee-simple proprietor. She had raised fifty-five actions for payment of rent against crofters, her tenants, but on the application of the tenants to have fair rents fixed, the Crofters Commission, without hearing parties, had issued an order in terms of the Crofters Act 1887, sec. 2, under which she was prohibited from recovering by sale any rents for which she might obtain decree. The rates should come out of rent, but there was none. The source of rates had perished. Rent was not exigible for a subject that had perished—*Muir* v. *M'Intyre*, February 4, 1877, 14 R. 470; and in like manner the assessment which the statute laid upon the subject could not be exacted — *Tod* v. *Mitchell*, January 26, 1858, 20 D. 449; Guthrie Smith, p. 391; Cassell's Law of Rating, pp. 35, and 42; *Mayor of Woodstock*, November 10, 1876, L.J., 2 Ex. Div. 49; Browne on Rating, p. 516; *Govan Police Commissioners* v. *Armour*, February 3, 1887, 14 R. 461. The question was, if the subject showed a profit on which it could be rated. The Valuation Act laid the burdens on the value of property as it could be "let from year to year." The valuation roll was the basis on which the Board levied the rates, and in the usual case was conclusive of the rental. But in this case a *vis major* had occurred as truly as if the subject had been swept away by the sea. For after the valuation roll had been made up, the Crofters Commission interposed between the appellant and her tenants, and restrained her from recovering two-thirds of the rents at least for the year to which the roll applied. In this way the value stated in the roll, which was the warrant of the collector, had been reduced. Moreover, if the power to recover rents were arrested, the result might be a destruction of the rental as it entered the roll, and therefore as it afforded the measure of taxation. The crofters applied to have fair rents fixed in June, the roll was made up in September, but if the Commissioners reduced the rents their deliverance would draw back to the date of the crofters' applications. Thus the basis of assessment would be destroyed.

The pursuer argued—No doubt there was hardship in the present case, but the collector was bound to assess according to the roll—*M'Lachlan* v. *Tennant*, May 4, 1871, 43 Jur. 390. It was admitted that the appellant had not recovered all her rents, but she had not exhausted her remedies. She might have obtained decree, and sold in implement thereof to the extent of one-third of the rent.

At advising—

LORD JUSTICE-CLERK—There is, I am afraid, only one way in which this case can be decided, although it is certainly one of the most deplorable that have come before the Court. Lady Matheson, the liferent proprietrix of the Lewis, is unable to collect enough rents due to her from the

estate to pay the public burdens imposed upon it. The Crofters Act of 1886, with its amendments in 1887, has had this effect, that while the landlord is liable to pay assessment upon rents which had been fixed by open bargain between the landlord and the tenant as a fair rent for the land, the Crofters Commission steps in and says that these rents are not to be paid. But while the law thus prevents the payment of rent to the landlord, it has not said that the obligation on the landlord to pay rates on the rents formerly fixed shall also be stayed. It was argued that the operation of the Crofters Commission was a *vis major* which altered the ordinary position of affairs and stopped the receipt of rents, which was the only real ground upon which the obligation by the landlord to pay rates had rested. But when we look at the statute under which the pursuers, who are the rating authorities for the district, act, we find that they have no option but to do as they have done. They must take the rental of the property as it appears in the valuation roll, and then insert in the rating-book the proper proportion of the whole rate which Lady Matheson has to pay, whether the proportion refers to houses which are valued above £4 per annum or below that sum. This has been done, and I can find nothing in the Crofters Acts to prevent them following the usual course in the present case.

Lord Young—I am of the same opinion, and think that there is here no stateable case. The action is by the duly authorised collector of the poor and other rates in the island of Stornoway, and is for the payment of these rates which have not been paid by the defender. By statute it is required that proprietors shall be duly assessed on their property as it appears in the valuation roll in force at the time the rate is laid on, and the rates were duly assessed upon the defender as the value of the property appeared in the valuation roll. The assessor sends to the various proprietors a notice of what value he intends to put upon their respective properties, and if any proprietor feels aggrieved at this proposed value, then he is able to appeal to the Commissioners, and afterwards to the court of review. That is while the roll is being made up, but when it is amended and made up and authenticated the rating authority is bound to take the values there laid down as the basis for any rates which he may have to lay on.

The only question in this case, as it appears to me, is, whether the defender was duly rated and assessed for the sum now sued for? The first averment for the pursuer is that he is the proper officer for laying on the rates in the parish, and the second averment is that the defender was duly assessed in the sum of £764, 7s. 7d., and that she had paid to account of said sum £542, 0s. 3d., leaving a balance due to the pursuer of £222, 7s. 4d., which is the sum sued for, and the answer to these averments is "Admitted." It is not possible that there could be a stateable case after that admission. There is no case of *vis major* in the circumstances here. In defence she says that she cannot recover her rents from her tenants. She says—"The defender had been assessed in rates on the assumption that the rental of her tenants who paid less than £4 per annum would produce a sum of £168, 2s. 6d. sterling, but she had only recovered £102, 2s. of that sum; with regard to tenants who pay rents of £4 per annum and upwards, she had been assessed on the assumption that the rates applicable thereto would amount to £508, 16s. 8d., but notwithstanding all her efforts she had only been able to collect rents representing an assessment of £352, 9s. 10d." But she admits that she was duly assessed in the sum, and what has the rating authority to do with the fact that she cannot recover her rents from her tenants. Her next statement is—That any legal proceedings she might adopt against her tenants who were in arrear of rent would, in terms of the Crofters Holdings (Scotland) Act 1887, be liable to be prohibited till the crofter's application to fix a fair rent had been determined; and that there was no immediate prospect of their application to fix fair rents being entertained or determined. And her plea-in-law is—"The defender not having recovered payment of the sums sued for in respect of rates from her tenants who pay less than £4 per annum, and in respect of rents from those who pay £4 per annum and upwards, she is not bound to pay rates in respect of the sums not recovered by her as aforesaid, and she is entitled to be assoilzied with expenses." Is that stateable in argument? No doubt there is this peculiarity and hardship, that the Crofters Commission may consider and reduce the rents which had been agreed upon between the tenants and the proprietor, but what has the rating authority to do with that? At the time the Legislature interfered through this Commission with the rents fixed between the tenants and the proprietors in that part of the country, it might very well have given directions to the rating authorities that they were to take some other basis for their rating than the value of the estate as it appeared in the valuation roll, but it did not do so. The rating authority is a statutory body having a statutory duty to perform under statutory rules, and these rules it has carried out in this case.

It is impossible to avoid sympathising with this lady, and with many other landlords with crofter tenants, who I have no doubt have abused the privileges given them by the Legislature, but all that cannot interfere with the action of the rating authority. The duty of the Crofter Commission is only to settle fair rents, and I suppose Lady Matheson holds and is prepared to maintain before the Commission that the rents on her estate are fair rents, and if no change is made she will then be able to recover the whole rents on which rates have been paid, but while that question is being considered the rates must be paid.

Lord Rutherfurd Clark concurred.

Lord Lee—I agree that we have nothing to do with the policy of the statutes referred to at the debate, and that on the record as it stands there is really no question of the defender's liability. But I understood that the record was to be amended so as to raise formally certain questions which were mentioned from the bar. It was stated at the bar that under the Crofters Act the Crofter Commission has *de facto* interfered to suspend action on the defender's part to obtain her rents. It was also, I understood,

averred that the Commission have received and entertained claims for a revision of the rental which if sustained will by the Act draw back to June 1887, prior to the making up of the valuation roll. Now, as to the irrelevancy of these allegations I have the misfortune not to be so clear as your Lordships. I am for one thing not in a position to give an opinion on the extent of the powers of the Crofter Commission. That matter was not fully argued, nor is it competently before us. Then I take the case on the footing that *de facto* the rental has been altered, or rendered subject to alteration by a supervening event since the valuation roll was made up in September. I should have thought that that raised a serious question on the Valuation Act. That Act, I think, is concerned with valuation only, not with the validity or effect of assessment, but with the amount of the rental on which they are to be calculated, and the manner of imposing them if they are effectual. Now, I think that if a subject is destroyed by some fire or flood, or suffers alteration in value from an unforeseen cause, the question of the effect of that upon the finality of the assessment is not necessarily decided by the valuation roll. I take section 31 of the Valuation Act as affording an illustration of the kind of question which arises —"In all cases where any land or heritage shall be separately let at a rent not amounting to £4 per annum, and the names of the occupiers thereof shall not have been inserted in the valuation roll, the proprietor of such lands and heritages shall be charged with and have to pay the whole of the assessments on such land and heritages separately let as aforesaid, but every such proprietor charged with and paying such assessment shall have relief against the tenants and occupiers of such lands and heritages for re-imbursement thereof, if and in so far as such assessments may by law be properly chargeable upon such tenants or occupiers." Now, the Crofters Act entitles the crofter to apply to the Crofters Commission both to stay action and diligence and to revise the rental, and the effect of the applications the defender's crofting tenants have made may draw back to June 1887. It does appear to me that that may affect the landlord's claim against the tenant for relief from the rates paid by him for the tenant under this section. In fact the effect of the Crofters Act has been to make the valuation roll not conclusive of the rental against the tenant, and therefore the right of the landlord to relief is interfered with. I think that raises a serious question, but your Lordships differ from me as to this, and I will only say that I do not see my way to concur.

Lord Justice-Clerk—I only wish to add that if any case had arisen here of the total destruction of the subject, that would have raised a totally different question from the one which we have to decide here, and one on which I wish to reserve my opinion, but in this case the subject has not been touched at all.

The Court pronounced this interlocutor—

"Find in fact that the rates sued for were duly assessed according to the valuation roll in force at the time: Find in law that the pursuer is entitled to insist for payment thereof accordingly: Therefore dismiss the appeal and affirm the judgment of the Sheriff-Substitute appealed against; of new decern in terms of the prayer of the petition: Find the pursuer entitled to expenses in this Court," &c.

Counsel for Appellant — D.-F. Mackintosh, Q.C. — M'Kechnie — Orr. Agents — Stuart & Stuart, W.S.

Counsel for Respondent—A. J. Young—J. P. Grant. Agents—J. Murray Lawson, S.S.C.

Saturday, December 15.

FIRST DIVISION.

[Sheriff-Substitute of Elgin.

ROBERTSON & SONS *v.* FALCONER.

Bankruptcy—Cessio—*Trust-Deed—Discretion of Sheriff—Debtors Act* 1880 (*43 and 44 Vict. c.* 34), *sec.* 9, *sub-sec.* 3.

When a petition for *cessio* is presented at the instance of a creditor, the above subsection gives the Sheriff a discretion to grant or refuse decree "as the justice of the case requires."

A tradesman executed a trust-deed for behoof of his creditors, and about a year thereafter became unable to fulfil his obligations to certain fresh creditors who desired him to grant a second trust-deed, but to a different trustee. He declined, and one of them gave notice that he would present a petition for *cessio*. The day after receiving this notice the debtor signed a trust-deed in favour of the former trustee, who at once proceeded to realise and distribute his estate. In the petition for *cessio* at the instance of the creditor, *held* that the petitioner was entitled to obtain decree in respect of the circumstances under which the trust-deed had been granted.

On 21st September 1888 Duncan Robertson & Sons, hat manufacturers, Glasgow, in virtue of a decree obtained in the Sheriff Court of Elgin on 25th July 1888, charged Alexander Falconer, tailor in Elgin, to pay to them the sum of £25, 6*s.* 7d. of principal and expenses contained in that decree. The days of charge having expired without payment, Robertson & Sons presented a petition in the Sheriff Court of Elgin for decree of *cessio* against Falconer, and served notice thereof upon him on 25th September 1888. The defender deponed that he had got into difficulties about four years before; these had been tided over for a time, but more than a year before he had found it necessary to grant a trust-deed for behoof of his creditors in favour of Mr Craig, C.A., Edinburgh, who was acting for him at the time. His creditors had acceded to the deed, and he had arranged to pay them 15*s.* or 16*s.* per £, and had signed bills payable at three, six, and nine months for payment of that composition. He had paid the first instalment, and part of the second, but none of the third. The pursuers were not creditors under that trust-deed.

In June or July 1888 payment had been demanded of certain debts due to the pursuers and two other creditors, and these creditors had subsequently sued him therefor. The agent for the creditors subsequently asked him to grant a trust-deed in favour of William Stephen, accountant in Elgin, but he had declined to do so. On 26th September, however, he granted a trust-deed in favour of Mr Craig, the trustee under the previous trust-deed, and Mr Craig had disposed of his stock-in-trade, fittings, and book debts.

In the state of affairs produced by the defender, and deponed to as correct, the value of the assets belonging to him was set down at £108, 19s. 4d., and the amount of the liabilities at £294, 14s. 9d., of which £14 was a preferable claim. The claim of the pursuers and of two other creditors whom he represented amounted in all to £64.

By the Debtors Act 1880 (43 and 44 Vict. c. 34), sec. 9, sub-sec. 3, it is provided that on a petition for *cessio* being presented at the instance of a creditor, "the Sheriff shall, on such examination being taken, allow a proof to the parties if it shall appear necessary, and hear parties *viva voce*, and either grant decree decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same *in hoc statu*, or make such other order as the justice of the case requires."

The Sheriff-Substitute (RAMPINI) on 2nd November 1888 pronounced the following interlocutor:—"Finds that the defender executed a trust-deed on 26th September last in favour of Mr James Craig, C.A., Edinburgh, for behoof of his creditors: Finds that his estate is in process of being realised, and is in fact almost realised under said deed: Therefore refuses the prayer of the petition, dismisses the same: Finds the petitioners liable in expenses, &c.

"*Note.*—The Sheriff-Substitute has no difficulty in refusing the prayer of this petition. The estate is all but wound up under the trust-deed of 26th September 1888, and not a word has been said against the manner in which the trustee under that deed has done or is doing his duty. Looking to the fact that *cessio* is a mere distributive process, and that distribution has already taken place, or nearly so, by another process equally as effectual, and apparently more agreeable to the debtor and the majority of his creditors, the present application is a mere abuse of the process of this Court, and accordingly the Sheriff-Substitute has felt bound to exercise the discretion allowed him by the statutes."

The pursuers appealed to the First Division of the Court of Session.

Argued for the appellants—No doubt the Sheriff had a discretion to grant or refuse *cessio*, but in this case he should have granted it. The defender had abused the privilege of granting a trust-deed by first refusing to grant one in favour of a person in whom the creditors had confidence, and then granting one behind their backs to a person in whom they had no confidence. It was a device on his part to prevent decree of *cessio* being granted. Questions were to be raised as to Mr Craig's administration under the previous trust-deed, and it would not be proper for him to be in a position where he might have to decide questions in which he was interested as a party. The creditors were entitled to have the advantages which decree of *cessio* would give them, and these were considerable, as the trustee in a *cessio* might be ordered by the Sheriff to find caution, and his accounts were subject to supervision by an officer of the Court—Act of Sederunt anent Process of *Cessio*, December 22, 1882, secs. 3 and 18. In the case of a trust-deed there might be difficulty in supervising the conduct of a trustee—Bell's Com. (7th ed.) ii. 392-397, (5th ed.) 495-502.

Argued for the respondent—In the circumstances of this case the Sheriff-Substitute had rightly exercised the discretion given him by the Debtors Act 1880, in refusing decree of *cessio*. The pursuers had no objection to a trust-deed if they had obtained the trustee they wished. The creditors represented by the pursuers only represented a small part of the claims against the defender. The allegations against Mr Craig's management should have been made before the Sheriff, who had the discretion in the matter. Even sequestration, it had been said, need not be granted if there were equitable considerations of weight to the contrary—Opinion *per* Lord President MacNeill in *Campbell* v. *Dunlop*, June 11, 1862, 24 D. 1103. Here the estate had been almost all realised, and only a very small sum was left for distribution, which would be swallowed up by expenses if decree of *cessio* were granted—*Ross* v. *Hanstead*, November 16, 1885, 13 R. 207.

At advising—

LORD PRESIDENT—In this case if it were not for the discretion given to the Sheriff under the 3rd sub-section of the 9th section of the Debtors Act 1880 I should be of the opinion that there was nothing to prevent a creditor, who had not acceded to the granting of a trust-deed, going on with the diligence of *cessio*. I say "diligence," for it appears to me that a *cessio* at the instance of a creditor is really of the nature of diligence. But no doubt we must take into account the latitude given to the Sheriff as to whether *cessio* shall be granted or not.

The Sheriff-Substitute is of opinion that it is expedient in the interests of all concerned that the trust-deed should be made use of in winding-up this estate, and that decree of *cessio* should not be given. I do not agree with that opinion. I think that in this case the trust-deed was granted in such circumstances that a creditor was entitled to say that it was done improperly on the part of the bankrupt, and that it should not receive effect.

The creditors who are represented by the applicant say they asked the bankrupt to grant a trust-deed in favour of a different party, but that he refused to do so, and that the negotiations came to an end. It appears to me that these creditors had no alternative but to apply for *cessio* or for sequestration, and as the debts due to them were not of sufficient amount to warrant an application for sequestration, they gave notice to the debtor that they would present an application for *cessio*. The next day the bankrupt executed a trust-deed to a person in his confidence, to whom he knew the creditors would object. Now, the Sheriff-Substitute says that this gentleman is to have the management of the estate of the bankrupt, and I do not think that that is

justly or fairly within the discretion given to the Sheriff by the enactment.

The advantage which the creditors have in bringing the matter into Court is, that the trustee in a *cessio* is bound to account for his actings to an officer of the Court. But in the present case, if the trustee is to go on to distribute the estate, and then to obtain his discharge, there is no security whatever for the creditors. The person in whose favour the bankrupt has now granted a trust-deed was also trustee under a former deed, and there is no evidence that his administration was unobjectionable. If objections are made, he is in the position of being the only party to call himself to account. I am therefore for recalling the interlocutor of the Sheriff.

Lord Shand and Lord Adam concurred.

Lord Mure was absent.

The Court sustained the appeal, recalled the interlocutor appealed from, and remitted to the Sheriff to grant decree decerning the respondent Alexander Falconer, as debtor, to execute a disposition *omnium bonorum* for behoof of his creditors, and to proceed further in terms of the Statute 43 and 44 Vict. c. 34.

Counsel for the Appellants—C. S. Dickson. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for the Respondent—Strachan. Agent—Peter Douglas, S.S.C.

Tuesday, December 18.

SECOND DIVISION.

MORRISON *v.* TAWSE.

Married Women's Property (Scotland) Act 1877 (40 *and* 41 *Vict. c.* 29), *sec.* 3—*Wife's Earnings not Kept Separate.*

A married woman's earnings had not been kept separate from those of her husband, but had been lodged in a bank account in their joint names, "to be repaid to either and the survivor." *Held* (*diss.* Lord Young) that she was entitled, even after her husband's death, to prove that her earnings had equalled his in amount, and to credit herself with half of the sums so invested before accounting, as sole trustee and executrix for her husband's trust-estate.

James Tawse, bleacher, Downfield, Dundee, died on 6th September 1886, survived by his wife and a daughter by a previous marriage. He left a trust-disposition and settlement dated 15th September 1885, by which he appointed his wife his sole trustee and executrix. After providing for payment of his debts and deathbed and funeral expenses, he provided that his widow should during her lifetime not only be entitled to the free liferent use and enjoyment of the whole trust-estate, but should also be entitled from time to time, as she should think necessary, to use and appropriate such parts of the capital of the estate as she might require for her own personal use and maintenance, and that upon her death the residue of his estate should be divided into three equal shares, of which his daughter was to get one.

The said daughter Mrs Rachel Tawse or Morrison claimed *legitim*, and accordingly brought an action of count, reckoning, and payment against the executrix Mrs Tawse in the Sheriff Court at Dundee to have the amount of her *legitim* determined.

The Married Women's Property (Scotland) Act 1877 (40 and 41 Vict. c. 29), sec. 3, provides that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof."

At the time of her marriage in 1868 Mrs Tawse was a washerwoman, and after her marriage she continued to take in washing.

In 1869 James Tawse received payment of a legacy of £40. In the same year, on the death of his son, he received £200 from an insurance company. From his marriage in 1868 until his death in 1886 he made on an average £1 a-week as a bleacher. Upon 1st March 1870 the sum of £240 was lodged in the National Bank of Scotland, Dundee, upon a deposit-receipt in favour of the said James Tawse and his wife, "payable to either or survivor." After that date various sums were lodged in the same bank upon deposit-receipt in similar terms until 11th April 1881, when the amount, being £400, was uplifted and lent to the Dundee Provident Property Investment Company upon a deposit-receipt in favour of the said James Tawse and his wife, and bearing that that sum was to be repaid "to either or survivor." This Investment Company went into liquidation on 12th March 1884, at which date £14, 16s. 10d. of interest was due upon said sum of £400. In January 1885 £51, 17s. 1d., or a dividend of 2s. 6d. per £1, was paid, leaving a balance of £362, 19s. 9d, which was still unpaid.

Upon 22nd November 1881 the said James Tawse and the defender opened an account with the Dundee Savings Bank in their joint names, "to be paid to either of them and the survivor," and on 24th September 1884 they opened another account with said Savings Bank in the same terms. The balances at the credit thereof at the date of the death of the said James Tawse were respectively £144, 18s. 5d., and £108, 3s. 2d., which with interest amounted together at the date of the action to £261, 16s. 6d.

The defender alleged that at the date of the marriage she had £104; that during her marriage she made from 24s. to 28s. a-week by washing; and that she was entitled to £28, 2s. 6d. as aliment, at the rate of 12s. 6d. a-week for forty-five weeks, from the death of her husband until

the date when the pursuer intimated her intention to claim *legitim*.

She pleaded—"(3) The defender is, as well (1st) in respect of the terms of and circumstances attending the lodgment of the foresaid sums in said banks and with the said Investment Company, as (2d) under the Married Women's Property (Scotland) Act 1877, entitled to at least one-half of the said sums in her own right, and that over and above her legal or conventional rights, and prior to any division for ascertaining the amount, if any, to which the pursuer Rachel Tawse or Morrison may be entitled as *legitim*."

At a proof before the Sheriff-Substitute the pursuer deponed that the house occupied by her father and the defender was her property, that for five years after her father's marriage she had asked no rent for it as certain repairs had been made upon it by him, but that now she got £14 a-year for it. She admitted her father had told her the defender often made £1 a-week by washing, but said it was against her father's wish that the defender worked so hard.

The defender deponed that at the time of her marriage she had £104, and her husband had nothing; that she paid his debts, and gave him money to buy clothes; that they put up a washing-house for their own convenience, and repaired the house; that she made about 28s. a-week by washing; that she kept both the money she made herself and what was given to her by her husband, and that with it she paid for whatever was required for the house; that she kept the deposit-receipts in repositories belonging to her, and that if her husband wanted them he had to ask her for the keys.

The defender was corroborated generally by other witnesses.

The following are the interlocutors in the Sheriff Court so far as relate to the questions argued in the Court of Session:—

"*Dundee, 12th January* 1888.—The Sheriff-Substitute [CAMPBELL SMITH] having made avizandum, . . . Finds with regard to charge item 2, being £261, 16s. 6d. due by the Dundee Savings Bank to James Tawse and Helen Steele, his wife, to be repaid to either of them and the survivor, that the defender is bound to give the estate credit for the whole of said sum, and not merely for the half of it, in respect of failure to prove that one-half of said sum had become her property by donation or otherwise, or even to prove that the deceased knew of the distinct terms of the receipt for the money taken by her from said bank, when she, as keeper of the household purse, deposited the money in bank: Finds, with regard to item 3, being £362, 19s. 9d. of money due by the Dundee Provident Property Investment Company to the said deceased and his said wife, and payable to either or the survivor, that the defender has by facts and circumstances established her title to one-half of said debt, having proved more particularly that at the time of her marriage she was possessed of about £100; that she earned a considerable income by washing and dressing clothes, and that the deceased knew that her written title to said sum was a title joint with his own, and with such knowledge acquiesced in said title: Finds, with regard to the defender's alleged discharge, that the widow's claim for aliment falls to be disallowed to the extent of £25, and the agent's claim for work done under the trust-deed, which the pursuer repudiates to the extent of £5: Finds that the estate realised by the defender amounts to £261, 16s. 6d., and that the amount of moneys disbursed by her for which she is entitled to take credit is £41, 6s. 11d.; that therefore the estate at present divisible into thirds is £220, 9s. 9d.; Decerns against the defender for one-third of said sum, being £73, 9s. 11d.: Further, finds the pursuer entitled to a sixth share of the debt due to the deceased and the defender by the Dundee Provident Property Investment Company, conform to acknowledgment dated 11th April 1881: Grants warrant to the liquidator of said company to pay to the pursuer or her agent, upon production of a certified copy of this interlocutor, a sixth part of whatever dividend or dividends may hereafter become payable in respect of said debt: Finds the pursuer entitled to expenses modified to ten guineas, and decerns.

"*Note.*—The defender in substance claims the half of the apparent goods in communion as her own property, and she next claims the third of the other half as falling within her legal rights as widow. To give effect to that claim would be, I am convinced, to do no inconsiderable injustice to the pursuer. Her father obtained £200 from an insurance on her brother's life, who was drowned, and he also received a legacy of £40 from her mother's father, and to these sums she certainly had an equitable right, and for aught I know a good legal right to a share of them. Her stepmother's claim involves four-sixths of these sums, or what is left of them, and the equity of that claim I have not been able to discover. No doubt the defender presented her second husband, who was by no means as thrifty as she, with a suitable marriage dress, and she says (and I don't doubt her veracity, though I doubt the meekness of her temper) that she took home £104 in money, which she spent partly in paying his debts and partly in building a washing-house, and otherwise improving a property of the pursuer, and partly in investing £400 with the unlucky building society. Further, she says that she toiled night and day as a washerwoman, and earned at least as much as her husband did. I believe she earned a good deal, and also that her husband grumbled a good deal about her devotion to the washerwoman business at untimeous hours. I am not able to see my way to apply the Married Women's Property Act of 1877 to the earnings of a washerwoman who works her business in her husband's premises, burns his coals, and perhaps in her eagerness to earn money neglects to cook his dinner or make his bed. If the wife be free to choose her own occupation, and to keep all her own wages, I think the husband ought to have due warning of the kind of partnership in which he is involved, and ought to have an opportunity of expressing either assent or dissent. At all events, if their interest be to be separated, their accounts ought to be kept separate. But in this particular household there were no separate accounts; there was not even a separate purse for husband and wife. There was only one purse, and the defender kept it. There was only one bank account, and the defender kept it in her husband's name and her own. Now, the presumption of law is, when there is only one conjugal purse, that it is the husband's purse, and that presumption would

extend to a joint bank account, at least when the wife manages that joint account at her own discretion, and there was no evidence that the husband knew that the written title taken by the wife was in himself and his wife or the survivor. I do not think a bank receipt in these terms is sufficient evidence of any separate property in the wife, or of *mortis causa* donation on the part of the husband. Besides, in the present case the theory of *mortis causa* donation is not consistent with the husband's last will (and he could revoke a donation *inter virum et uxorem*), nor with a previous mutual settlement signed by both of them. Each of these documents seems to me to exclude the idea that the married pair had divided all their funds in their lifetime. If they had, I am not disinclined to think that it would have been a fair enough way of winding-up the *quasi* commercial joint adventures of this double second marriage. I think the wife, in consideration of her economy and industry, may fairly enough have been entitled to half of the funds, but I hardly think she was fairly entitled to half the funds as a joint adventurer made over to her *inter vivos*, and then to a third of the remaining half as widow. Therefore it is that I think the alleged making-over of half the moveable estate to her *inter vivos* requires to be established by clear evidence. Such evidence I have failed to find. I do not believe that either the deceased or the defender ever intended to defeat the pursuer's claim for *legitim*. I believe they thought she would be content with a third of the whole property when the defender was done with it, and perhaps so she might had reasonable precautions been taken to prevent the defender spending it all."

The pursuer appealed to the Sheriff (Combie Thomson), who pronounced these interlocutors:—"*7th March* 1888.—Recals the interlocutor appealed from to the extent and effect following, viz., in the 'discharge' of the statement of the defender's intromissions, sustains the defender's claim for aliment to the amount of 7s. 6d. a-week for forty-five weeks: Sustains the item 'solicitors' account,' as the same shall be taxed by the Auditor of Court: Finds that by virtue of the Married Women's Property Act 1877, sec. 3, the *jus mariti* and rights of administration of the defender's husband were excluded from the defender's earnings as a washerwoman from 1st January 1878."

"16*th April* 1888.—The Sheriff having resumed consideration of the cause, . . . Finds that the defender is entitled to receive credit in the accounting between the parties for the following sums, namely—(1) The sum of £16, 17s. 6d., being aliment for forty-five weeks at the rate of 7s. 6d. per week; (2) the sum of £8, 8s. 5d., being the taxed amount of the defender's agent's business account; and (3) the sum of £175, being the amount to which the defender was entitled as earnings as a washerwoman from 1st January 1878, exclusive of her husband's *jus mariti* and right of administration: Finds that the estate, as valued by the defender, amounts to £261, 16s. 6d., and that the amount for which she is entitled to take credit is £235, 4s. 5d., leaving a balance of £26, 12s. 1d. available for division; that the pursuer is entitled to one-third of said balance, being £8, 17s. 4d., for which sum decerns against the defender as executrix of the deceased James Tawse: Finds no expenses due by either party."

The pursuer appealed to the Court of Session, and argued—1. The respondent had no claim for maintenance against an estate of which she had been left the liferent. 2. No deductions fell to be made in consequence of the Married Women's Property Act 1877. That Act was intended primarily to protect married women living apart from evil husbands. Even if it could have been made to apply here, it could only have been by keeping the wife's earnings distinct from those of the husband, which had not been done. On the contrary, the wife had herself so put the earnings together, and so invested them, as to give her husband right to the whole fund. It was well-settled law that the terms of the deposit-receipts and of the bank account were not such as to give any portion of the money to the wife. The wife's £104 undoubtedly became the husband's *jure mariti*, and it was only after 1st January 1878 she could have separated her earnings, but there was no change in the way in which the spouses dealt with their money after that date.

Argued for the respondent—1. The appellant had been so long in lodging her claim for *legitim* that the respondent was entitled to aliment up to that date at the rate sued for, for she had arranged her expenditure on the understanding that she was to get the liferent of the whole estate. At any rate, she was entitled to aliment at that rate until the next term of Martinmas after her husband's death—*Baroness de Blonay* v. *Oswald's Representatives*, July 17, 1863, 1 Macph. 1147; Fraser on Husband and Wife, p. 990. 2. The Married Women's Property Act 1877 clearly applied. The Act said nothing about keeping the woman's earnings separate. She was entitled to make her claim at any time if she could show how much her earnings had contributed to the fund in question, and that they had not been consumed. Even if she had gifted her earnings to her husband—which was denied—she could revoke the donation in spite of his death—Fraser, p. 950; *Laidlaw* v. *Laidlaw's Trustees*, December 16, 1882, 10 R. 374. If the accounts were to be considered joint accounts, then the law presumed that a half belonged to each—*Bank of Scotland* v. *Robertson and Others*, January 12, 1870, 8 Macph. 391. In any view, the deductions allowed by the Sheriff fell to be made before division into thirds took place.

At advising—

Lord Lee—The question in this case is, what is the amount of the estate of the late James Tawse, for which the defender as his widow and executrix is accountable in a question with the pursuer, who claims her *legitim*.

Two points have been discussed under this appeal which affect that question—the first being whether the defender is entitled to distinguish and separate from her husband's estate the amount of her earnings as a washerwoman since 1st January 1878, when the Married Women's Property Act 1877 came into operation; and the second being as to her claim to alimony out of her husband's estate up to the term after his death, which occurred on 6th September 1886.

The facts bearing upon the first point are as follows—After her marriage in 1868 to James

Tawse, the defender, who was a washerwoman, continued to take in washing and to follow the occupation of a washerwoman. Her husband was a bleacher, earning from 18s. to 24s. a-week. Having brought her husband a little money, a part of it was spent in building a washing-house attached to the house in which they lived; and the evidence clearly shows that her husband allowed her to follow her occupation in this place, and thereby to gain earnings which are proved to have amounted to 24s. per week, and sometimes as much as 28s. Her earnings in this way (after deducting expenses) appear to have been at least equal to those of her husband. She took charge of his earnings as well as her own, the balance, after paying what was required for the house, being lodged in bank in the joint names of the spouses, "payable to either and the survivor." Down to 1881 the money so deposited, along with a sum he had received under a policy of insurance upon the life of his son, was invested in a building society in the same terms. This investment proved unfortunate. The building society went into liquidation, and a dividend amounting to £51, 17s. is all that has been received upon the joint claim, leaving a balance of £362, 19s., which is supposed to be worth 5s. in the pound. The earnings subsequently to April 1881 were deposited in the savings bank in similar terms, the defender still taking charge of the money and keeping the books. The result has been that over and above the amount due by the building society there are two deposit-receipts, amounting in all, with interest, to £261, 16s. 6d., payable to either of the spouses and the survivor. This sum is the proceeds of the earnings of both of them. Assuming that the house expenses were paid equally out of the earnings of each (and there is no ground for supposing that the wife paid more than half), it is evident that at least one-half of the amount must have arisen from the defender's earnings. The question is, whether the amount of her earnings, so far as not expended, is her property by virtue of the Married Women's Property Act 1877, and is separable by her from the amount belonging to her husband's estate? The Sheriff-Substitute answered that question in the negative, holding apparently that the statute was inapplicable to the earnings of a wife unless kept separate. For he decided against the defender "in respect of failure to prove that one-half of said sum had become her property by donation or otherwise," adding in his note that if the interests of the spouses were to be separated their accounts ought to have been kept separate. The Sheriff took a different view, and sustained the defender's claim to the effect of separating her earnings from her husband's estate. My opinion agrees with that of the Sheriff. I think that the statute is not limited to cases where the wife's earnings are kept separate, and that these being protected by the operation of the statute may be claimed by her in so far as they can be traced and distinguished like any other separate estate belonging to a wife, and from which the *jus mariti* is excluded. There may be cases (like *Edwards* v. *Baxter's Trustees*, 13 R. 1209, *aff.* 13 App. Ca. 385) where a wife's separate estate, or the income derived from it, has been so dealt with as to raise a presumption that it has been applied to a purpose of the wife's or to which she was a party.

But in the present case the first question is, whether the statute applied to the defender's earnings to the effect of saving them from the *jus mariti*? Upon that question my opinion is that the statute was applicable. It applies to the earnings of any married woman "acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged." In this case the exclusion of the husband's right of administration was of no consequence, because according to the evidence the husband did not exercise his right of administration. The terms of the deposit-receipts appear to have been settled by the wife with his consent or approval.

The next question is, whether the terms of the deposit-receipts imply any renunciation by the wife of her right to these earnings as her own separate estate? This question, I think, must be answered in the same way as if the estate in question had been a separate estate belonging to the wife in any other way; and I see no reason for ascribing to the terms of the deposit-receipt any different or higher effect as regards the wife's separate estate than such a deposit-receipt would imply as to the husband's estate. It does not imply in either case donation either *de præsenti* or *mortis causa*. In both cases it leaves it open to the proprietor to vindicate his or her separate right in so far as the subject of that right is traceable.

If the wife's separate income from her own earnings had been paid over to the husband, or placed to the credit of his bank account, a different question would have arisen. In such a case donation might be presumed. But even in that case the doctrine laid down in the House of Lords in *Edward* v. *Baxter's Trustees*, 13 App. Ca. 385, would have enabled the defender to reclaim her earnings so far as not consumed. The doctrine as stated in that case was this—"By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband, with this difference, that by Scotch law she has the privilege, even after her husbands death, of reclaiming the subject of her gift in so far as it has not been *bona fide* consumed."

In the present case, however, there was nothing, in my opinion, from which a gift can be presumed, and I therefore think that the defender is entitled to separate from her husband's estate the amount of her earnings included in these deposit-receipts. Upon the evidence my opinion is, as I have already said, that the sum in these deposit-receipts must have consisted to the extent of at least one-half of her earnings—that is, £130, 18s. With this variation in amount, I think that the Sheriff's interlocutor allowing a deduction on account of the defender's earnings ought to be affirmed.

As to the defender's claim in name of alimony, my opinion is that it cannot be sustained. The case of *De Blonay* v. *Oswald*, 1 Macph. 1147, which was referred to in support of the claim, appears to me to be adverse to it in the case of a wife who takes her husband's estate under such a settlement as that which in this case has been executed in the defender's favour.

There was one point not argued which does not

stand very clear upon the interlocutors of the Sheriffs. I refer to the debt due by the Dundee Investment Company. No part of it has been recovered or intromitted with as yet, but I think that the Sheriff-Substitute's interlocutor goes too far in so far as it sustains the defender's claim to any part of the amount, excepting in so far as it consists of earnings subsequent to 1st January 1878. The £100 referred to by him, and all her earnings prior to 1st January 1878, in my opinion must have fallen to the deceased *jure mariti*.

Unless the defender could identify some part of the balance due by the Investment Company as produced by her earnings subsequent to 1st January 1878, when the Married Women's Property Act 1877 came into operation, I do not see that she can have any claim upon it as not falling into her husband's estate.

Lord Rutherfurd Clark concurred.

Lord Young—I have the misfortune to differ from my learned brethren. The action is an account-ing by an only lawful child against her father's executrix, and for *legitim*. The pursuer would have been entitled, if her father had left a widow but no will, to two-thirds of his moveable estate. But as he left a will, and she has repudiated it, her claim can only be for one-third, the widow taking the remaining two-thirds. The Sheriff by his judgment gives this only child as her *legitim* a sum of £8, which will be only slightly increased by the judgment your Lordships—who take a different view from him as to the widow's claim of aliment—are to pronounce. The facts of the case on which that judgment—singular in its money result—is to proceed are these. The pursuer's father married the defender—his second wife—in 1868. He was a bleacher, and she was a washerwoman. She, the defender, says—and I accept the statement—that when she married him in 1868 she had a fortune of £104. That passed to her husband *jure mariti*, as Lord Lee has remarked. So the man had some fortune; and in 1869 he got £200 from an insurance on the life of his son, who died in that year. Again, in 1869 he got a legacy of £40. In all he starts in 1869 with a fortune of £344.

Now, during the marriage, which was dissolved in 1886 by his death, he made £1 a-week, or a little more. His wife, the defender, had earnings too. What they were is matter of controversy. But the household was conducted on this footing, that the family lived in a house which belonged to the pursuer, she having succeeded to it from the first wife, her mother. Apparently she allowed her father and stepmother to have it at an easy rent; she explains that she did so in consideration of the repairs they made upon it, and the building of the washhouse, and I accept her evidence, because I find it confirmed by this, that the rent was raised after her father died. Now, the wife, the defender, was taking in washing, and the first question is, whether her earnings as a washerwoman fell under the Married Women's Property Act 1877. I confess I am strongly inclined to be against the application of that Act (unless the parties acted on the footing that the rule thereby made was to be applicable to their arrangements) to a case in which a man allows his wife, living in family with him, to take in washing or sewing, or keep a shop in the house in which they live. I think it is for him to determine the footing on which that shall be done. I think the intention of the Married Women's Property Act was to prevent an ill-doing husband from invading a well-doing industrious wife and taking her earnings for his own purposes, as experience showed had been often done. But these parties, I think, showed by their conduct that they were not acting on the footing of the wife carrying on a separate business and earning a separate estate protected from her husband. The case of a wife living in family with her husband, and earning money by charing or sewing or the like, is not *prima facie* a case for the application of the statute, unless, as was not the case here, the parties so act as to show they intend such case. Here there was a common fund, made up of what the spouses earned and what the husband succeeded to. This money was put in bank in the joint names indeed, but under a destination which, according to the law of Scotland, would make the husband the proprietor. Of this common fund £400 was put out in a speculation in a building society. It was all dealt with as one fund. That £400 was lost by the failure of the building society in 1880—at least only a dividend will be recovered. But the rest of the common fund, amounting to £261, 16s. 6d., remained in bank when the marriage was dissolved by the death of the husband. Now, that money he understood he was dealing with by his will. He made his wife executrix, giving her the liferent of all, with power, if need be, to spend the capital, and on her death the money is to go to his children. Was that done on the footing that she was a creditor for £175, that he had in his possession as a borrower—£175 of her money—and that his daughter, if she claimed her legal right, could only receive £8. I think he had no conception of such a thing, and neither, I am persuaded, had his widow. But her claim, if a debt, must be capable of being proved as such. It is no case of donation between husband and wife. It is a claim of debt, the same as if she were not the executrix of her supposed debtor. How would she have proposed to establish it? By parole evidence, and saying she carried on business in her husband's house as a washerwoman? Would she, by proof of the fact that she took in washing and got payment for it, have been held to have established her claim to a debt of £175. I think that is out of the question. I never heard of a claim being so established. My opinion, then, is against the application of the statute to the present case, looking to the nature of the earnings and the conduct of the parties. The husband supplied the house accommodation which they enjoyed together, and bore the expenses of the establishment, and was liable for every farthing of the debts of the household, and when the wife is put to show that she has a claim for £175 she fails. I cannot in these circumstances agree with a judgment which will give the only legitimate child of the deceased a sum of £8, and which, as I understand your Lordships' opinion, will give the widow £130 as debt due by the estate.

My conclusion is, that the deduction to be made from the executry estate is £43, 4s. 5d. (expenses of the trust). Deducting that from £261, we have £218, a third of which is £72, which I should find to be the pursuer's

legitim. In short, I concur substantially with the judgment of the Sheriff-Substitute, while I have thought it right to make the observations I have now made as to the application of the statute to the circumstances, and as to the necessity of the wife in the circumstances establishing her claim as a creditor.

The case was argued on 26th October before the appointment of the Lord Justice-Clerk.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 12th January 1888, and whole interlocutors subsequently pronounced in the Inferior Court: Find that the defender's liability, as executrix of the deceased James Tawse, to account to the pursuer for her *legitim* out of the estate of the said James Tawse is not now disputed; and with regard to the account produced by the defender, and the pursuer's objection thereto . . . . (2) Find as to the balance due upon two accounts kept with the Dundee Savings Bank in name of the deceased and the defender, 'to be repaid to either of them and the survivor,' that the same consisted to the extent of one-half, or £130, 18s. 3d., of earnings gained by the defender as a washerwoman subsequent to April 1881, and did not form part of the deceased's estate; (3) find that no part of the balance due by the Dundee Provident Property Investment Company has been recovered or intromitted with by the defender, and that she was not in right of the same excepting in so far as she might have proved the sums to have consisted of earnings by her as aforesaid subsequent to 1st January 1878, and find that she has not proved that any part of said balances was composed of such earnings: Subject to these findings, approve of the charge side of the account: Further, as to the discharge side of the account, Find that the defender, as executrix under the trust-settlement of the deceased husband, has no claim in name of alimony out of his estate; and therefore sustain the objection to the item of £28, 2s. 6d.: Repel also the pursuer's objection to the charge for expenses of administration, and with these findings remit the case to the Sheriff that effect may be given thereto, and decern."

Counsel for the Appellant—Sol.-Gen. Darling, Q.C.—Chisholm. Agent—David Milne, S.S.C.

Counsel for the Respondent—Rhind—Baxter. Agent—Robert Menzies, S.S.C.

Tuesday, December 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WOODSIDE STEEL AND IRON COMPANY *v.* DICK & STEVENSON.

Contract—Executory Sale—Delay—Disconformity to Contract.

Under a contract for the supply of machinery which specified no time for completion of the work, the price was payable, one-half upon delivery, one-fourth upon the machinery being started, and the remaining fourth three months thereafter. The first instalment and part of the second were paid at the time stipulated. In an action against the purchaser for the balance of the second instalment he sought to set off alleged loss from undue delay in delivery, and from disconformity to contract, and pleaded that the pursuers, being themselves in breach of the contract, were not entitled to sue under it.

Held that the allegations of disconformity were relevant, but did not form a sufficient defence, seeing that the third instalment, which exceeded the abatement claimed, had become due.

Messrs Dick & Stevenson, engineers, Airdrie Engine Works, Airdrie, by letter of specification dated 5th February 1883, offered to supply The Woodside Iron and Steel Company, Coatbridge, with a horizontal 3-cylinder engine with Stevenson's Patent Rolling Mill Clutches, at the price of £2680, and their offer was accepted by letter dated 12th February. The following were the important parts of said letter of specification—"The price of the whole is to be £ , one-half payable when the principal parts of the materials of the engines and gearing are delivered at place of erection, one-fourth on the same being started, and the remaining one-fourth within three months thereafter. . . . . We undertake to uphold the whole machinery herein specified for the space of twelve months from date of starting, inasmuch as we will supply and fit up, free of charge, parts to replace every part which may prove defective during that time, and will re-adjust all parts which may wear out of order within the time named; and, in short, we guarantee that the whole will be left by us in as good and perfect working order at the end of twelve months from date of starting as at first, excepting (of course) ordinary wear and tear and such wasting or breaking of parts as may be caused by accident or by derangement of the mills or other parts of machinery not embraced in this specification, and excepting also the doings of ill-disposed or malicious persons."

By letter dated 20th February 1883 the engineers offered to change the engine from horizontal to vertical form, and to make certain other alterations in the specification on condition of the price being advanced to £2830, and this was agreed to. No precise time was specified within which delivery was to be given.

The engine and gearing were begun to be laid down in the Woodside Company's works in Octo-

ber 1883. On 3rd December £1000 was paid to the engineers, and on 16th May 1884 a further sum of £400, leaving a balance of £15 still unpaid on the first half of the price. The engine and gearing were started on 30th September 1886, when a further instalment of £707, 10s. became due. An *interim* payment of £500 had been made on 25th January 1885, of which one-half, or £250, went to reduce said sum of £707, 10s., leaving a balance of £457, 10s. This, with the above sum of £15, left £472, 10s. due to the engineers, and for this sum they raised an action against the Woodside Company in the Sheriff Court at Airdrie in November 1886. They admitted that the defenders had a claim of £13, 4s. against them which would be given effect to on a final settlement taking place. The defenders admitted that under the contract the sum sued for was due, but they alleged that the engine and gearing were not timeously delivered; that while they were in course of erection objection had repeatedly been taken to parts thereof; that they were not conform to contract, and were worth less by upwards of £472, 10s. than those contracted for; and that the defenders had sustained loss and damage through the pursuer's delay in completing their contract to the amount of upwards of £4000, which sum the defenders claimed to set off against the balance of the contract price.

The pursuers pleaded—. . . "(2) The defenders' counter claim being illiquid, cannot be set off against the sum sued for."

The defenders pleaded—"(1) The engine and gearing in question not being yet completed in terms of the contract, the pursuers are not entitled to any further payments to account. (2) The defenders having sustained loss and damage through the pursuers' failure timeously to implement their contract, they are entitled to set off such loss and damage against the contract price. (3) The engine and gearing not being conform to contract, and the pursuers having refused or failed to complete the same, the defenders are entitled to deduct from the contract price the difference in value to them between the engine and gearing as delivered and said price."

The Sheriff-Substitute (MAIR) on 16th December 1886 pronounced this interlocutor—"Repels the pleas-in-law for the defenders, and decerns in terms of the prayer of the petition against the Woodside Steel and Iron Company, Coatbridge, and John Allan, and James Allan junior, individual partners of the company, for the sum of £472, 10s., but under deduction of the sum of £13, 4s. admittedly due by the pursuers, with the legal interest on the sum of £459, 6s. from the 30th September 1886: Finds the said defenders liable in expenses, &c.

"*Note.*—The case for the pursuers is practically admitted by the defenders, and the defence itself as appears from their pleas resolves itself into a claim of damages for breach of contract. The claim of the pursuers is clearly a liquid one constituted by the contract between the parties, while that of the defenders is as clearly illiquid and of uncertain amount. The pursuers on 5th February 1883, by letter of specification, offered to supply the defenders with a horizontal three cylinder engine with Stevenson's Patent Rolling Mill Clutches at the price of £2680, and on the 12th of that month the defenders by letter accepted of said offer. By letter dated 20th February 1883 the pursuers offered to change the engines from horizontal to vertical form, and to make certain other alterations on the specification on condition of the price being advanced from £2680 to £2830, and this was agreed to by the defenders. By said letter of specification the pursuers stipulated that one-half of the price was payable when the principal parts of the engine and gearing were delivered at the place of erection, one-fourth on the same being started, and the remaining one-fourth in three months thereafter. The defenders in their defences refer to the documents above referred to, copies of which are in process, and they admit that the instalments of the price were to be paid as stated in the contract between the parties. The pursuers aver—and the averment is also admitted by the defenders—that the principal parts of the engine and gearing were delivered to the defenders at the place of erection, and that on 3rd December 1883 they paid the sum of £1000, and on 16th May 1884 a further sum of £400, making together £1400 on account of the one-half of the price of the engine and gearing as stipulated in the contract, leaving a balance of £15 of the said one-half still unpaid. The pursuers further aver that the engine and gearing were started on 30th September 1886, and were then and are now at work manufacturing iron, and that one-fourth of the purchase price, viz., £707, 10s., then became due and payable. The defenders' answer to this averment is as follows — 'Admitted that the engine and gearing were started shortly after 30th September 1886, and have since been at work.' The pursuers also say that the defenders on 25th January 1885 made an interim payment of £500 to account of said engines and gearing, half of which, in terms of letters dated 15th and 19th January 1885 (copies of which are in process), was applicable in reduction of the said instalment of £707, 10s., leaving the balance of £457, 10s. due and payable on 30th September 1886, and the present action has been brought for payment of this sum and of the £15 before referred to, making together £472, 10s. Practically, as I have said, the case for the pursuers is admitted by the defenders. It is admitted that the principal parts of the engine and gearing were delivered to the defenders; it is admitted that one-half of the contract price was then to be paid, and that that half less £15 has been paid; it is admitted that one-fourth of the contract price was payable on the engine and gearing being started, and it is admitted that the engine and gearing were started on 30th September 1886 or shortly thereafter. So standing these admissions, the pursuers' case is established, and unless there is something in the defences to prevent it they are entitled to instant decree. What, then, is the defence set up? It is simply this—that there was great delay on the part of the pursuers in furnishing the engine and gearing, and that the defenders in consequence sustained considerable loss to the extent of upwards of £4000, which they claim to set off against the pursuers' claim for the contract price of the engine and gearing. On the face of it, therefore, this is an attempt to set up an illiquid claim against one which, by the terms of the contract and the admissions of the defenders, is a

liquid one, and the question to be considered is, whether this is to be allowed in the present action? Erskine, iii. 4, 16, says 'compensation is not regularly receivable where the debts of both sides are not clear beyond dispute. They must be ascertained either by a written obligation, the oath of the adverse party, or the sentence of a judge, or as put up by Professor Bell (Prin., sec. 572)—'The debts must both be liquid *certum an et quantum debeatur*, it being, however, sufficient that the debt shall be instantly verified by writ or oath.' It is true that an exception has been admitted to the rule thus laid down by the authorities where the illiquid claim arises out of a mutual contract, but this only where there has been a failure on the part of the party seeking to enforce his liquid claim to fulfil a stipulation in the contract. Was this the case here? The claim for the defenders, as I have said, is really one of damages for delay in the delivery of the engine and gearing. But when the contract is looked at, it will be found that there is not a syllable in it from beginning to end as to when the engine and gearing were to be delivered. There was thus no provision as to time, and therefore no failure on the part of the pursuers so far as the contract was concerned. But the defenders say that the pursuers ought to have delivered the engine and gearing within a reasonable time, and that they took an unreasonable time, and hence the defenders say they sustained the loss and damage. In such a case, however, the defenders cannot be allowed to plead their illiquid claim in the present action against the pursuers' liquid claim. In the case of *M'Bride* v. *Hamilton*, June 11, 1875, 2 R. 775, it was held that where no time is expressly stipulated within which work is to be completed, a claim of damages on the ground that the work was not completed within a reasonable time cannot be pleaded *ope exceptionis*. In that case the Lord President (Inglis), referring to the case *Johnston* v. *Robertson*, 1861, 23 D. 646, says:—'There was a careful and precise stipulation that the building was to be completed and the keys delivered over by a specified day. There could be no doubt there was a breach of contract in point of time. I think it was the opinion of all the Judges that if there had been no express provision in the contract as to time, and the only complaint of the employers had been that the work was not completed in reasonable time—which is an implied condition in all contracts—that would not have led to the same result, since there would not have been a breach of the particular contract sued on, and the plea would not have been available in the same way against the contractor that he had not performed his part of the contract, and therefore could not recover.' Lord Ardmillan in the same case said—'If the contract had borne some specific date for the delivery of the machinery—that is, for erecting it in the premises of the defenders—I should have no doubt that the contractor could not have sued for the contract price without laying himself open to a claim for damages for delay in fulfilling his contract. If no specific time for completion had been mentioned in the contract, there would have been more difficulty. I am disposed to think that if no time for completion was stipulated, and if it was necessary to go into an inquiry as to what was a reasonable time, then that would have been a different case from the present, and the defender would not have been entitled in such a case to maintain *ope exceptionis* a claim of damages against the pursuer in respect of unreasonable delay in fulfilling the contract.' The observations I have quoted from the two eminent Judges have a striking application to the present case. In the same case it was further remarked by the Lord President—'If this defence is not pleadable *ope exceptionis*, there is no defence to the present action, and the pursuer is entitled to instant decree.' Upon this authority, therefore, I have no alternative but to refuse to allow the defenders a proof of their counter claim, and must accordingly give instant decree to the pursuers. I have, however, deducted from the sum sued for £18, 4s. claimed by the defenders as set forth in article 6 of their statement in connection with certain accumulators. The pursuers admit this claim, but they say credit will be given for it on a final settlement taking place. I see no reason, however, why it should not now be deducted from the sum sued for. With reference to the statement in the same article as to certain additions having been made to the engine and gearing, and certain governors connected therewith, which the defenders say have necessitated the employment of a man night and day, this, in my opinion, is sufficiently answered by the provision in the contract under which the pursuers undertook 'to uphold the whole machinery herein specified for the space of twelve months from the date of starting,' &c. If the defenders have any ground of complaint with reference to the engine and gearing, they have their remedy under this guarantee, but it cannot be entertained as a defence to the claim now made by the pursuers."

The defenders appealed to the Sheriff, and upon 10th November 1887 were allowed to put in a condescendence of *res noviter*.

They alleged that on 19th May 1887 the engine and gearing had broken down owing to original defect in the engine, and that the pursuers, notwithstanding the clause of guarantee in their letter of specification, declined to interfere; and they pleaded—"(1) The engines and gearing in question having been all along defective and disconform to contract, and having in consequence thereof broken down during experimental working by the defenders, and the pursuers having refused to put said engines into good and perfect working order, in terms of contract, the defenders are entitled to absolvitor, with expenses. (2) *Separatim*—The pursuers are not entitled to insist upon payment of the contract price until they have made the engines and gearing complete in terms of contract."

The pursuers replied that the breakdown was entirely owing to a subsidence of the foundations on which the machinery rested, for which the defenders were alone responsible, and that the defenders had begun to patch the engines themselves instead of informing them at once of what had occurred.

The Sheriff (Berry) on 7th March 1888 pronounced the following interlocutor:—"Under reference to the annexed note, refuses a proof of the condescendence of *res noviter:* Adheres to the interlocutor appealed against: Finds the

pursuers entitled to the expenses of the appeal, and decerns.

"*Note.*—[*After stating the facts and pleadings of parties*]—Is it, then, competent to allow this liquid claim to be compensated by the illiquid claim of damages which the defenders set up? The authorities lead to the conclusion that it is not competent. There have of recent years been various decisions on the competency of setting off an illiquid against a liquid claim where the two claims arise out of mutual obligations of the same contract, and the general result of these seems to be that a defender may be allowed to liquidate a counter claim which is illiquid at the time of action brought, provided that the existence of the counter claim is not doubtful, although its amount be unascertained. In applying this principle to a defence of damages through delay in the completion of work the price of which is sued for, the Courts have laid it down that if the time for the completion of the work is definite and specified, and that time has been exceeded, the defence of damages through the delay will be admitted although the amount of damage is illiquid, seeing that the fact of a breach of contract on the part of the pursuer is undoubted. But if, on the other hand, the time for completion is left indefinite—that is, if the parties have left their rights to be regulated by the implication of law that the contract shall be completed within a reasonable time—a defence founded on alleged delay will not be allowed, inasmuch as the question whether there has been unreasonable delay requires investigation, and it may turn out that there has not been any breach of contract in respect of time on the part of the pursuers. This, I think, is the principle recognised in *Macbride* v. *Hamilton & Son*, 2 R. 775, and other cases on this subject. In the present case it was urged that the fact of unreasonable delay cannot be doubted, inasmuch as the contract was concluded in February 1883, whereas the start of the engine founded on by the pursuers was not until 30th September 1886. There may however have been circumstances possibly in the conduct of the defenders themselves by which this delay may be so explained as to show that it was not unreasonable, and it seems impossible to say that inquiry into the facts is unnecessary. I am of opinion therefore that the defenders cannot be allowed to resist the pursuer's claim in the present action by the defence of delay which they seek to set up.

"A good deal of this reasoning applies to the defence of alleged defect in the engine and its non-conformity with contract. Except to the extent of £13, 4s., which the pursuers admit, and for which the Sheriff-Substitute has properly allowed a deduction, the pursuers deny that there were defects in the engine, and the question whether these existed would therefore require investigation. The claim of the defenders is altogether doubtful and uncertain.

"Beyond the general objection to the competency of the counter claim, the right of the pursuers to payment of the balance of the instalment sued for in this action seems necessarily to follow from the stipulation in the contract providing for its payment on the engine being started. On the other hand, the possibility of such defects as the defenders allege is provided for by the guarantee clause, to the effect that the pursuers shall uphold the machinery for twelve months after the date of starting, and shall fit up and replace parts that may prove defective. That clause seems impliedly to exclude a claim to retain the instalment payable on the engine being started in respect of alleged defects.

"I have not in what I have said had in view the condescendence of *res noviter*, but that does not seem to me to alter the case or to justify the admission of the counter claim. The fact that the engine broke down last May may not be attributable to any defect in the engine as supplied by the pursuers, and if they were responsible for it, it was one of those contingencies against which the guarantee clause was intended to provide. From what I have said it follows that I cannot give effect to the defenders' request that this action should be conjoined with the action of damages at their instance against the present pursuers."

The defenders appealed to the Court of Session, and argued—The respondents were not entitled to the second instalment of the price here sued for under a contract in which they had themselves failed to perform their part. They had (1) unduly delayed to furnish the article contracted for, and they had (2) supplied an article disconform to contract. The article supplied was of less value by more than £472, 10s.—the sum here sued for—than the article contracted for. The Sheriffs, relying on the case of *Macbride*, had held that there being here no time specified for delivery the respondents were not barred from suing under the contract, and the appellants could not set off an illiquid claim for damages against the price sued for, but must constitute their claim in a separate action. Now, the opinions in *Macbride* as to the law where no time is specified were *obiter*. Besides, the Sheriffs had ignored the appellants' second ground of defence. It was only where delay was the sole ground of action that the law as laid down by them applied. The appellants had raised an action of damages against the respondents. They sought to have their defences in the present action considered together, and to have the two actions conjoined. With regard to the respondents' argument that any complaints as to the engines not being conform to contract were met and obviated by the maintenance clause in the contract, the appellants pointed out that that clause referred to keeping up engines conform to contract when started. In this case the engines had never been started conform to contract, and therefore the second instalment here sued for was not due.

Argued for the respondents—1. The appellants in their condescendence based their claim for damages entirely on undue delay. That was an illiquid claim, and could not be set off against their admitted debt—*Macbride* v. *Hamilton*, June 11, 1875, 2 R. 775; *Pegler* v. *Northern Agricultural Implement Company*, February 2, 1877, 4 R. 435. 2. The engines were admittedly started upon 30th September 1886, when accordingly the second instalment became due, and their starting was *prima facie* evidence that they were conform to contract. 3. As to the *res noviter*, it was a maxim of law *pendente lite nihil innovandum*, and yet the appellants sought to strengthen their case by reference to a breakdown which actually took place months after the

Sheriff-Substitute had issued his interlocutor. For twelve months after the starting of the engines the respondents were bound, under the clause of guarantee in the letter of specification, to make good any deficiencies, but their money must be in their own pocket. What the appellants proposed was to litigate with the respondents' money.

At advising—

Lord Rutherfurd Clark—The contract does not specify any time within which the engine and gearing were to be delivered. It was therefore conceded by the defenders that they could not retain the instalment of the price sued for in this action against any loss which had been caused by reason of the delivery having been unduly delayed. They took this point to be settled by authority, and we need not further consider it.

But the defenders contended that the engine and gearing were not, in various particulars, conform to contract, and that in consequence they were of less value by "upwards of £472, 10s. than those contracted for." The pursuers answered that this was an illiquid claim which could not be set off against a liquid claim.

In my judgment the plea maintained by the defenders is not properly a plea of compensation. It is based on the consideration that the article contracted for was not furnished, and that the price is not due. In a proper contract of sale the remedy of the buyer would be to reject. But this remedy is not applicable in the case of an executorial contract like the present. Inasmuch as the article cannot or need not be returned, the remedy must consist in a right to refuse to pay more than its true value. In other words, the seller cannot claim the contract price if the article furnished is not conform to contract, and the buyer must be entitled to deduct the sum which represents the difference between the value of the article contracted for and that actually furnished. The defence therefore is not a plea of compensation. If well founded it proves that the price sued for is not due.

Nor do I think that the defenders' claim for abatement can be met by the plea that they have their proper remedy under that clause of the contract which provides that the pursuers shall uphold the machinery, and make good defects for twelve months from the time of starting. This clause assumes that the contract engine and gearing have been furnished, and imposes on the pursuers the additional obligation of maintenance.

It seems to me therefore that the defenders have so far stated a relevant defence when they say that the article supplied was not according to contract, and was of less value than the article contracted for by £472, 10s. They say "upwards" of that sum. But I cannot attach any meaning to that phrase, and for the purposes of this case I must disregard it.

The question now comes to be, whether in the face of that defence the pursuers are entitled to the decree for which they ask? and some important matters have to be considered under this head.

By the contract one-half of the price was to be payable when the principal parts of the materials of the engine and gearing were delivered, one-fourth on the same being started, and the remaining fourth within three months thereafter. The engines were started on 30th September 1886, and the sum sued for is the balance of the instalment which then became due; a portion of that instalment having it appears been previously paid. There remains due the fourth instalment, amounting to £707, 10s.

The instalment sued for was thus due at a fixed date, and should have been paid unless there was a sufficient defence to the contrary. The only defence—which is in any way relevant—is, that the engine as furnished was of less value by £472, 10s. than the engine contracted for. I should have held this to be a relevant defence to the effect that the defenders could not have been required to pay the whole contract price until their allegations had been inquired into, because in my opinion it means that the contract price is not due to the amount above stated. But I do not think that it has any further virtue. For it acknowledges that the contract price is due except to that extent, and considering that another instalment became due in the course of three months, which exceeded the sum which the defenders claim to have abated from the price, I think that the defence is not sufficient, and that the pursuers are entitled to decree. The last instalment more than covers the abatement which they claim.

I have hitherto considered the original defence only. But after the Sheriff-Substitute had decided in favour of the pursuers the defenders were allowed to put in a condescendence of *res noviter*.

I do not think that discoveries of defects after the instalment was payable form a relevant defence. On the record, as it originally stood, the pursuers were in my opinion entitled to decree. The engine had been started, and the instalment was then due. The only reason assigned against paying it was an abatement was claimed But, as has been seen, that abatement was claimed not against the instalment alone, but against the whole price, of which more than the abatement was shortly to become due. As that was in my opinion an insufficient defence the defenders were bound to pay the sum sued for. I think that the additional condescendence should not have been allowed, nor is it relevant, for in my opinion the right of the pursuers to recover was to be determined by reference to the defences which were stated and were stateable when the instalment became due. It is said that the defects in the engine were only discoverable after it had been sometime in use. But that means nothing else than that the defenders could not assign other reasons for not paying the instalment which had become due, and their delay in satisfying their obligation cannot, I think, place them in a better position.

I think therefore that the pursuers are entitled to decree. But I decide nothing more than that they are entitled in the meantime to payment of the sum sued for. All claims on either side will be reserved, and if it be eventually found that the defenders are entitled to a larger abatement the fact that they have paid the sum sued for will form no bar to the just settlement of the claims. The pursuers will be bound to repeat if it be ascertained that they have received more than is justly due to them.

Lord Young and Lord Lee concurred.

[The LORD JUSTICE-CLERK had not been appointed when the case was argued.]

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for the Appellants—D.-F. Mackintosh—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondents—Balfour, Q.C.—Jameson. Agents—J. & J. Ross, W.S.

Tuesday, December 18.

SECOND DIVISION.

[Sheriff of Argyll.

CURRIE *v.* CAMPBELL'S TRUSTEES.

Property—Feu-Charter—Description by Boundaries Inconsistent with Measurements—Plan.

A feu-charter described the subject by boundaries. It also described it by measurements, and referred to a plan annexed. The measurements and plan agreed, but they were inconsistent with the boundaries specified. In a question as to the extent of the subject, *held* that the boundaries must prevail.

Lord Young *dissented*, on the ground that the intention of parties was that shown by the measurements and plan.

In 1881 Archibald Currie, shoemaker, Tarbert, Argyllshire, applied to the late George Colin Campbell Esq. of Stonefield, for a piece of ground in Tarbert upon which to erect a dwelling-house.

Ground was laid off by Mr Campbell's factor, and buildings erected upon it by Mr Currie. The ground allotted was subsequently enlarged on the south-east and a feu-contract entered into between the parties.

By feu-charter dated 3rd and 6th and recorded 17th February 1882 the whole subjects feued were described as follows:—"All and whole that area or piece of ground situated in the town or village of Tarbert aforesaid, bounded on the west by the public street called Kintyre Street, along which it extends 40 feet 9½ inches or thereby; on the north partly by ground belonging to the said Colin George Campbell, and presently occupied by Finlay Smith and Duncan M'Arthur, along which it extends 41 feet 7 inches or thereby; on the east partly by the house also belonging to the said Colin George Campbell, and presently occupied by Donald Johnston, fisherman, along which it extends 14 feet 9 inches or thereby; and again on the north by the said house, along which it extends 20 feet or thereby; and again on the east, partly by Burnside Lane, along which it extends 26 feet 9½ inches or thereby; and on the south by ground feued to Robert Lyon Dawson, along which it extends to Kintyre Street 62 feet or thereby, as the said area or piece of ground is shown on a plan or sketch thereof annexed and signed by the parties of even date with the said feu-contract as relative thereto, together with the houses and other buildings erected on the said area or piece of ground."

The plan or sketch referred to had the figures mentioned in the feu-charter placed upon the appropriate lines, but it was not drawn to scale and was more of the value of an illustrative sketch than of a formal plan.

A difficulty subsequently arose as to the boundaries of the feu on the north-east. "The house, . . . occupied by Donald Johnston, fisherman," when the feu-charter was signed, was taken down in 1883, and the site was disponed by the superior to another person. In 1886 Currie began to build a wall upon a part of the site as being within his feu. Mr Campbell obtained an interim interdict against this proceeding, and Currie thereupon brought an action of declarator against Mr Campbell in the Sheriff Court at Campbeltown, to have it declared that his feu was bounded "again on the north by a stone wall erected by the pursuer on the site of said house (Donald Johnston's house) along which it extends 20 feet or thereby."

After protracted proceedings before both the Sheriff-Substitute (RUSSEL BELL) and the Sheriff (FORBES IRVINE), in the course of which Mr Campbell died and his trustees were sisted as parties to the action, the pursuer brought the case by appeal before the Second Division of the Court of Session. It appeared that it was impossible to reconcile the boundaries given in the feu-charter with the measurements therein given and with the plan thereto attached; and it was

Argued for the appellant—The plan and the measurements, which agreed with one another, and supported his contention as to the limits of his feu, must prevail over the boundaries given in the feu-charter, or rather that the plan agreeing with the measurements must prevail over the description by boundaries, which did not so agree. The portion of ground claimed belonged to the respondents, and therefore this was not an error which could not be rectified. Moreover, the respondents' agent had prepared the feu-contract and the plan, and their factor had marked off the ground. They were therefore responsible for any mistake that had been committed, and were not entitled to take advantage of their agent's actings to the detriment of the appellant—*North British Railway Company* v. *Magistrates of Hawick*, December 19, 1862, 1 Macph. 200; *North British Railway Company* v. *Moon's Trustees*, February 8, 1879, 6 R. 640. The removal of Johnston's house was in contemplation at the time of the feu-contract.

Argued for the respondents—Although the question at issue was of small money value, they were brought to contest it in the interests of the person to whom the ground built upon by the appellant had been feued. This declarator was the only way of getting the interdict question settled. The boundaries were perfectly distinct, and could not be altered by a rough sketch not drawn to scale, and only intended to illustrate the feu-charter. Their case was the same as if there had been no plan, but if looked at at all it was in their favour, for it showed Johnston's house to be outside of the feu altogether. The measurements were demonstrative not taxative. The appellant would not have had a stateable case but for the fact that the ground in dispute belonged to them, and really that made no difference upon the law on the subject. What bounded a feu could not form part of the feu. Besides, in 1882 Donald Johnston's house was standing, and the appellant's boundary could not go through a house which bounded his feu—*Reid* v. *M'Coll*, October 27, 1879, 7 R. 84.

At advising—

Lord Justice-Clerk—This case is a very unfortunate one. The claim relates to a heritable subject of most trifling value to either party, and covering about 60 square feet. The difficulty arises out of the description in the title of the piece of ground feued by the respondents to the appellant. The feu-charter gives a complete description by the boundaries surrounding the feu, but if the measurements there given are taken to be correct there is certainly a mistake somewhere. The gentleman who drew the feu-charter to show matters more clearly added a description by a plan or sketch. This was a reasonable and sensible thing to do if it had been well done, but there can be no doubt that the adding of this sketch has been the origin of this dispute. If no sketch had been added there could have been no difficulty as to the boundaries at the place in dispute, and these boundaries would have been the boundaries contended for by the respondents. The question therefore is, which is to rule—the sketch or plan attached to the feu-contract, which is without any scale, and with only the figures written upon each side, or the boundaries described by the names of the subjects surrounding the feu?

I have given the matter my best consideration—it is a difficult question as it stands, and would have been a still more difficult one if the plan had been carefully drawn to scale—and the opinion I have come to is that the boundaries as given in the description in the feu-contract must prevail over the sketch, which is to be taken as illustrative only.

The feu at the place in dispute is said to be bounded on the north by Donald Johnston's house. Therefore the line at that place cannot be drawn anywhere within the house occupied by Johnston. Taking all the facts together, I should have been astonished if this case had been brought about this piece of ground if no intervening difficulty had occurred since it was feued off, but it appears that the 60 square feet in question has since been feued to someone else. I think, however, that if there had been anyone in Tarbert to bring these people together this action need never have been here.

Lord Young—I assent to the proposition as generally true that where boundaries and measurements are in conflict in the description of a subject the boundaries must prevail. But that is only a general rule, adopted because experience has taught the Court that it generally leads to the true conclusion as to the intention of the parties. If a field or an estate of considerable extent is conveyed by distinctly specified boundaries the subject conveyed is not to be altered to satisfy the measurements, which may be wrong as regards feet or yards or even acres. That error must just be submitted to, and the intention of the parties given effect to, although the subject conveyed may be somewhat in excess or somewhat short of the measurements. This is not a case of that kind. It is not a case of yards or acres in a large property, but is the case of a feuing stance conveyed to a feuar by the proprietor, the feu-contract being prepared by the proprietor's man of business, and the land being laid off and the drawing made by the proprietor's factor. It happens that the description of the subject by boundaries in the deed and by measurement do not correspond with the plan. Whether you call it a plan or sketch is immaterial; it is the only kind of plan appropriate here for the purpose in view. It is a plan in which the direction of every line is given, and in which the measurement of each line is given and marked down, and so given and marked down that a surveyor, to whom a remit was made by the Sheriff-Substitute, had no difficulty in applying the plan to the ground. His plan, which is drawn to scale, applies to the ground, and gives the very direction and the very dimensions indicated in the sketch, but it is said it does not answer to the description in the deed. In what respect does it not answer? Only in the matter of boundaries, for the measurements are all in accordance with the measurements in the feu-charter. It is contended for the proprietor, whose man of business framed the deed and whose factor drew the sketch, that there is to be an interpretation of the deed which will give the feuar a different subject both in boundaries and measurements from that laid down in the sketch.

Now, there is a maxim of our law which says, *verba cartarum fortius accipiuntur contra preferentem*, which has been interpreted as meaning that deeds are to be construed most strongly against the granters. Here the proprietor's man of business is responsible for the deed, and his factor on the spot for the sketch, and whether the boundaries or the measurements are to give way, I should give it against the superior's agent and factor rather than against the feuar, who is entirely innocent of the matter.

It is said it is dreadful to disregard the boundary of Johnston's house, but we were told that it was a mere hovel of no more permanence than a haystack. I am not going to sacrifice the measurements to subjects "presently occupied by Donald Johnston," especially in the case of a mere hovel which has since been taken down. Acting, then, upon general rules of law, and giving due weight to the maxim I have quoted, I am not for disregarding all the measurements, but rather for disregarding this boundary of Johnston's house. I am therefore for giving the pursuer the decree he asks.

Lord Rutherfurd Clark—The pursuer feued a piece of ground from Mr Campbell of Stonefield, the predecessor of the defenders. Before he obtained his feu-disposition he built a house on part of it. His title was ultimately completed in 1882, and the ground was disponed to him with the buildings erected thereon.

In so far as the pursuer has built on the ground his title cannot be disputed. It appears, however, that a house which belonged to Mr Campbell, and which at the date of the feu-disposition was occupied by Donald Johnston, was pulled down. The pursuer claims a part of the site of this house as being conveyed to him by his feu-disposition. The only question in the case is whether this claim is well founded.

In order to have his right disclosed the pursuer has raised this action. He asks the Court to declare that he has the sole and exclusive right to the area of ground described in the petition. The boundaries therein given are the same as those contained in the feu-disposition with one exception. In the disposition the boundary

with respect to which the dispute arises is this —"On the east partly by the house also belonging to the said Colin G. Campbell, and presently occupied by Donald Johnston, fisherman, along which it extends 14 feet nine inches or thereby, and again on the north by the same house, along which it extends 20 feet or thereby." In place of this boundary the pursuer introduces into his petition the following words—"And again on the north by a stone wall erected by the pursuer on the site of said house, along which it extends 20 feet or thereby." The question is, whether the pursuer is entitled to have decree of declarator in terms of the new boundary which he has substituted for the boundary contained in the disposition?

The portion of the south gable of Johnston's house is known and admitted. It is further conceded by the pursuer that his claim in this action involves a claim to a portion of the site of these houses. But he says that his feu was given out according to a plan appended to the disposition, and that the area thereon on the plan, and defined by the measurements contained in the disposition itself, comprehends the ground which he claims in this case.

The defenders, on the other hand, maintain that Johnston's house is the northern boundary of the pursuer's feu, and that no part of that house is comprehended within it.

I take it to be settled law that what is described as the boundary of a feu in the feu-disposition which creates it is by that very fact excluded from the feu. There may be exceptions where the boundary is a river or a road. But with such exceptions we have here nothing to do. The northern boundary of the pursuer's feu is Johnston's house. Hence I think it clear that according to the disposition no part of that house or of its site was included within the pursuer's feu.

Nor is the plan inconsistent with the disposition. It shows, and I think that it was designed to show, that Johnston's house was wholly excluded from the feu given out to the pursuer.

The pursuer relies on the measurements contained in the disposition and also transferred to the plan. And there is no question that according to the view which I take of the case certain of these measurements are wrong. Johnston's house is the boundary partly on the east and partly on the north, cutting out a corner from what would otherwise be a quadrilateral figure. Measuring along Johnston's house on the east, the true length of the east boundary at that part should be 17 feet 9 inches or thereby, instead of 14 feet 9 as given in the disposition, and of course there is a corresponding error in the other portion of the eastern boundary. I cannot, however, adopt these measurements to the effect of giving to the pursuer ground which I think was plainly excluded from his feu. The boundaries given in the feu-disposition must in my opinion prevail. To my mind it is plain, both from the disposition and the plan, that Johnston's house was wholly excluded from the feu, and as the measurements would include a part of it, I must hold that this was wrong. An error of that kind may easily be made. I cannot hold that the measurements are right to the effect of assigning to the pursuer a piece of ground which the disposition expressly declares to be excluded from it.

For these reasons I think that we cannot give declarator in terms of the prayer of the petition, and therefore that the defenders are entitled to absolvitor. In pronouncing this decree we decide the only question which has been raised, and even if it were desirable to pronounce any other form of decree we have not the means of doing so, inasmuch as the parties when they were before us renounced all further probation.

Lord Lee—My opinion is that the Court in this case is not called on either to make a new plan or a new description, and that we ought not to deal with any point excepting that which was raised by the defenders' objection to those words of the prayer, which substitute a new boundary instead of Donald Johnston's house. On that point I concur with the majority of your Lordships. We can only gather the intention of parties by construing the contract according to the ordinary rules. It appears to me that the one point clearly ascertained by the terms of the title is, that the feu did not include any part of Johnston's house. That house is not only described as a boundary in the feu-contract, but is also shown in the plan or sketch referred to as outside the boundary of the feu. Upon this point there is no conflict between the words of the description and the plan or sketch. There is a slight discrepancy elsewhere in the measurement or in the sketch, but as to such discrepancy my opinion is that the description by boundaries according to the usual rule must prevail.

I therefore think that on the only point in controversy the defenders are entitled to prevail.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 8th May 1888, and the interlocutor of the Sheriff on 23rd July following: Find that no part of Donald Johnston's house is included in the feu given off by the late Colin George Campbell, author of the defenders, to the pursuer: Therefore assoilzie the defenders from the conclusions of the petition: Find them entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Appellant—Balfour, Q.C.—Crole. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Respondents—Gloag.—Gillespie. Agents—Tawse & Bonar, W.S.

Friday, November 9.

OUTER HOUSE.

[Lord Wellwood, Ordinary.

CLARK, PETITIONER.

Entail—Disentail—Lands directed to be Entailed—Rutherfurd Act (11 *and* 12 *Vict. cap.* 86), *secs.* 27 *and* 28.

A testator by his trust-disposition and settlement, after providing for the payment of his debts, certain small annuities, and a family provision of £6125 in favour of his son and his children, directed his trustees

upon the death of his son to execute a disposition and deed of strict entail of his estates in favour of the eldest son of his (the testator's) son and substitute heir of entail. He further directed that in the event of his son dying before the child entitled to succeed as institute should have attained twenty-six years of age, the trustees should retain the management of the estates, pay a portion of the income in maintenance of the heir-apparent, and accumulate the remainder into a sinking fund until that event. In the event of the sinking fund not being strong enough when that event arrived to wipe off the family provision of £6125, and the annuities and legacies left by the testator, the trust was to remain in force until those and all the testator's other engagements were fully discharged. He further directed that after the whole purposes of the trust were accomplished, but not till then, his trustees should denude of the trust and deliver over to the heir of entail in possession of the heritages for the time the title-deeds of the same.

The testator was predeceased by his son but survived by his grandson (his only son's eldest son), who at the date of the testator's death was more than twenty-six years of age. The testator's personal estate was insufficient to meet his personal debts. There was a balance of about £1600 to be met by the heritable estate. In addition the heritable estate was burdened with heritable debt to the extent of £7900 and was primarily liable for certain small annuities. The value of the estates was about £17,500.

The testator's grandson presented a petition under the Entail Acts, with the necessary consents, to have the trustees ordained to convey the estate to him in fee-simple. The reporter appointed to inquire into the procedure reported, that while in his opinion the petitioner — strictly under the trust-deed, and apart from the Rutherfurd Act—could not have compelled the trustees to denude in his favour until the sinking fund had become strong enough to pay off the family provision of £6125, he considered that the provisions of sections 27 and 28 of the Rutherfurd Act had the effect of entitling him to obtain possession at once, all parties interested being satisfied or secured. The Lord Ordinary *approved* of the report and ordained the trustees to denude accordingly.

Francis William Clark of Ulva died on 13th September 1887, leaving a trust-disposition and deed of settlement executed by him *mortis causa* dated 15th February 1865, with a codicil dated 15th June 1875, by which he conveyed to certain trustees his whole estate heritable and moveable, real and personal, in trust for the purposes therein mentioned. The purposes of the trust were, *inter alia*, as follows:—The first purpose of the said trust-disposition and deed of settlement was for payment of all the testator's just and lawful debts, sickbed and funeral expenses, and the expenses of executing the trust; and the second purpose was for payment of certain small annuities, amounting to £25, to surviving sisters of the deceased. By the third purpose the testator, *inter alia*, gave directions as to the payment and division of a family provision of £6125 settled by him, as therein narrated, for the benefit of the late Francis William Clark, Sheriff of Lanarkshire, his only son, and his children.

By the fourth purpose of the said trust-disposition and deed of settlement the testator directed that upon the death of his son, the said Sheriff Francis William Clark, his the testator's trustees should execute a disposition and deed of strict entail of his estates of Ulva, Inchkenneth, and Kilpatrick, and of all lands and other heritages which should belong to him at the time of his death, and that in favour of the eldest lawful son of his the testator's said son, and to the heirs whatsoever of his body; whom failing, the second lawful son of his said son, and to the heirs whatsoever of his body, and so on until all the heirs-male of his said son's body are exhausted; whom failing, the eldest lawful daughter of the testator's said son, and to the heirs whatsoever of her body; whom failing, as mentioned in the said trust-disposition and deed of settlement.

The fifth purpose of the said settlement provided that in the event of the testator's son, the said Sheriff Francis William Clark, dying before his child entitled to succeed as institute under the said disposition and deed of entail should have attained the age of twenty-six years complete, then the testator's trustees should still retain the management of the trust aye and until such child should have attained the age of twenty-six years complete. Further, the said trustees were thereby empowered to pay to such heir-apparent after the death of the testator's said son, for his or her education, maintenance, and support, one-eighth part of the free yearly produce of said estates, and other seven-eighth parts to be by said trustees accumulated into a sinking fund until such apparent heir attained twenty-six years complete; and in the event of the said sinking fund not being strong enough, when said child should have so attained twenty-six years, as to wipe off the said sum of £6125 and annuities and legacies left by the testator, then the said trust should remain in full force and effect aye and until these sums and all the testator's engagements were fully provided for and discharged. On the other hand, any surplus of the sinking fund should be spent in buying land, to be entailed as aforesaid.

By the seventh and last purpose thereof he appointed that after the whole purposes of the said trust were accomplished, but not until then, his trustees should denude of the trust, and deliver over to the heir of entail in possession for the time of the said estates of Ulva, Inchkenneth, Kilpatrick, and other heritages, the whole title-deeds of the same, and all the deeds of the trust.

Francis William Clark, the testator, was predeceased by Sheriff Francis William Clark his only son. The only son of Sheriff Francis William Clark, was Francis William Clark, barrister-at-law, of No. 1 Mitre Court Buildings, Temple, London, who was born on the 8th of December 1857.

The personal estate left by the testator amounted in value at the date of his death to £6000 or thereby, and his personal debts, including the provision of £6125 and the said legacy, payable primarily out of his personal estate, amounted to £7600 or thereby, showing a deficiency of personal estate to meet personal claims to an extent of about £1600.

The heritable property left by the said testator consisted of the said estates of Ulva, Ormaig, Inchkenneth, Kilpatrick and others in the county of Argyll, which were of the capital value of £17,500 or thereby, and were burdened with heritable debt to the amount of £7900. These estates were also primarily liable for the annuities of £25 left by the testator, and for other annuities amounting to £14 payable by him.

The only trustee accepting and surviving was Peter Miller, writer, Linlithgow.

In these circumstances Francis William Clark, barrister-at-law, the grandson of the testator presented this petition to the Court in terms of the Statutes 11 and 12 Vict. cap. 36, 16 and 17 Vict. cap. 94, 38 and 39 Vict. cap. 61, and 45 and 46 Vict. cap. 53, in which he prayed the Court to "authorise, grant warrant to, and ordain the said Peter Miller, as trustee under the said trust-disposition and deed of settlement, or other persons or person acting for the time being in the execution of the trust thereby created, to dispone and convey to the petitioner in fee-simple, and for his own absolute use and behoof, the said estates of Ulva, Ormaig, Inchkenneth, Kilpatrick, and others, but subject to and under burden of all debts and annuities secured upon said estates or for which said estates are liable, and forthwith upon all such debts and annuities being paid or provided for, to execute and deliver such dispositions and conveyances, or other deeds or instruments, as may be necessary for conveying and transferring the said estates to the petitioner and his heirs or assignees whomsoever, absolutely in fee-simple, all in terms of the said statutes."

The Rutherfurd Act, sec. 27, enacts—"That where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might by virtue of this Act have acquired to himself such land in fee-simple by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court, as hereinafter provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee-simple; and the Court shall, upon such application and with such consents if any as would have been required to the acquisition of such land in fee-simple, have power to grant such warrant and authority." Sec. 28 enacts—"That for the purposes of this Act, the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

There were called to the petition as heirs whose consents must be given or dispensed with—(1) Mrs Agnes Clark or Ramsay, eldest daughter of the said Sheriff Francis William Clark, and wife of the Reverend Walter Marlow Ramsay; (2) Francis Graham Ramsay, her eldest son; and (3) Ernest Wulfilus Ramsay, her second son, being the three nearest heirs who, if the said direction to entail had been carried out, would have been at the date of presenting this petition for the time entitled to succeed to the said entailed estates after the petitioner.

The said Mrs Agnes Clark or Ramsay was of full age and subject to no legal incapacity except that arising from her marriage. The said Francis Graham Ramsay and Ernest Wulfilus Ramsay were respectively of the ages of seven and five years, and curators *ad litem* were appointed to them. Deeds of consent by the said Mrs Agnes Clark or Ramsay with consent of her husband, and by the respective curators to the heirs in pupillarity, were produced in process.

On 29th May 1888 the Lord Ordinary (TRAYNER) remitted to Mr H. B. Dewar, S.S.C., to inquire into the circumstances set forth in the petition, to examine whether the procedure has been regular and proper and in conformity with the provisions of the statutes and relative Acts of Sederunt, and to report.

The report, after narrating the circumstances, proceeded as follows:—"The somewhat ample quotations from the deed of settlement which I have ventured to make are with a view to your Lordship considering whether the point of time has arrived which entitles the petitioner to acquire the estates in fee-simple at present—keeping in view the special terms of the directions given by the testator to his trustees, and generally the whole scheme and frame of the trust—read in the light of the 27th and 28th sections of the statute.

"The testator in the scheme of his settlement did not make any express provision for the event which happened, namely, that he should be predeceased by his son Sheriff F. W. Clark, nor for the other event which happened, namely, that the petitioner, his grandson, should have been more than twenty-six years at the date of the testator's own death. It humbly seems to the reporter, however, to be pretty clear that under a combined reading of the fourth, fifth, and seventh purposes of the trust the petitioner—strictly under the trust-deed, and apart from the Rutherfurd Act—could not have compelled the trustees to denude in his favour until the sinking fund formed out of the income of the lands held in trust had accumulated so as to be 'strong enough' to pay off the £6125 family provision. It was important of course to the substitute heirs of entail succeeding after the petitioner that that debt should be paid off out of accumulated income arising while the petitioner was the institute, although not yet actually in possession—in other words, paid off practically by the petitioner himself—rather than that the deed of entail should be executed at once, and the institute put in possession at present, with the fee of the estates burdened permanently with a capital debt of £6125.

"The question accordingly arises, whether the provisions of the 27th and 28th sections of the Rutherfurd Act, read along with the latter half of the 43rd section of the same statute, have the effect of, so to say, accelerating the point of time at which the institute shall take—shall get actual possession of—the lands, or whether the

terms of the directions in the trust-deed are such as to suspend the operation in favour of the petitioner of the 27th section until the £6125 has been paid off out of a sinking fund accumulated out of the rents for the next thirteen years to come or thereby.

"The reporter is not aware whether the precise point in question has hitherto been decided, but he is humbly of opinion that both upon the principles on which the Rutherfurd Act proceeds, and upon the analogy of some recent cases, the petitioner is entitled to acquire in fee-simple the estates in question at present, upon the £6000 payable out of the £6125 provision to the petitioner's sisters and the annuities of £25 being first properly secured.

"It is unnecessary to recal the fact that the Rutherfurd Act proceeds upon the preamble that 'the law of entail has been found to be attended with serious evils both to heirs of entail and to the community at large.' Similarly the common law looks with disfavour upon trusts directing the rents of lands to be accumulated for long periods in order to pay off capital debt out of income, and therefore it seems not to be difficult to infer that if substantially the rights and interests of persons now alive can be fully secured, the Court will look favourably upon any proposal to give, in fee-simple and at once, to anyone in the position of the petitioner, estates directed to be but not yet entailed, provided the interests of other beneficiaries under the trust be secured, and provided also of course that the consents of the three next heirs of entail be obtained.

"In the case of *Milles Riddell, Petitioner*, July 12, 1853, 15 D. 914, and 25 Jur. 531, Lord Rutherfurd, in delivering the opinion of the whole Court in a case the immediate point in which was what heirs require to be called as respondents 'for the safety of the after heirs,' said—'Where the parties are in existence whose consent is sufficient to disentail, it seems plainly unnecessary in any proceedings under the Act to call any other parties, because these, together with the petitioner, are in truth the proprietors of the estate, entitled to dispose of it at pleasure, and therefore in any procedure in which they are all present every recognised interest in the estate is fully represented.'

"In the case of *Ranald G. Macdonald, Petitioner*, Feb. 21, 1857, 19 D. 506, 24 Jur. 542, and Duncan's Manual, p. 440, where money was held in trust for the purpose of being entailed after all claims were satisfied, the Court authorised the disentail to be granted upon the consent of the three next heirs being got, and upon arrangements being made which secured that certain debts of the entailer should be paid. The circumstances of that case were very different from and much more complicated than those of the present case; but the principle on which it seems to have been decided appears to the reporter to apply to the present case.

"More particularly, the view strongly expressed by Lord Deas in that case, and concurred in by Lord Curriehill, and not dissented from by Lord President M'Neill, who was the only other Judge who sat on the case (Lord Ivory having been absent), was that the 43rd section of the Rutherfurd Act, read along with the 3rd and 4th secs. thereof, entitled a person in the position of the present petitioner, with the consent of the next three heirs, to disentail trust money or trust lands. Section 43 (*ad fin.*) enacts that where trust money or trust lands are directed to be entailed, "they may be dealt with under this Act in all respects, as such lands might have been dealt with if entailed in terms of such trust or directions. And on referring back to section 3 it is seen that the petitioner with three consents could disentail, or, under section 4, could with these consents sell, alienate, and dispone, charge with debts or incumbrances, lease or feu such estate in whole or in part, and that unconditionally.

"There is the further view that the 28th section of the Rutherfurd Act enacts—'That for the purposes of this Act, the date at which the deed placing such money or other property under trust, or directing such land to be entailed first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust.' These words seem to the reporter to be very strong as applied to this case, and to override the direction in the trust-deed to postpone the execution of the entail until the £6125 had been accumulated out of the rents accruing subsequent to the date of the testator's death—13th September 1887. In short, by the Statute of 1848 the Legislature, upon grounds of public policy, made a testamentary direction of this kind to accumulate rents for a long period and thereafter entail the lands quite ineffectual, and made the legal construction of such a direction to import a direction to entail as at the date of the testator's death. If so, then the petitioner constructively, and for the purposes of the Rutherfurd Act and relative statutes, is at this moment heir of entail in possession under an entail of date 13th September 1887, and entitled therefore to disentail, but of course only on compliance with the 6th section of the statute, directing that debts on provisions affecting, or that may be made to affect, the entailed lands be first properly secured.

"It is accordingly thought that under these sections the petitioner is entitled to disentail at present, and that, moreover, the full spirit, if not the letter, both of the testator's direction to execute the entail, and of the 27th section of the Rutherfurd Act, will be carried into effect by the petitioner getting at present a fee-simple conveyance with the consent of the three next heirs, and under burden of the £6000 of the £6125 provision payable to his sisters, and of the £25 of annuities. The words of the 27th section are—'Where any land is directed to be entailed, but the direction has not been carried into effect,' of course the words 'the direction' refer mainly to the direction to execute the entail, although as that direction is coupled with, if not qualified by, the subordinate directions as to accumulating the income and retaining the management of the trust, it may with some force be said that 'the direction' means the direction taken as a whole, and read with its qualification, and that the petitioner is not entitled to get the conveyance in fee-simple until matters are in such a position as to entitle him to demand the execution and delivery of the deed of entail, and entry into actual possession of the entailed lands. But, as already indicated, the answer to this seems to be, that if all the parties interested are satisfied or made secure, the Court will not deny to the petitioner the benefit, under the 27th section of the statute,

of an immediate conveyance. The reporter has already shown, he thinks, that the whole corporation of heirs is represented by the petitioner and the three next heirs whose consent he has got. It was the next heirs who would have been benefited by the £6125 having been paid out of the accumulated income in place of being made a burden upon the fee of the estate, but as the persons who at present are the three next heirs are satisfied on this point, there seems to be no one else who has any interest or title to object. And this seems to be in accordance with other recent decisions, more particularly the case of the *Hon. Atholl M. Forbes of Brux*, in which your Lordship said — 'It appears to me that the only reasonable way of dealing with the Rutherfurd Act is to give effect to its provisions in the circumstances existing at the time when these are appealed to. This I take to be the principle on which the Court proceeded in deciding the case of *Preston Bruce*, March 6, 1874, 1 R. 740.' To this decision the First Division adhered June 29, 1888, 25 S.L.R. 592."

On 9th November 1888 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor: — "Having considered the petition and the report by Mr H. B. Dewar, No. 24 of process, Finds that the procedure has been regular and proper, and in conformity with the provisions of the statutes and relative Acts of Sederunt: Interpones authority: Grants warrant to and authorises and ordains Peter Miller, writer, Linlithgow, as trustee under the trust-disposition and settlement of the late Francis William Clark of Ulva, of date the 15th February 1865, with relative codicil, dated 15th June 1875, to dispone and convey to the petitioner in fee-simple, for the absolute use and behoof of himself and of his heirs and assignees, the estates of Ulva and others, as described in the said trust-disposition and deed of settlement, but subject to and under the real burden of (1st) the existing heritable debt thereupon of £7900 interest and penalties; (2nd) the sum of £6000 and corresponding interest and penalties of a provision in favour of the daughters of the late Sheriff Francis William Clark, the petitioner's sisters; (3rd) a yearly annuity of £10 to the testator's sister Elizabeth Clark or Bruce; (4th) a yearly annuity of £10 to the testator's sister Johanna Anderson Clark; and (5th) a yearly annuity of £9 sterling to the testator's sister Henrietta Clark or Graham; and to execute and deliver at the sight of the reporter such dispositions and conveyances as may be necessary for conveying and transferring the said estates and others to the petitioner and his heirs and assignees whomsoever absolutely in fee-simple, and such a bond and disposition in security; and remits to the reporter to see such a disposition and conveyance or dispositions and conveyances as well as a bond and disposition in security over the estates of Ulva and others about to be disentailed in favour of the daughters of the said deceased Sheriff Francis William Clark for £6000 with interest thereon and penalties, but postponed to a sum not exceeding £1140 about to be secured thereon by the petitioner, prepared and delivered; and to see such a disposition and conveyance and such a bond and disposition in security duly recorded in the appropriate register of sasines, and to report; and decerns; but supersedes extract of the decree until a certificate under the hand of the reporter be lodged in process that satisfactory evidence has been produced to him that the personal debts and arrears of annuity, amounting together to £732, 17s. 5d., and the legacy of £105 mentioned in his report, have been paid and discharged."

Counsel for the Petitioner—Low. Agents—W. & J. Cook, W.S.

Thursday, December 20.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

LEITH AND BREMNER *v.* W. & J. KIRKWOOD.

Burgh—Dean of Guild Court—Jurisdiction—Nuisance — Interdict — Erection of Byre in Burgh.

Warrant for the erection within burgh of a byre for the accommodation of thirty cows was opposed on the ground that it would create nuisance, and the Dean of Guild sisted process to allow the objectors to bring an interdict. This not having been done, the Dean of Guild recalled the sist, and granted warrant in terms of the prayer of the petition. On appeal the Court (following the case of *Manson* v. *Forrest*, June 14, 1887, 14 R. 802) of new sisted process to allow the objectors to apply for interdict.

Opinion (*per* Lord President) that while the Dean of Guild may refuse a lining where a proposed structure is only adapted to the purposes of a trade which has been specified by law as a nuisance, it was expedient that a question of nuisance should not be tried in the Dean of Guild Court.

In May 1888 Walter Kirkwood and John Kirkwood, builders, Edinburgh, presented a petition in the Dean of Guild Court, Edinburgh, craving warrant to erect on ground belonging to them at Canaan Grove, Eden Lane, byres and other necessary buildings for the accommodation of thirty-two cows.

The petitioners averred that when they acquired the premises in 1887, they were then used as byres for the accommodation of twenty-four cows, and the subjects had been occupied in that way for more than twenty years. They proposed to remove the old byres, and to build others of an improved construction; to keep the new buildings of such a height as not to be noticeable by adjoining proprietors; and to regulate the drainage according to the most improved sanitary principles. The petitioners also alleged that the entrance to their ground was by Eden Lane, and that none of the compearing respondents had any material interest therein.

Answers were lodged by Mrs Margaret Forbes or Leith and Dr Bruce Allan Bremner, adjoining proprietors, who averred that the contemplated byres and manure heaps would be within a short distance from their respective mansion-houses, and that their grounds would be overlooked and

deteriorated in value. The district was residential and adapted for feuing, but the proposed erections would create a nuisance, and would interfere with feuing and affect the health of the neighbourhood, and the cows passing up and down the lane would be a danger to the inhabitants. By the conditions of feu in the petitioners' titles, which formed a real burden on their property, it was provided that no houses were to be erected for the carrying on of any trade which might operate as a nuisance to the neighbouring feuars.

Under the Public Health (Scotland) Act 1867 the following are, amongst others, declared "a nuisance"—Section 16, sub-sec. C—"Any stable, byre, pig-stye, or other building in which any animal or animals are kept in such a manner as to be injurious to health." Sub-sec. D—"Any accumulation or deposit of manure or other offensive matter within fifty yards of any dwelling-house within the limits of any burgh, or wherever situated, if injurious to health." Sub-sec. E—"Any work, manufactory, trade, or business, injurious to the health of the neighbourhood, or so conducted as to be offensive or injurious to health."

The respondents averred that the erection of the proposed buildings, and the use to which they were admittedly to be put by the petitioners, would be a nuisance within the meaning and intention of the said Public Health (Scotland) Act 1867.

The petitioners pleaded, *inter alia*, that the defences raised questions which were not within the jurisdiction of the Dean of Guild Court.

The respondents pleaded, *inter alia*—"(3) The effect of the erection and use of the proposed buildings being to create a nuisance to the respondents' property, destroying the same as a residential property, seriously affecting the amenity of the property, and being detrimental to health, warrant to erect the same ought not to be granted. (4) The proposed buildings and business intended to be carried on being nuisances in the sense of the statute before mentioned, warrant to erect the same should be refused. (5) The construction of the proposed buildings, and the carrying on of the said business, being contraventions of the feu-right of the ground on which it is proposed to erect the buildings, warrant to erect the same should be refused."

On 9th August 1888 the Dean of Guild (Gowans) pronounced the following interlocutor and note:—"Finds that the answers of the respondents raise questions which are not within the jurisdiction of the Dean of Guild Court: Therefore sists the process, to allow the respondents, or either of them, to apply for an interdict against the erection of the proposed buildings, if so advised, reserves all questions of expenses, and decerns.

"*Note.*—Messrs W. & J. Kirkwood, builders, Edinburgh, are proprietors of certain house property and ground known as Canaan Grove and Wood Grove, Eden Lane, Edinburgh, and having an extent of about two acres. Eden Lane, which is a *cul de sac*, runs down almost the entire west side of this property, and close to its southern extremity gives entrance to certain buildings which occupy the extreme south-west corner of the petitioners' property. These buildings are now, and have been for many years, occupied as byres for the accommodation of twenty-four cows. In the wall which forms the southern extremity of the lane there is a private back-entrance to Streatham House, the property of the respondent Dr Bremner. This lane also contains various villa residences. The southern boundary of the petitioners' property is a high wall, dividing it from the grounds of Canaan Lodge, the property of the respondent Mrs Leith.

"The petitioners crave warrant to erect byres for thirty-two cows, with cart-shed, stable, storage and other appropriate accommodation, on the south-east corner of their ground, and on their completion, to remove the buildings hitherto used for a like purpose on the south-west corner of the property, with exception of a timber erection.

"The respondents have lodged answers objecting to the erection of the byre. While Dr Bremner in particular objects to the effect on Eden Lane, and Mrs Leith avers that her house will be only thirty yards distant from a proposed manure pit in connection with the byre, in many particulars their objections are identical. They aver that the proposed operations will prejudice the amenity, the feuing value, and the salubrity of their respective properties. They further state that the erection of the byre will be a nuisance to the neighbourhood and injurious to health. They also found upon the following condition both in the petitioners' titles and in their own—'Not to erect or allow to be erected on any part of the ground hereby feued any house or houses for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars;' and upon the provisions of the Public Health (Scotland) Act, 1867, sec. 16 (*c*) (*d*) (*e*), which declare certain things to be nuisances.

"So far as the objections on the ground of amenity are concerned, the Dean of Guild does not consider that the respondents' answers are well-founded. If the erection of a byre is not prohibited, and is in itself lawful, it could not be prevented merely because it might prejudice the amenity of neighbouring properties.—*Barclay* v. *M'Ewen*, 7 R. 792.

"With regard to the other grounds of objection, the petitioners plead, 'The defences raise questions which are not within the jurisdiction of the Dean of Guild Court;' and in the circumstances of this case the Dean of Guild has sustained this plea.

"It was argued to the Dean of Guild that he had jurisdiction in the matter of nuisance, which was a part of the subject of neighbourhood, and that if he thought that the proposed operations, in the use to be made of them, would prove a nuisance, he could stop them, or order them to proceed upon conditions. In support of this contention the respondents relied on a series of decisions beginning with *The Magistrates of Stirling* v. *The Sheriff*, 1752, M. 7584. In that case an inhabitant of Stirling raised the side wall of his house, whereby he interfered with a servitude acquired by his neighbour, who complained to the Sheriff. The Sheriff sustained his own jurisdiction, and the Magistrates successfully brought a declarator 'that by virtue of their erection the sole and only jurisdiction in all questions concerning building houses within burgh, taking

down and rebuilding thereof, servitudes thereon, and marches and boundaries of the same, belonged to them excluding the Sheriff.' But in that case there was an allegation of direct fault in the structure of the building, and there was no question of the use to which the building was to be put. In *Fleming*, 1750, M. 13,159, the Dean of Guild, on the petition of a lower proprietor, forbade the future letting of an upper floor to a fencing-master, on the ground of nuisance arising from noise. In *Proprietors of Currubber's Close* v. *Reoch*, February 26, 1762, M. 13,175, a wright's shop had been burned, and with it neighbouring houses in a crowded close. The wright proposed to rebuild as before. It was held that the shop was in the circumstances a public nuisance, as being liable to fire, and that the Dean of Guild must deal with it. In this case the question of nuisance was directly connected with questions involving the structure of the building in dispute. In *Buchanan*, M. 13,178, a Dean of Guild had ordered the removal of watersheds from the front of houses, on the ground that they encroached on the streets, deformed the same, and proved a nuisance to the general public. His proceedings were sustained. Analogous to these are the cases of *Vary* v. *Thomson*, M. App., *voce* Public Police, No. 4, and *Charity*, M. App. Public Police, No. 6. But all these cases were the subject of judicial consideration in *Donaldson* v. *Pattison*, Nov. 14, 1834, 13 S. 27, and that with a result hostile to the view contended for by the respondents. Donaldson was in the habit of raising goods by cranes to his upper storey from the pavement close to the front wall. Pattison, his next neighbour, obtained interdict from the Dean of Guild on the ground that the pavement was obstructed to his prejudice. It was held that the Dean of Guild could not competently entertain the petition, as the subject-matter of the nuisance was not of an architectural nature, and therefore did not fall within his province. Lord Mackenzie explains his reasons for considering that the Dean of Guild's jurisdiction was excluded, and after examination of the cases cited above he refused to accept the plea that the Dean of Guild could consider not only the structure of a building but also the use of it if that was illegal. In the case of *Fleming* his Lordship noted that the point of jurisdiction was never raised, while in the other cases not only was illegal use complained of, but also illegal construction of a building.

"So far as the Dean of Guild is aware, there is no other case where the point now under consideration has been the subject of direct decision, but there are more recent cases where important statements have been made as to the law on this head. In *Colville* v. *Carrick*, July 19, 1883, 10 R. 1241, warrant was craved for the erection of a hall behind a house in a street. The house had been used as a school for many years, and the hall was intended as an adjunct thereof. The titles allowed the feuars to build at the back such offices as they might consider necessary for additional convenience, but forbade shops, warehouses, or trading places. The Dean of Guild refused the petition. It was held that the hall was an office necessary to the petitioner's convenience. In the course of his opinion the Lord Justice-Clerk said:—'If the only question is as to a right to use the proposed building in a particular way, I greatly doubt whether the Dean of Guild has any authority to deal with that matter.' Lord Young, *inter alia*, said, 'I am clearly of opinion that the Dean of Guild has nothing to do with the use to which buildings are to be put.'

"The case of *Manson* v. *Forrest*, June 14, 1887, 14 R. 802, presents many analogous features to the present, but it does not throw much additional light upon the question of jurisdiction. In that case the erection of a byre was objected to as a nuisance, but interdict was refused because the petitioner undertook so to manage his business as to prevent the possibility of nuisance. The question of jurisdiction was argued to the Court at an early stage of the case, and the rubric of the case certainly asserts that the Court doubted the Dean of Guild's jurisdiction to entertain this question, but there is no expression of opinion on this point. It is the fact, however, that process was sisted by the Court on the motion of the respondents, who sought to uphold the Dean of Guild's jurisdiction.

"The more recent case of *Robertson* v. *Thomas*, 14 R. 822, is more in point. A petitioner proposed to make a large increase of a stable which stood in the centre of a thickly populated square of houses. It was chiefly objected that this would result in nuisance from smell and noise, and in an increased danger of fire. The Dean of Guild allowed a proof in order to ascertain whether the matters embraced in these objections, when established, would or would not be of a character with which he could competently deal. The petitioner appealed on the ground, *inter alia*, that the Dean of Guild had no jurisdiction as to the use of a building or as to a mere question of nuisance. But the Court (Lord Rutherfurd Clark *diss.*) refused the appeal, on the ground that it was expedient that the facts should be ascertained before determining whether the subject-matter of the objections was within the Dean of Guild's jurisdiction.

"In this case the Court practically reserved all questions of competency, and it appears to the Dean of Guild that this decision is no qualification of the doctrine that he cannot competently consider a simple question of nuisance, or a question as to the use to which a building is to be put. The whole object of the inquiry in that case was to ascertain whether the facts were such that the Dean of Guild could deal with the objections raised. The Lord Justice-Clerk, *inter alia*, said:—'I am clearly of opinion that there are cases of nuisance, and cases as to the use of buildings, which cannot come under the jurisdiction of the Dean of Guild, because they do not involve questions of the character for which he is the proper judge, but that, on the other hand, it is no answer to say what the appellant says here if the nuisance is connected with a structural alteration of the building itself, and the use is the use of that building.'

"In the present case the respondents' contention amounts to this, that the Dean of Guild has jurisdiction where the use of a building would naturally, if not necessarily, occasion nuisance. The Dean of Guild does not concur in this view. It appears to the Dean of Guild that he has only authority in the matter of nuisance, when by the circumstances of the particular case that matter is connected with questions involving the structural arrangements of the building for which war-

rant is craved. He thinks that these elements do not appear in the present case.

"The Dean of Guild ought to add, that after visiting the premises, and after full consideration of the plans, he is opinion that the petitioners' proposed operations are confined to their own property, and are structurally of a satisfactory nature.

"The lane, which gives access to various properties, is a *cul de sac*. It is only twelve feet wide, and thus too narrow to admit of two carts or cabs passing each other in it. The cartage for byres for thirty-two cows will be considerable, and will obstruct ordinary traffic."

On 23rd August the Dean of Guild sisted the cause for one month from that date, and on 25th October he pronounced the following interlocutor:—"The respondents having failed to apply for interdict on the ground of nuisance, on the motion of the petitioners recals the sist: Finds that the proposed operations are confined to the petitioners' own property, and can be executed without danger: Finds that the proposed premises are structurally of a satisfactory nature: Finds that the objections of the respondents on the ground of amenity are irrelevant for the reasons explained in the note to the interlocutor of 9th August last: Therefore repels the pleas-in-law for the the respondents, grants warrant to the petitioner in terms of the prayer of the petition and of the plans therewith produced, which are docquetted as relative hereto: Finds the respondents liable to the petitioner in expenses," &c.

The respondents appealed to the Court of Session, and argued—The proposed building would be a nuisance both at common law and under the Public Health Statute 1867, which by section 16 prohibited any accumulation of manure within fifty yards of any dwelling-house. In the present case it was proposed to make a manure-heap within thirty yards of Mrs Leith's house. The Dean of Guild must look to the nature of the building, and the use to which it was obviously to be put. Under the petitioners' title he was prohibited from erecting any such buildings as he here proposed. There was no case in which it had been expressly decided that the Dean of Guild had no jurisdiction to consider the question of nuisance within burgh.

Counsel for the respondents were not called on.

At advising—

Lord President—I think that in this case we ought to follow the same course as was taken in the case of *Manson*. I am not disposed to lay down any very stringent or definite rule as to how far the Dean of Guild in a question of lining is entitled to entertain such an objection as is here taken on the ground of nuisance. I can understand that in such cases as those to which Mr Innes has referred, when certain kinds of works have been ticketed by law as nuisances, the Dean of Guild may refuse a lining, because the structure is only adapted to the purposes of an unlawful trade. But in regard to the other cases which have been referred to, and are quoted in the note to the Dean's interlocutor, I am not disposed to do anything which would lead to an extension of the jurisdiction of the Dean of Guild. Questions of nuisance are often of very great delicacy, and raise points of law which require the intervention of higher courts than that of the Dean of Guild. Such questions are among the enumerated cases which are sent to trial by jury, showing plainly the intention of the Legislature that they are of such importance that they ought to be brought before the highest tribunal only. I think that is very sound, and for these reasons, while I am not disposed to do or say anything which would appear to extend the jurisdiction of the Dean of Guild, I am not disposed to attempt to define the precise limits of that jurisdiction, because that is often a very difficult matter, and will in almost all cases depend upon circumstances. But apart from the ground of incompetency, I have no doubt that expediency requires that a question of nuisance should be tried elsewhere. I therefore think that we ought to sist this process in order to enable the appellants to bring an interdict against the erection of these buildings.

Lord Mure concurred.

Lord Shand—I quite agree with the course which your Lordship proposes, and to the views which your Lordship has expressed. It does not appear from the reports that questions of this kind have been tried in the Dean of Guild Court for a long time, and it is not desirable that they should be dealt with there. The circumstances here are somewhat different from what they were in *Manson's* case, and the question between the parties is a very proper one for raising under an action of interdict in this or the Sheriff Court.

Lord Adam concurred.

The Court sisted process to allow the appellants to raise an action of interdict against the erection of the buildings objected to, reserving the question of expenses.

Counsel for the Appellant Mrs Leith—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Appellant Dr Bremner—Brodie Innes. Agents—Richardson & Johnston, W.S.

Counsel for the Respondents—Mackay—H. Johnston. Agents—Menzies, Coventry, & Black, W.S.

Thursday, December 20.

SECOND DIVISION.

[Sheriff of Forfar.

CUTHBERT *v.* WHITTON AND OTHERS.

Property—Mutual Wall—Common Author.

The proprietor of two adjoining houses, by his settlement, left one to one daughter and the other to another daughter. The conveyance of each house was in similar terms, and each was described as bounded by the other. The gable wall of one house formed part of the back wall of the other.

In an action of declarator by one of the daughters against the other, *held* that in the absence of any evidence to the contrary in the titles this wall must be presumed to be mutual.

John Galloway, plumber, Arbroath, was pro-

prietor of two adjoining houses there. The end or gable wall of one was part of the back wall of the other. By trust-disposition and settlement and codicil dated 22nd May 1857 he left the former to his daughter Mrs Ann Galloway or Whitton, and the other to his daughter Mrs Catherine Galloway or Cuthbert. The conveyance of each house was in similar terms, and each was described as bounded by the other.

In March 1888 Mrs Cuthbert brought an action in the Sheriff Court at Arbroath against John Galloway Whitton and others in right of Mrs Ann Galloway or Whitton, now deceased, and prayed the Court "to find and declare that the wall dividing the property of the pursuer from the property of the defenders situated in Allan Street, Arbroath, is a mutual gable wall." The petition contained further declaratory conclusions of common property in a back court, and exclusive property in a back stair, which were afterwards given up.

The defenders claimed the exclusive right to the wall, or at all events did not admit that it was the mutual property of them and of the pursuer.

As far as this case was concerned nothing was known about the history of these two houses or their sites prior to the time when John Galloway, proprietor of both, conveyed them to his two daughters respectively. The Sheriff-Substitute (Robertson) allowed a proof, which was confined by the parties entirely to the question whether the wall in dispute complied with the characteristics of a mutual wall, and afterwards by interlocutor of 13th June 1888 the Sheriff-Substitute found that the pursuer had failed to show that the wall and back court in dispute were mutual, or that the stair mentioned in the petition was her exclusive property, and assoilzied the defenders. He added a note explaining that his judgment was based on the facts that the defenders' house was built before the pursuer's, that the wall had not the usual thickness of a mutual wall, and that there was a window in it which benefited only one of the proprietors.

The pursuer appealed to the Sheriff (Comrie Thomson), who dismissed the appeal.

"*Note.*—I am unable to find any of the usual features or marks which are looked for in a mutual gable. It has not been built so as to suit the purposes of the two properties in the same degree, and such equality of rights as is of the essence of a mutual gable is, from the mode in which the wall was erected, impossible."

The pursuer appealed to the Court of Session.

Argued for appellant—The conveyances were in similar terms. There was nothing to lead to the conclusion that the father, the proprietor of both houses, had given a four-wall house to one daughter, and a three-wall house to the other with no right to touch the fourth wall without her sister's consent. Such an extraordinary result could only receive effect if for some reason the natural presumption of the mutuality in the dividing wall was clearly overcome by the titles. The conveyances made no such unreasonable distinction, and the Sheriff-Substitute was wrong to allow a proof at all in this matter.

Argued for respondents—This was an oppressive action. The really important conclusions had been departed from, and now a bare declarator that this was a mutual wall was asked. It was the appellant who was seeking to disturb the harmony which had hitherto existed. The respondents conceded the present state of possession, and admitted the appellant was entitled to have her house duly supported by their wall. They objected to the declarator asked on the ground that the appellant, if successful, would probably thereupon insert vents and otherwise weaken their wall.

At advising—

Lord Justice-Clerk—There is here a fifteen-inch wall between two houses which is and must be part of the sustaining walls of both. The proprietor of both houses left one to one daughter and the other to another daughter, and the questions solemnly decided by the Sheriffs after a proof are, whether each daughter has a right in the wall which actually divides her house from that of her sister at that place, or whether the whole wall belongs to one of the daughters, the other being entitled to a right of support for her house. This wall is not strictly a gable, but nothing turns upon that at all. I should have thought the natural reading of the conveyances in this case would have been that the father gave to each daughter an equal right in the wall so far as it forms the division between the two houses, but the Sheriff-Substitute has gone elaborately into the question of mutual gables, and the Sheriff says—"I am unable to find any of the usual features or marks which are looked for in a mutual gable." I do not think that was the way to deal with the case here at all. The property belonged to one man. We do not know how long it is since these houses were built, but when they were gifted to these young ladies they were the property of one man, who was their father, and at that time no rights of property existed in the one house as against the other. He had an equal right to both. The only reasonable reading of such a gift is to hold that he gave an equal right to both in what was necessary to both. It was suggested that there would be great danger to the house of which this wall is the gable if the wall were to be declared mutual and vents were allowed to be introduced. I think if the gable is mutual, the right to have vents made can be settled at once by the proper Court.

I have therefore come to the conclusion that, without looking at the proof at all, we should decide that this wall is a mutual wall.

Lord Young—This case is to my mind one of the very simplest. A father was proprietor of two adjoining and not detached houses, that is, with a wall between them, of which the house on the one side uses one side, and the house on the other side the other. By deed of settlement he left one house to one daughter and the other house to another daughter. The terms of the conveyance of each house are absolutely indistinguishable, and each is described as bounded by the other. The only question is, to whom does the wall between the houses belong? It is used by each as a mutual wall. Is there any reason for including it in the conveyance of one house and excluding it from that of the other?

None in the world that I can see. But it is said one house was built before the other. What in the world is that to the purpose? It might have been to the purpose if there had been two feudal properties divided by a wall, but there is no suggestion here that there ever were two properties. The proprietor of a stance builds two houses upon it, not necessarily at the same time, and conveys one house to one daughter and the other to another daughter. What reason is there for holding that he included the wall in the conveyance to the one daughter, and excluded it from the conveyance to the other daughter, which was in identical terms? Yet that is what the Sheriffs have held. On what ground I cannot see. I should assume, with nothing to the contrary, that this mutual wall was conveyed as a mutual wall and to be so regarded. The other conclusions in the summons I understand to have been simply abandoned. Mr Ure explained that the whole evidence led related to this wall, and apparently the whole evidence does relate to it. He also said that he had been compelled to give up the other conclusions because there was not a word of evidence about anything except the wall. What use there was for evidence I do not see. It might have been needful with regard to the other conclusions, but no such evidence was led.

I therefore agree with your Lordship in thinking that the pursuer here is entitled to the declarator she asks, that this is a mutual wall, and that the defenders should be assoilzied from the conclusions of the action, and that no expenses should be found due in either Court.

Lord Rutherfurd Clark concurred.

Lord Lee—I am of the same opinion. I think the question of the mutual wall depends upon the conveyance from the common author, and that a proof was unnecessary.

The Court recalled the interlocutors in the Sheriff Court; found and declared the said wall to be mutual; *quoad ultra* assoilzied the defenders from the conclusions of the action; and found no expenses due by either party.

Counsel for the Appellant — Gloag — Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Law. Agents Duncan Smith & M'Laren, S.S.C.

REGISTRATION APPEAL COURT.

Friday, December 21.

(Before Lord Mure, Lord Lee, and Lord Kinnear).

[Sheriff of Selkirk.

PHILIP *v* ROXBURGH.

Election Law— County Franchise— Representation of the People Act 1884 (48 *and* 49 *Vict. c.* 3), *sec.* 3—*Service Qualification—Farm Manager.*

A farm manager had the exclusive use and occupation of a bedroom in the farm-house by virtue of his employment. His mother, who was tenant of the farm, and his sisters, also resided in the farm-house, and he took his meals along with them in another room in the house. *Held* that the dwelling-house was inhabited by the person under whom he served, and that therefore he was not entitled to be placed upon the roll of voters as an inhabitant-occupier of a dwelling-house.

Alexander Roxburgh, farm manager, Thorneylee, Selkirkshire, claimed to have his name entered in the register of voters for the county of Selkirk as tenant of a dwelling-house at Thorneylee, Selkirkshire. Alexander Philip, solicitor, Peebles, as agent and mandatory for William Thomson junior, Clovenfords, Stow, a voter on the roll, objected to the claim on the ground that on a sound construction of the Representation of the People Act 1884, as applied to the facts of the case, the dwelling-house inhabited by the claimant was also inhabited by the person under whom he served, viz., his mother Catherine Douglas or Roxburgh. The Sheriff admitted the claim.

Philip took a case for the opinion of the Court. The facts set forth were as follows—"The said Alexander Roxburgh is farm manager at the farm of Thorneylee, in Selkirkshire, of which his mother Catherine Douglas or Roxburgh is tenant under a lease granted by the Right Honourable Lady Reay in favour of the said Catherine Douglas or Roxburgh and William Roxburgh, now deceased, and the survivor of them. The said Alexander Roxburgh inhabits and has the exclusive use of a bedroom in the farm-house of Thorneylee by virtue of his employment as farm manager aforesaid. The said Catherine Douglas or Roxburgh and her daughters also reside in the said farm-house, and the said Alexander Roxburgh takes his meals along with them in another room of the said farm-house. The said Alexander Roxburgh has occupied the said room as aforesaid for the requisite length of time to entitle him to be put on the roll of voters, if his qualification is otherwise sufficient."

The question of law for the decision of the Court was—"Whether in respect of the foresaid facts the said Alexander Roxburgh is entitled to be entered on the roll in respect of the qualification set forth in the 3rd section of the Act 48 and 49 Vict. 3?"

The Representation of the People Act 1884 (48 and 49 Vict. c. 3), sec. 3, provides—"Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed, for the purposes of this Act and of the Representation of the People Acts, to be an inhabitant occupier of such dwelling-house as tenant." Sec. 7, sub-sec. 4, provides—"The expression 'dwelling-house' in Scotland means any house or part of a house occupied as a separate dwelling."

Argued for the appellant—The occupation of part of a house by virtue of service was not a good qualification for the household franchise if the house of which it formed part was occupied by the master—*Stribling* v. *Halse*, November 2, 1885, L.R., 16 Q.B.D. 246. The case of *Ballingall* v. *Menzies*, November 26, 1886, 14 R. 127,

was not in conflict with this view, for in that case there was no occupation of the house by the employer.

Argued for the respondent—The qualification of the respondent was his exclusive right by virtue of his contract to occupy a particular room in the house. That room was a "dwelling-house" in the sense of the Act. It was not occupied by the person under whom the claimant served. To argue that the claimant's qualification was destroyed by the occupation by his mother of the rest of the house was to give two meanings to "dwelling-house" in the same clause, which was illegitimate. The case of *Ballingall* v. *Menzies* was in point. That case differed from the present one only in this, that the employer there was a company.

At advising—

Lord Lee—My opinion on the facts stated is, that the claimant's mother (who is tenant and occupant of the farm) inhabits the whole farmhouse, and that therefore the claimant's occupancy of a bedroom in that house by virtue of his service is not sufficient under clause 3rd of the Act of 1884 to qualify him as an inhabitant occupier of a dwelling-house in respect of that room. There is some difficulty in reading the clause along with the interpretation—a difficulty that was avoided in the Act of 1868 by the condition of separate rating. But I think that that difficulty is solved by observing that a man cannot (under the terms of the clause) be said to inhabit a dwelling-house by virtue of service if such dwelling-house, either as a whole or as part of a larger dwelling-house is, *de facto* inhabited by the person under whom he serves. This is the view which appears to have been taken in the case of *Stribling*, L.R., 16 Q.B.D. 246.

Lord Kinnear and Lord Mure concurred.

The Court sustained the appeal and recalled the judgment of the Sheriff.

Counsel for the Appellant—Guthrie. Agents—Philip, Laing, & Co., S.S.C.

Counsel for the Respondent—Vary Campbell. Agent—Thomas Dalgleish, S.S.C.

Friday, December 21.

(Before Lord Mure, Lord Lee, and Lord Kinnear.)

WATT *v.* M'GUIRE.

Election Law—County Franchise—Representation of the People Act 1884 (48 *and* 49 *Vict. c.* 3), *secs.* 2 *and* 7 (4)—*Representation of the People (Scotland) Act* 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 3—"*Inhabitant-Occupier*"—*Constructive Residence—Imprisonment of Occupier during Part of the Necessary Period of Occupation.*

A man occupied as tenant a house in a county for the necessary period, with the exception of three months during which he had been confined in jail under sentence for assault. While he was in jail his wife and son resided in the house. *Held* that he was entitled to be enrolled as an "inhabitant-occupier."

John M'Guire was entered on the roll of voters in the county of Midlothian as an inhabitant-occupier as tenant of a house in Slateford, Colinton parish, Midlothian, from 31st July 1887 to 31st July 1888.

Watt, a voter on the roll, objected to the registration on the ground that M'Guire had been convicted of assault on 23rd April 1888, and had in respect of this conviction suffered imprisonment in the prison of Edinburgh for four calendar months from that date.

The Sheriff repelled the objection.

Watt took a case, in which the above facts were set forth. It was further admitted at the bar that while the voter was in jail his wife and son resided in the house for which he claimed during the time of his imprisonment, and that the house was never shut up during that period.

The question stated for the opinion of the Court was—"Whether John M'Guire, having been imprisoned (as aforesaid), is entitled to be retained on the roll?"

Argued for the appellant—The question was whether a man who had been in jail for four months out of the twelve could be said to have been an "inhabitant-occupier." *Prima facie*, inhabitation must be actual. There might be constructive residence, but to establish it there must be *animus revertendi* on the part of a person who is *sui juris*. This was settled law in England — *Powell* v. *Guest*, November 22, 1864, 18 C.B. (N.S.) 72; *Ford* v. *Hart*, November 21, 1873, 9 L.R., C.P. 273; *Atkinson* v. *Collard*, November 5, 1885 16 Q.B.D. 254; *Ford* v. *Barnes*, *id.*; *Ford* v. *Elmslie*, *id.*; *Spittall* v. *Brook*, December 4, 1886, 18 Q.B.D. 426. The question was treated in Scotland also as one of constructive residence—*Manson* v. *Sinclair*, December 19, 1868, 7 Macph. 329; *Kennard* v. *Allan*, November 4, 1879, 7 R. 1. The meaning to be attached to "constructive residence" in Scotland should not be different from that adopted in England. No doubt in *Manson* v. *Sinclair* Lord Benholme had referred to the residence required for the acquisition of a settlement under the poor law as an analogy, and it was settled that imprisonment did not interrupt such a residence—*Roger* v. *Maconochie*, July 5, 1854, 16 D. 1005; *Beattie* v. *Leighton and Mitchell*, February 20, 1863, 1 Macph. 434 (*per* Lord Cowan, p. 438). But although in some respects analogous, the question of residence under the poor law differed so greatly from that of qualification for the franchise, that the rules there applied could not be followed. If followed to the full extent, a man in the position of the pauper in *Deas* v. *Nixon*, June 17, 1884, 11 R. 945, would be entitled to be enrolled, a result which would not consist with the authorities in cases of registration.

Argued for the respondent—The words to be construed were the words "inhabitant-occupier." The words "shall have resided" were used in the Representation Act of 1832 (2 and 3 Will. IV., sec. 11), but have not been used in any subsequent Act. The words "inhabitant-occupier" were not to be so strictly construed. This was shown by analogy in the interpretation put upon the

words "actual personal occupancy" used in sec. 6 of the Act of 1868, in such cases as *Johnston* v. *Buchanan*, November 6, 1879, 7 R. 7, and *Lunan* v. *Allan*, November 13, 1880, 8 R. 13. The cases of *Manson* and *Kennard* were not in point. There was there a deliberate breach of continuity. The present case was of the nature of that of *Stewart* v. *Doull*, December 19, 1868, 7 Macph. 330. The case of *Powell* v. *Guest* was under a different statute. The applicant there had been in prison for the last five months out of the six required by the Act of 1832, and in a prison outside of the seven mile radius

At advising—

Lord Mure—This case relates to a party who is enrolled as tenant of a house at Slateford at a rental of £5 a year, and it is objected to his remaining on the roll that he was in prison for assault for several months in the year during which he required to occupy that house in order to enable him to retain his qualification,

The facts on which the question depends are clearly and shortly stated in the case, with this important additional explanation, which was agreed on by the parties at the bar, that during the period the respondent was imprisoned his wife and family continued to reside in the house of which he was tenant, and that on the expiry of his imprisonment he returned to his family at Slateford, and has since then resided with them there. The Sheriff has repelled the objection, and the question thus raised for decision is, whether in the circumstances stated the fact of the respondent having been so imprisoned destroyed his qualification?

The case therefore raises one of those questions of constructive residence which have been so frequently considered and decided under the operation of the 76th section of the Poor Law Act of 1845, and with reference also to the "personal occupancy" clauses of the Reform Act of 1882, and of the Representation of the People (Scotland) Acts of 1868 and 1884. It is unnecessary to refer to these cases in detail, for the result of the leading decisions as the law now stands cannot, I think, be doubted, and appears to me to be this—That when a party is temporarily absent from the house in which he is in use to reside, in the pursuit of his business or ordinary calling, or even in search of work, or through any other necessary cause, but with the intention of returning to that house as soon as he conveniently can, such temporary absence is not sufficient law to break the continuity of his residence either under the "continuous residence" provisions of the 76th section of the Poor Law Act, or under the "personal occupancy" clauses of the Acts which regulate the qualification of voters. In cases of both descriptions the party who has been temporarily absent will be held to have been resident constructively for the requisite period in the house occupied during his absence by his family or by his servants as the case may be.

Now, I did not understand it to be maintained on the part of the appellant that if during the four months' absence the respondent had been engaged in some work which required him to reside for a time in the locality where he was employed, his absence could have been held to effect the continuity of his residence at Slateford, and so to destroy his qualification. But it was contended that as his absence was compulsory, and brought about by his imprisonment for a criminal offence, this absence must be deducted from the period of his occupancy. No decision in this country was referred to in support of this proposition, and I am not aware that any such decision was ever pronounced. But a decision to a directly contrary effect was pronounced in the case of *Rogers*, July 5, 1854, 16 D. 1005, in which it was held that absence under two consecutive imprisonments of considerable duration, the one for assault and the other for desertion when serving in the militia, did not break the continuity of a party's residence under sec. 76 of the Poor Law Act. This, in the view I take of it, was a very important decision, and has, I believe, been considered to regulate the rules of the law of Scotland on constructive residence ever since its date, not only in questions of continuous residence under the Poor Law Act, but also in questions of occupancy when dealing with the elective franchise.

In that decision there was no indication of any difference of opinion among the Judges who were called upon to deal with it. It originated in the Sheriff Court, where the Sheriff-Substitute held that the continuity of the residence was not interrupted. His interlocutor was adhered to by the Sheriff, who laid it down distinctly that compulsory absence in respect of imprisonment could not be regarded as an interruption of the residence. Upon an advocation the reasons of advocation were repelled by the Lord Ordinary, whose judgment upon the matter now in question was unanimously affirmed by the First Division of the Court, whose views were shortly expressed by the Lord President (Colonsay), who delivered the opinion of the Court.

Such being the character of the decision, it is plainly a binding authority in all poor law cases, and I can see no reason why it should not be acted upon in questions of the present description. For it appears to me to lay down the rules of the law of Scotland which are to be applied in dealing with the clauses of any Act of Parliament relative to residence or occupancy which require or admit of the application of the doctrine of constructive residence as that doctrine is known in Scotland, and they are, I conceive, specially applicable in cases under the Registration of Voters Acts, in which, as Lord Benholme remarked in the case of *Manson*, 7 Macph. 329, to which we were referred during the discussion, this Court is in use to "receive assistance from the analogy of poor law decisions." I am of opinion therefore that this appeal should be dismissed.

We have been referred to cases in the law of England on the subject, which I do not think it necessary to examine in detail, as our own law relative to constructive residence or constructive occupation is in my opinion very clear and distinct. The only one of these cases which related to the effect of absence during imprisonment was that of *Powel* v. *Guest*, 18 C.B. (N.S.), 72. But that decision, as I understand it, seems to have proceeded to some extent on the circumstance that there was no Act of Parliament which provided that in such questions time spent in prison was not to be deducted as had been done in other matters. In the view, how-

ever, which has been taken on questions of constructive residence in Scotland it has never been held to be necessary that there should be some express provision in an Act in order to authorise the Court to lay down the rules they have done. They seem, on the contrary, to have considered themselves entitled to construe the provisions of the Acts in order to ascertain whether on fair construction those provisions admitted of the rule being applied in the case where a party during a temporary absence from his home left his family there till his return. So construing the Acts, the conclusion they came to was that the absent party was to be considered as being constructively resident in the house where he had left his family, which was in reality his home, and that the rule applied in cases of compulsory as well as of voluntary absence, and in the result of those decisions I entirely concur.

The other cases were those of officers and soldiers absent on duty with their regiments, and in most of these the English Courts seem latterly to have come to the conclusion that parties so absent were disqualified. Those decisions have, however, no direct bearing, I think, on the present question, and I shall abstain from giving any opinion upon the important questions thus raised, as we may hereafter be called upon to decide them. At present I have only to say that when that time comes it will, I conceive, be necessary to examine other decisions given in England on similar questions, and more particularly the case of *Mitchell*, 10 East. 511, in which Lord Ellenborough, with the concurrence of the other Judges of the Queen's Bench of that day, appear to have taken a quite different view of the meaning of the word "inhabitant-occupier." from that laid down in the cases to which we have been referred.

Lord Lee — The question in this case is whether the name of John M'Guire, a voter on the roll for the county of Midlothian, ought to be struck off in respect of his having been for four months prior to 23rd August 1888 confined in the prison of Edinburgh under a sentence of imprisonment for assault.

His qualification, if not destroyed by such imprisonment, is the household qualification provided by clause 2nd of the Representation of the People Act 1884—that is to say, the same qualification (apart from the condition of rating) as was provided in regard to burghs by the third section of the Representation of the People (Scotland) Act 1868, which conferred the franchise upon every man who, when the Sheriff proceeds to consider his right to be inserted or retained on the register of voters, is of full age and not subject to any legal incapacity, and is and has been for a period of not less than twelve calendar months next preceding the last day of July an "inhabitant-occupier" as owner or tenant of any dwelling-house.

There is no allegation of legal incapacity.

It is not disputed that when the Sheriff proceeded to consider his right to be retained in the register M'Guire was an inhabitant-occupier as tenant of the dwelling-house mentioned in the case. Nor is it disputed that during the whole period of twelve months preceding the last day of July he was possessed of such a qualification unless his confinement in the prison between the 23rd April and 31st July prevented the acquisition of it.

It was admitted at the bar (though it is not stated in the case) that M'Guire occupied his house as tenant for the whole period. For it was explained that while he was in prison his wife and family continued to reside in the house, and that it was occupied by his furniture. But it was argued that he was not an inhabitant-occupier because he did not and could not personally reside in it during the period of his imprisonment.

I did not understand it to be contended that constant personal residence was required, but it was argued that there must be throughout the whole twelve months' residence on the part of the voter either actual or constructive, and that there could be no constructive residence in a house which the voter was not free to inhabit.

This argument upon the necessity of continuous residence, and the impossibility of allowing constructive residence where the power to reside and the fact of residence were both wanting for three months, was supported by reference to a series of English decisions, commencing with *Powell* v. *Guest* (18 Scott's Rep., C.B. (N.S.), 72.

I think it would be unsafe to apply these decisions to the household qualification conferred upon inhabitant-occupiers by the Representation of the People (Scotland) Act 1868.

They turned upon a construction of the condition of residence attached to the occupation franchise in boroughs under the Reform Act of 1832; and it appears from the judgment in *Ford* v. *Hart* (L.R., 9 C.P. 273) that there was thought to be a material distinction between inhabitancy and residence. It was by taking that distinction that the judgment in *Mitchell's* case in 10 East's Report was got over. I do not presume to criticise any of these judgments. I assume that they are all in accordance with the English law. But the case of *Mitchell* seems to be the most applicable to the present case.

The question then is, whether an interruption of the voter's personal residence in the house of which he is admittedly the occupant by reason of imprisonment for three months in the twelve is inconsistent with his being regarded as an inhabitant-occupier within the meaning of the statute?

I put aside the cause of his imprisonment, because it is not said, and cannot be said, that conviction of crime affects the franchise in this case. It is the fact of absence without the power of returning that is founded on. The question then comes to be, whether absence from home by reason of detention in prison for a portion of the year extending to three or four months is fatal to inhabitancy. It is said that such absence must be fatal unless it was terminable at the pleasure of the voter as well as temporary in its character.

This objection, if well founded, appears to me to reach far beyond cases of temporary imprisonment. I quite understand that a man could not be said to be qualified as an inhabitant-occupier of a dwelling-house if he had not inhabited that dwelling-house at all during the period required for a qualification. But there are very many cases in which the inhabitant-occupier of a

dwelling-house may be absent from home for considerable periods of each year without the power or liberty of returning when he pleases. The case of a man who joins the militia during the year, and goes out for eight weeks' training is an example of that. It occurs to me as strange that if such an objection be tenable it should not have been raised and sustained and applied in practice during the years which intervened between the Act of 1868 (when the household qualification was introduced in burghs) and the Act of 1884. During that period the qualifications were closely scrutinised, and not less keenly contested than they appear to be now, and my experience as a Sheriff in the revisal of the registers for the burghs of Stirling, Dumbarton, and Perth is that such an objection was unheard of where the voter's occupancy was clear, and the dwelling-house in question was his only or ordinary habitation during the twelve months. The case of *Manson*, 7 Macph. 329, was the case of a man who had voluntarily abandoned his dwelling-house in order to take employment elsewhere. It decided no such question as is raised here.

I regard the objection therefore as one which cannot be sustained without introducing a new principle in the administration of these enfranchising statutes, and my opinion is that it is not well founded. I think that if a man is *bona fide* the occupier of a dwelling-house, and if that dwelling-house is, as in this case it was, his ordinary and proper habitation during the twelve months required by the statute, his temporary absence during a portion of the twelve months, caused by confinement either in a prison or in a hospital for infectious diseases, does not prevent him acquiring a qualification as an inhabitant-occupier. The continuity of his residence or inhabitancy does not appear to me to be affected by such compulsory absence during a portion of the period of twelve months. Upon this point I think that the case of *Rogers*, 16 D. 1005, has a distinct bearing.

I concur therefore in thinking that the determination of the Sheriff in this case was right.

Lord Kinnear—I have come to the same conclusion as your Lordships, but I am unable to agree in thinking that the decisions of this Court upon the construction of the Poor Law Amendment Act are precedents for the determination of this case, because these are decisions upon the interpretation of a statute regulating very different rights, and expressed in altogether different terms. The Representation of the People Act, which we have to consider, does not require continued residence for any specified period as a qualification for voting, and therefore I do not find it necessary to consider whether imprisonment for the period of four months out of twelve would break the continuity of a residence if that had been, which I think it is not, one of the conditions which the statute provides for the qualification of a voter. What we have to consider is, whether this voter is or is not what is ordinarily meant by an inhabitant-occupier, and for the reasons given by Lord Lee, apart from his observations on the Poor Law Amendment Act, I think that M'Guire is an inhabitant-occupier of the house in question. I do not think that in coming to that conclusion we are doing anything at all different from what has been done by the English Court in any of the cases cited to us. I think that the decisions of the English Court upon the construction of the Statute of 1884 should be received with great respect, and if on the construction of that statute we had found they had come to a decision different from that at which we are inclined to arrive that would have given me great difficulty. But I do not find that any of the decisions of the English Court are inconsistent with the views which your Lordships have expressed.

The Court dismissed the appeal and affirmed the judgment of the Sheriff.

Counsel for the Appellant—Maconochie. Agents—J. & F. Anderson, W.S.

Counsel for the Respondent—Patten. Agents—J. & A. Peddie & Ivory, W.S.

COURT OF SESSION.

Friday, December 21.

FIRST DIVISION.

[Lord Trayner, Ordinary.

GENERAL PROPERTY INVESTMENT COMPANY *v.* MATHESON.

Bankruptcy—Liquidation—Limited Company—Articles of Association—Purchase by Company of its own Shares—Reduction of Transfer—Rectification of Register—Companies Act 1882, *sec.* 5.

It is *ultra vires* of a limited company, incorporated under the Companies Acts, to purchase its own shares, and any such transaction is void.

The 35th section of the Companies Act 1862 authorises the Court in an application for rectification of the register of a company, either to refuse the application, or, "if satisfied of the justice of the case," to make an order for rectification thereof.

By the 4th article of association of a company incorporated under the Companies Acts with limited liability, shareholders wishing to sell their shares were bound to offer them to the company. A shareholder transferred his shares to the company in 1876, and his name was removed from the register, the company's name being placed thereon instead, and he was thereafter in no way treated as a shareholder. This and similar transactions were known to a number of the shareholders. There was some evidence that the shareholder might have disposed of his shares to a third party had the company refused them. In 1886 the company went into liquidation. Part of the debt due by the company had been incurred while the name of the shareholder in question was still on the register. At the instance of the liquidator, the Court, in respect that it was *ultra vires* of the company to purchase its own shares, reduced the transfer, and *ordained* the names of the trustees and executors of the shareholder to be placed on the list of contributories.

The General Property Investment Company

(Limited) was incorporated under the Companies Acts 1862 and 1867 on the 8th February 1876. The object for which the company was established was described in article 3 of its memorandum of association to be as follows—"To purchase or acquire heritable property of every description within the United Kingdom, and any heritable rights or other rights vested in or secured over heritable property, and to hold, manage, improve, build upon, lend upon, deal with, feu, sell, or dispose of the same in every legitimate way, with power to borrow money on security of property purchased or acquired, or on debenture or by way of deposit, and the doing all such other things as are incidental or conducive to the attainment of the above objects." The company had no power under its memorandum of association to purchase its own shares.

The articles of association of the company were those of Table A of the Act of 1862 with certain modifications. Articles 3, 4, and 5 were as follows—"(3) The regulation No. 4 of said table is hereby modified to the effect that only £1 per share shall be at present called up, and another £1 per share on 15th May next, and the balance may be called up on three months' notice. (4) No shareholder shall transfer his shares until he has at first made offer of them to the company at the then market price. (5) Any shares acquired by the company may be retained as the property of the company, or disposed of in such manner as the company in general meeting thinks fit to direct."

The company bought considerable properties in Dundee, London, and Edinburgh, and for the years 1877, 1878, and 1879 paid dividends of 12 per cent. In 1886 it became insolvent. A winding-up order was pronounced on 16th December 1886, and Mr Myles, accountant in Dundee, appointed official liquidator.

The capital of the company, so far as issued, consisted of 4250 shares of £10 each, but at the date of the liquidation a number of the shares were held by and stood in the name of the company. Of these 250 shares had been acquired by the company from Robert Matheson, 25 Abercromby Place, Edinburgh, in the following circumstances—When Mr Matheson joined the company it was understood that he was to be, and he was accordingly on 3rd February 1876 appointed, architect of the company. Having found, however, that this position could not be occupied by him consistently with an office he held under Government, he offered his shares to the directors on 19th May 1876. On 5th June 1876 the directors intimated their willingness to purchase Mr Matheson's shares, and to pay him £254, 11s. 10d., being the amount paid upon the shares, with interest at 5 per cent. from the time at which payment had been made. The above sum was paid to Mr Matheson on 22nd June 1876, and a transfer was signed by Mr Matheson on 23rd June, and by three directors and the secretary of the company on 7th October 1876. Thereafter in the books of the company these shares stood in the name of the company. Previous to the liquidation of the company calls had been made on the shareholders payable as follows—£1 per share on or about 10th May 1876; £1 per share on 1st November 1880; 10s. per share on 7th February 1882; 10s. per share on 7th August 1882; 10s. per share on 9th November 1882; 10s. per share on 26th June 1883; 5s. per share on 1st May 1884; 5s. per share on 10th October 1885; 5s. per share on 10th January 1886; £3, 5s. per share on 23rd November 1886 After the company was in liquidation the liquidator called up the remaining £1 per share of unpaid capital on 30th June 1887.

Mr Robert Matheson died on 5th March 1877, and on 2nd November 1887 the company and Mr Myles, the liquidator, raised an action of reduction against Mrs Matheson and others, the trustees and executors of Robert Matheson, to reduce the transfer above mentioned, and also an entry in the books of the company dated 31st October 1876 of the names of the company as holder of the said 250 shares, and for payment of the sum of £254, 11s. 10d. received by Mr Matheson from the company, with interest from the date on which it had been received by him, and of the amount of the calls which had been made, with interest from the date at which such calls became due.

On February 25th 1888 the company and Mr Myles presented a note to Lord Kinnear, Ordinary, in the liquidation, to vary the list of the contributories of the company by having the names of the trustees and executors of Robert Matheson placed thereon in respect of 250 shares of the company.

The pursuers in the action pleaded—"(1) The sale and transfer of shares by Robert Matheson to the company condescended on being illegal and invalid, and inconsistent with and in violation of the Companies Acts 1862 and 1867—(*a*) The said transfer should be reduced as concluded for; and (*b*) Decree should be pronounced in terms of the petitory conclusions of the summons."

The defenders pleaded—"(3) The defenders should be assoilzied in respect of the lapse of time since the transfer was granted and accepted, and of the actings of parties, and the change of circumstances condescended on. (4) *Restitutio in integrum* being impossible, the defenders should be assoilzied. (6) The company and the shareholders and creditors thereof having acquiesced in and adopted and homologated the said sale and transfer, the pursuers are barred from now maintaining their present claims. (8) The pursuers' whole claims being inequitable and contrary to the justice of the case, the defenders should be assoilzied."

A proof was allowed in the action, from which the following facts appeared:—Of the 4250 shares issued, 1250 were acquired by the company. Of these a number were re-issued, leaving 758 in the hands of the company at its liquidation. Mr Matheson's shares were never re-issued. At least a number of the shareholders were aware of these transactions.

In the minute of the fourth annual general meeting of shareholders of the company, held on 31st October 1879, the following paragraph occurred:—"It was mentioned that Messrs Adam Curror, Kenneth Matheson, and Robert Craig, who held 250 shares each, had during the past year surrendered their shares to the company without any price being paid for them, and after consideration it was resolved that these 750 shares, along with 250 shares previously acquired by the company from Mr R. Matheson should be allotted equally amongst all the existing share-

holders prepared to accept thereof."

There was some evidence to the effect that Mr Matheson or his trustees might have disposed of the shares had they been refused by the company. Since May 1876 no dividend had been paid or intimation of any calls made to them. As to the dividends the evidence was to the effect that these had been paid in respect of estimated and not realised profits in 1878 and 1879. The liquidator's state of accounts showed a deficiency of £8933, and a probable dividend of 6s. 6d. per £, subject to expenses. Some of the liabilities had been incurred prior to the transfer of the shares by Mr Matheson.

Mr Myles in his examination on this point said—"With reference to the liabilities at present attaching to the company, there are some that were incurred prior to the purchase of Mr Matheson's shares by the company. There is a bond to H. R. Cunnynghame for the sum of £3000, which is not all paid up. The money was received on 15th May 1876. Then there is £800 of Clarke's trustees' bond. No claim has been made in respect of that—indeed, that has been paid up by a sale of the property by the bondholders since the liquidation. (Q) With regard to Cunnynghame's bond, there is a deficiency in the subject of security?—(A) Upwards of £1100 is the amount of the claim in the liquidation. (Q) The heritable subjects not having been sold?—(A) They are interested in the property that has been sold by Clarke's trustees, but they will get nothing out of it.—(Q) To some extent the security over which their bond extended has been realised?—(A) Yes, but by a prior bondholder, and they get no benefit. I am quite satisfied that the deficiency is not overstated in the claim that has been made; I think it will probably be more."

By section 35 of the Companies Act 1862 it is provided as follows:—"If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act . . . the person or member aggrieved, or any member of the company, or the company itself, may . . . as respects companies registered in Scotland by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified; and the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied with the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained."

The Lord-Ordinary (Trayner) on 10th March 1888 pronounced the following interlocutor in the action of reduction—"Finds that it was *ultra vires* of the General Property Investment Company to purchase from the late Robert Matheson the 250 shares mentioned on record, and that the transfer of said shares, now sought to be reduced, was illegal: Finds, further, that the pursuer, as liquidator of said company, is entitled to recover, and that the defenders are bound to make payment to him of the sum of £254, 11s. 10d., being the amount paid by said company to the said Robert Matheson in respect of said transfer, with interest thereon at the rate of five per cent. from the date of citation to this action till paid: *Quoad ultra* supersedes further consideration of the cause *in hoc statu*: Grants leave to reclaim.

"*Opinion.*—The pursuers in this case seek decree against the defenders, the representatives of the late Mr Robert Matheson, in the first place for reduction of a pretended transfer by Mr Matheson to the company of 250 of the company's shares; and secondly, of a pretended entry in the books of the company, dated 1st October 1876, of the names of the company as holders of the 250 shares. These reductive conclusions are followed by a conclusion for payment of over £3000, made up of £254, 11s. 10d. paid by the company to Mr Matheson in respect of the transfer, and the balance, of calls made on and said to be payable in respect of the 250 shares in question. The defenders say that no notice of any calls have ever been given to them, and that they should be assoilzied from the conclusions relating to the calls.

"The last of the calls is one made since the company went into liquidation, and it is quite obvious that with that I cannot meddle; that is a matter that must be disposed of in the liquidation. With regard to the other calls, I am not in a position to pronounce any judgment at present. No argument whatever has been addressed to the Court on one side or the other with regard to the question raised by the defenders' fifth plea. It is stated by the defenders that no notice was sent to them or to Mr Matheson that the calls in question had been made, and I might almost assume that to be true, because at the date of the respective calls Mr Matheson's name was not on the register of the company, having been removed in respect of the transfer now sought to be reduced.

"What effect the absence of due notice may have upon the question of the defenders' liability for the calls is a matter I may have to consider and determine. But I think it advisable to supersede consideration of that matter at present, for a nice question has been raised by the defenders as to whether in the whole circumstances of this case they are now subject to be put on the register of the company as representing Mr Matheson, and thereby made liable as contributories. The defenders' argument is based upon certain words in the Companies Act of 1862, and undoubtedly may give rise to some difficulty. At all events, it involves some nice considerations, and I am not disposed to throw any difficulty in the way of the defenders pleading that right which they have, if it is a right to exemption, before the Judge who is taking charge of the liquidation.

"Therefore at this moment, desiring not to prejudice anybody's rights, I am to supersede consideration of this case *quoad* the calls to enable either the pursuer to apply to the Judge in the liquidation to have the defenders put upon the register of shareholders, or to allow the defenders, if they think right, to take any steps for their own protection against such liability as would thereby be imposed. What I propose to do in the meantime is to find that the transfer in question was illegal and invalid, and that the defenders are liable in repayment of the sum paid by the company in respect of that transfer.

It might have been supposed that on that finding I should at once have proceeded to the logical conclusion of reducing the transfer; but I do not do that in the meantime, because if I were to reduce the transfer it might have the effect of restoring Mr Matheson's name to the register, and that might be settling the whole question against him, and practically against his representatives, and I do not desire to do that in the meantime. All that I shall do is to find that the transfer was illegal; that the defenders are bound to repeat the price; and *quoad ultra* supersede consideration of the case."

The Lord Ordinary in the liquidation reported the note by the liquidator, and the answers thereto by the trustees of Robert Matheson, to the Court.

The defenders in the action reclaimed, and argued—(1) By section 35 of the Act 1862 the Court had to be satisfied of the justice of the case before rectifying the register in the manner proposed by the pursuers. That section had received an equitable construction. In this case there were the strongest considerations against rectifying the register. Matheson had only been on the register for a few months, and had been off for ten years, and he could have sold his shares to a third party if the company had not taken them. The shareholders were quite aware that he had sold his shares to the company, and creditors could have learnt from the balance-sheets that the company had purchased some of its own shares, Creditors, as representing the company, were subject to all the equities to which the company was subject. If the liquidator succeeded in having the reclaimers put on the register, he proposed to make them liable for calls, to pay not only creditors who had had claims on the company at the time he was on the register, but subsequent creditors also. That would be a far greater injustice than if his application were refused—*in re Dronfield Silkstone Coal Company*, December 20-21, 1880, 17 Ch. Div. 76; *Trevor* v. *Whitworth*, July 11, 1887, 12 App. Cas. 409, 440, opinion *per* Lord Macnaghten; *in re Kimberley North Block Diamond Mining Company*, June 2, 1888, W.N. 126; *Joint-Stock Discount Company* (*Sichell's* case), 3 L.R., Ch. 119, *per* Lord Cairns, 122; *Gardeners* v. *Victoria Estates Company* (*Limited*), July 18, 1885, 12 R. 1356. (2) Where a person applied, as the pursuers did here, for *restitutio in integrum*, they must comply with the condition that it should be really *in integrum*. It would not be enough to credit the trustees with the dividends paid by the company. Indeed, the company being in liquidation, *restitutio in integrum* was impossible—*Graham* v. *Western Bank*, February 2, 1864, 2 Macph. 559, and March 8, 1865, 3 Macph. 617, *per* Lord Curriehill, 631; *Addie* v. *Western Bank*, July 9, 1865, 3 Macph. 899, and May 20, 1867, 5 Macph. (H. of L.) 80.

The pursuers and respondents argued—(1) The transaction between the company and Matheson was not voidable merely, but was *ab initio* void. The case of *Trevor* v. *Whitworth* put it beyond doubt that the action of the directors was *ultra vires*. The *dicta* of Lord Macnaghten relied on by the defenders were *obiter*, and contrary *dicta* might be found in the opinion of the Master of the Rolls—*Ashbury Railway Carriage and Iron Company* v. *Riche*, 7 Eng. & Ir. App. 653, *per* Lord Cairns, 672. The liquidator represented the company as a corporation, and thus all shareholders, present or future, and all creditors. Creditors, if aware of such transactions, were bound to know that they were contrary to law, and that such transferences were void. The company would not be barred by *mora* from getting a transaction recalled which was void as being *ultra vires*. Particular creditors and shareholders at the time might be barred, but subsequent creditors and shareholders could not be barred. This was not the kind of case where the Court would refuse the liquidator's application under section 35 of the Act 1862—*National and Provincial Marine Insurance Company ex parte Parker*, 2 Ch. App. 685; *in re Gresham Life Assurance Society*, 8 Ch. 446; Buckley on the Companies Acts, sec. 35, notes. In the case of a shareholder who had paid up his shares in something else than cash, and who appeared on the register as fully paid up, though the creditors could not have relied on him, yet years afterwards, if it were discovered that he had not paid in cash, payment might be demanded—*in re Canadian Oil Work Corporation* (*Hay's* case), 10 Ch. 593; *Huntington Copper Company* v. *Henderson*, January 12, 1877, 4 R. 294, and November 29, 1877, 5 R. (H. of L.) 1. Here there were creditors who had been creditors when Matheson was on the register, and the transactions which brought the company down had at least been initiated before he left. (2) *Restitutio in integrum* was no doubt impossible, but the doctrine of the requirement thereof had never yet been held necessary where a transaction was not merely voidable but void—*Graham* v. *Western Bank*, *supra*, 5 Macph. (H. of L.) 86; *Clark* v. *Dickson*, April 26, 1888, 27 L.J., Q.B. 223; *Houldsworth* v. *City of Glasgow Bank*, March 12, 1880, 7 R. (H. of L.) 53.

At advising—

Lord Shand—The General Property Investment Company, with reference to certain of whose shares the present question has been raised, was incorporated under the Companies Acts of 1862 and 1867 in February 1876, with a capital of £42,500, the shares being divided into 4250 shares of £10 each. The object of the company was practically to speculate in land. They proposed to purchase lands which were likely to rise in value, to hold them for a time, and then to sell them as advantageously as they could, and they carried on business for about ten years till December 1886, when they became insolvent. This Court then pronounced an order for winding-up the company, and Mr Myles was appointed liquidator. It appears that during the existence of the company a number of the company's own shares were purchased by the directors, one of the articles of association purporting to confer on them a power to make such purchases. Part of these shares were re-allocated, mainly, if not altogether, to existing shareholders, but when the liquidation came into force the company had in their hands no fewer than 758 shares of their own stock. The late Mr Matheson had been an original shareholder of the company to the extent of 250 shares. He paid the deposit upon these shares, but shortly after having done so he found that the reason which had induced him to con-

nect himself with the company no longer existed, because, while he had anticipated professional employment as a valuator for the company, he found that his engagements otherwise would not admit of his taking such employment, and accordingly an arrangement was made between him and the directors that the company should purchase his shares. This they agreed to do, and to repay the deposit of £1 on each share, with interest of 5 per cent. to date. The company accordingly accepted a transfer of the shares. A call, I believe, had been resolved on by that time, but of course it was not enforced, the transfer having been accepted before it became payable, and it appears that Mr Matheson's name was removed from the register or stock ledger, and the shares carried to an account of shares re-purchased by the company. Mr Matheson died in 1877, and for ten years, and indeed until this liquidation occurred, no more was heard of these shares by anyone representing him. The company went on doing business, paying large dividends for one or two years, but these dividends ceased, and then calls were made, and I believe an additional call of £1 has been made since the liquidation commenced, exhausting the whole nominal capital. It appears, I think, that Mr Matheson might, and probably would have sold his shares to a third party in the market, or to some other shareholder, if the company had not bought them, and his executors after his death had no reason to anticipate any responsibility in connection with these shares, so that undoubtedly the case now presented, viz., that the contract must be set aside and Mr Matheson's trustees placed on the register of the company is one of very great hardship. There can be no question of that. But, on the other hand, the liquidator, founding as he was bound to do on the strict principles applicable to joint-stock companies under the statutes, has brought proceedings for two purposes—1st, an action of reduction to have the transfer by Mr Matheson set aside, and the price which he received repaid to the company with interest, with a conclusion also for payment of the calls made by the company and by the liquidator. That action depended before Lord Trayner, who has given findings to the effect, first, that it was *ultra vires* of the company to enter into the transaction with Mr Matheson; and second, that the pursuer is entitled to recover the sum of £254, being the amount paid by the company to Mr Matheson, and interest. In addition to that action there is before us a note presented to Lord Kinnear, in which his Lordship, as Judge in the liquidation, is asked to put the trustees and executors of Mr Matheson on the register in respect of their holding of these shares, and there again there is a claim made for the payment of calls. That note has been simply reported to the Court to be taken up with the action of reduction, and we have now to deal with both proceedings.

So far as regards the action of reduction, I think that although a defence was urged against any decree for payment of calls, on the ground of the lapse of time that has taken place and the actings of parties, it was scarcely maintained that there was any legal ground upon which the defenders could resist the conclusions in so far as the Lord Ordinary has given effect to them. His Lordship has found that it was *ultra vires* of the company, under the Joint-Stock Companies Acts of 1862 and 1867, to become purchasers of their own shares, and upon that ground he has found that the transaction was illegal, and that the price must be repaid. If there was any argument against that view of the Lord Ordinary, I have only to say that I think the point has been clearly settled by the decision in the case of *Trevor* v. *Whitworth* in July 1887, shortly before this action was raised, and as we have already had occasion to refer to that case very fully in the case of *Klenck*, which has just been disposed of, I shall say no more than this, that I think it clearly decides that a transaction of this kind is not merely voidable, but is void, as being *ultra vires* on the part of the company. It is a transaction which not only the directors had no right to enter upon, but which even the company themselves at a meeting of all the shareholders could not adopt, because it was directly in the teeth of the Statute of 1862. It is to be observed with reference to the opinions given by the learned Judges in the House of Lords that the judgment is the result of a careful examination of the provisions of the Statutes of 1862 and 1867, and is strongly placed upon the ground that creditors dealing with companies limited under the Companies Acts are entitled to look to the capital as disclosed in the memorandum of association as the fund to meet their debts, and that a company cannot cut into that capital by any such proceeding as purchasing back its own shares any more than they can by issuing shares at a discount. Now, that being so, it appears to me that we must plainly adhere to the interlocutor of the Lord Ordinary so far as it goes.

But the further questions under the conclusions for reduction and the petition have now to be disposed of. The first question is, is the transfer to be reduced, and I think it follows from what I have said that there must be decree of reduction of that transfer. The next question is, whether Mr Matheson's representatives are to be put upon the register as the holders of these shares. That is resisted by the executors on the ground, as I have said, of the lapse of time and the circumstances I have already referred to. It is stated, and I think it is made out upon the proof, that at least a number of the shareholders were aware that the company was purchasing its own shares. We have the fact that in the books of the company the shares after the delivery of the transfer were no longer in Mr Matheson's name or in the name of his executors, but that they stood in the name of the company, and the balance-sheets circulated among the shareholders, at least after 1881, made it clear that the company had purchased and themselves become holders of a large number of their own shares. It was further said that but for the conduct of the company Mr Matheson would have sold his shares to a third party, and in any view that his executors would have so sold them shortly after his death in 1877. That being so, it was contended that under section 35 of the Statute of 1862—which, in dealing with the amending of the register by putting on a shareholder's name, uses the expression that the Court shall do so "if satisfied of the justice of the case"—it would not be in accordance with the justice of the case that we should adopt that course here and replace the name of Mr Matheson's executors

as representing him upon the register. On the other hand, it appears from the proof that there has been a very large amount of debt incurred by the company, and that there is one special debt of very considerable amount which was incurred before the transaction with Mr Matheson for the purchase of his shares took place at all. Mr Myles is examined on that point, and he says—"There is a bond to H. R. Cunnynghame for the sum of £3000, which is not all paid up. The money was received on 15th May 1876. Then there is £8000 of Clarke's trustees' bond. No claim has been made in respect of that—indeed that has been paid up by a sale of the property by the bondholders since the liquidation. (Q) With regard to Cunnynghame's bond there is a deficiency in the subject of security?—(A) Upwards of £1100 is the amount of the claim in the liquidation. (Q) The heritable subjects not having been sold?—(A) They are interested in the property that has been sold by Clarke's trustees, but they will get nothing out of it. (Q) To some extent the security over which their bond extended has been realised?—(A) Yes, but by a prior bondholder, and they get no benefit. I am quite satisfied that the deficiency is not overstated in the claim that has been made; I think it will probably be more." So that we have an existing debt of upwards of £1100 incurred before Mr Matheson sold his shares to the company, and a number of debts incurred afterwards. In that state of matters the question is, whether the liquidator is to be precluded from the remedy which he asks, of putting Mr Matheson's executors on the register. I do not think the defenders can successfully resist the liquidator's demand to that effect. If the law—the legal right of the company—be clear, then it follows that the justice of the case requires that effect shall be given to that right. Now, the ground on which the case of *Trevor* v. *Whitworth* was decided was that the purchase of the shares was *ultra vires* of the company. The transfer is therefore an absolute nullity, and when it is maintained for the respondents that the company have adopted or homologated what was then done the reply is obvious that a company of this kind, carried on under the statutes with the limited powers which these statutes confer, can no more by adoption or homologation make a proceeding of this kind legal than they can lawfully enter into the original transaction itself. It is a nullity originally, and the company cannot homologate or adopt a nullity, for that is equally *ultra vires*. And so upon that ground I think the case for the respondents fails. It is clear also that there are creditors who are not satisfied—creditors to a large amount, whose debt existed before this transaction took place, and they are entitled through the liquidator to have it found that the proceeding whether originally or by adoption was *ultra vires* and could not prejudice them. Then there are creditors for large amounts whose debts were afterwards contracted. I do not express any final opinion, but the leaning of my opinion is to the effect that even later creditors are entitled to get behind a transaction of this kind, because they are entitled to say that they must have the whole capital of this company in the condition in which the shares were issued to the shareholders, in so far as the shareholders have not validly transferred their shares, that they are entitled to realise that capital, and that they are entitled through the liquidator to cut down a transaction of this kind. The views that I have now stated as to this being clearly *ultra vires* of the company, and as to the effect of a transaction of that kind being such that it cannot be adopted even by homologation, I think are strongly borne out by the decision of the Court in the case of the *Ashbury Railway Carriage Company*, which has been so often referred to in cases of that kind as to the powers of joint-stock companies. There was a reference in the argument for Mr Matheson's executors to an important part of the opinion of Lord Macnaghten in the case of *Trevor* v. *Whitworth*, where he discusses the judgment in the case of the *Silkstone Colliery Company*, and where his Lordship indicates a strong opinion that although the judgment was bad, in so far as it was held that the company could purchase back its shares he indicates very strongly that he thinks it was well decided in the result, because of the actings of the company subsequent to the re-purchase of its own shares, and because of the position in which the company was when the claim to put the shareholders again on the register was first made. I shall only say, with reference to the views his Lordship expressed on this point, that this case differs materially from that of the *Silkstone Colliery Company* in this important particular, that in that case there was no creditor claiming who had been a creditor when the re-purchase of the shares was made by the company. The creditors all claimed on debts subsequently incurred. But further, his Lordship's *dicta* on this point were *obiter*, not entering into the grounds of judgment, and it appears to me that if it be just as much *ultra vires* of a company to homologate a transaction of this kind as it was to enter into it originally, the actings of the company subsequent to the transaction cannot make it effectual and binding on the company in liquidation. If the case had been one of a shareholder's liquidation only, there might be room for the argument that shareholders, and certainly shareholders who were parties to a transaction of this kind, would be barred from insisting on a former shareholder being brought on the register after all that had occurred, but the case does not bring any point of that kind up for consideration. Then, although it may be quite true that had this question been raised at a much earlier date Mr Matheson or his executors might have sold the shares to a third party, this can be no answer to the liquidator's claim, for his reply is that the nature of the transaction as being void, it was open to challenge under the statutes at any time, and the shareholder was bound to know this was the law. What I have said now leads, I think, first, to our proceeding a step further than the Lord Ordinary has done, viz., to the granting of a decree of reduction of the transfer, and in the next place, to the putting of Mr Matheson's executors on the register.

But there remain questions about two matters which have not been fully discussed, and which, in any judgment that we now pronounce, must be reserved for consideration. I refer to the question as to the liability for calls, and also as to the right to credit for dividends. On that

matter I should like to say that tt appears that the calls were never intimated to Mr Matheson's executors, and naturally they could not be intimated because they were not treated as shareholders. It is clear, therefore, that in the absence of intimation till the service of the summons of reduction, an important question must arise in regard to the interest in any view which can be debited on account of calls. On the other hand, Mr Matheson's executors say that all the other shareholders during the period which elapsed after the re-purchase by his company of the shares in question received large dividends for some years, and they claim credit for these dividends, with interest applicable to them. In regard to these dividends the liquidator has intimated that he is to maintain that they were paid out of capital and not out of profits. I must say I was not satisfied on the argument I heard that this has been made out on the proof, but that question remains for consideration, and all I shall say about it now is, that it will not do after property has come down greatly in value during subsequent years to look at the question in the light of that great depreciation, as the leading element to guide us with reference to what the directors did at the time when there was no such depreciation, but when property was rising in value. They may have been sanguine, but if they honestly believed that the properties had largely risen in value so as to warrant the payment of dividends, the very purpose of that company was to take advantage of such rise in value, and to pay dividends accordingly. But a second point may further be urged for Mr Matheson's executors, that if they are to be put in the position now of having to come into this company and to pay calls as if they had been in the company all along, they would have got dividends as the other shareholders did, and it is very hard to say that they shall not get the benefit of that at all events, which in the case supposed would have been so much money in their pockets. I mention these matters for the purpose of leading up to this, that I think all that might very properly form a subject for settlement as between the parties. Equitable considerations fairly come in in questions of this kind. Of course Mr Myles must do his duty as liquidator, but it appears to me that there are materials, on the grounds I have now stated, for an arrangement with reference to the interest on these calls, and with reference to the dividends, and I hope parties may ultimately see their way, instead of spending more money in litigation, to arrange these matters without further proceedings.

Lord Mure—I entirely concur in the view that Lord Shand has now expressed. I see no answer that can be made to the objection taken to the purchase of the shares by the directors from Mr Matheson. The sale was null and void from the first in law, and therefore it must be set aside. That involves the affirmance of the Lord Ordinary's findings in fact, and the pronouncing of a decree as Lord Shand proposes. It also involves this, that the names of Mr Matheson's executors must be placed on the register. It is a hard case unquestionably in the circumstances, and if I could see my way to any other course which would save Mr Matheson's representatives from the loss which this will lead to, I should be very glad to adopt it, but having regard to the nature of the transaction, I see no ground for relieving them to any extent at present. I sympathise very much in the suggestion that Lord Shand has thrown out as to the questions that may hereafter occur. If this question had been raised by the shareholders alone, and were not a question with creditors, there are certain words in the statute which appear to me to give the Court a power of considering that class of question, because the shareholders were equally to blame in what was done. But these questions do not arise here, and when they do arise, the consideration as to how far justice and equity may not require some modification of the proposals which may be made with a view to the demands that may arise in the circumstances is a matter upon which I can give no opinion in the meantime.

Lord Adam—With reference to the first question here, I think upon the authorities and upon the reason of the case there can be no doubt that the sale must be reduced and set aside, because I think it was a clear and absolute nullity—a sale which the company had no power whatever to enter into. Therefore upon that point I concur with Lord Shand, and the sale being a nullity I should have thought that it followed almost as a matter of course that Mr Matheson's representatives should go upon the register. But it has been urged to us that the words of the 35th section of the Companies Act of 1862 apply, viz., that the Court may, if satisfied of the justice of the case, make an order for the rectification of the register. In this case I am satisfied, on the grounds stated by Lord Shand, that it is in accordance with the justice of the case that the representatives should go upon the register; and I do not think it is necessary to consider what the force of these words in the 35th section is, because I am satisfied, in any view of the case, that the register must be rectified by the representatives going on it. But it is obvious that after they are put upon the register questions may arise as to the liability to calls, and as to interest. On these matters I reserve my opinion.

Lord President—I concur with all your Lordships in holding that the judgment of the House of Lords in *Trevor* v. *Whitworth* necessarily rules this case so far, and that we must hold, upon that authority, that the sale of shares by Mr Matheson to the company, and the acceptance of that transfer by the company, was a nullity. With regard to the special circumstances of the case which have been founded on by Mr Matheson's executors, the lapse of time during which Mr Matheson's name has been off the register, and the conduct of the company in dealing with these shares as no longer belonging to him, and so forth, I can only say that I have never been able to understand how a statutory company can confirm a nullity, and if they could not by direct resolution confirm a nullity, I do not see how that can be done *rebus et factis*. Acquiescence is nothing at all unless it amount to confirmation or be equivalent to confirmation, and if it be impossible for a statutory corporation to confirm a nullity by direct resolution, it certainly cannot do it in any other way. The judg-

ment proposed, I think, is quite right in so far as we advance a step further than the Lord Ordinary in the reduction has done, and pronounce decree of reduction, and also pronounce decree for repayment of the price paid to Mr Matheson by the company, £254, 11s. But the other question which is raised both by the conclusions of reduction and by the application of the liquidator is a question of novelty, and, I think, of very great importance, and it is one upon which hitherto we have heard no argument. Whether your Lordships will be inclined to remit the hearing of that to the Lord Ordinary in the reduction, or to the Lord Ordinary in the liquidation, or to keep it here and dispose of it directly, I am not disposed to offer any very confident advice, but that would require to be determined before we adjust the terms of our interlocutor. If the parties find themselves in a position to negotiate upon this subject, we might allow the matter to stand over. On the other hand, if there is no prospect of any settlement, perhaps the best plan would be to remit the matter to the Lord Ordinary in the reduction, for it is more directly and properly raised there than anywhere else.

In the action of reduction the Court pronounced this interlocutor:—

> "The Lords having considered the reclaiming-note by Mrs Alexa Urquhart or Matheson and others (Matheson's trustees and executors) against Lord Trayner's interlocutor dated 10th March 1888, and heard counsel for the parties, Adhere to said interlocutor: Refuse the reclaiming-note, and decern in terms of the reductive conclusions of the libel; also decern against the defenders for payment to the pursuers of the sum of £254, 11s. 10d. sterling, with interest thereon at the rate of five per centum per annum from the date of citation to this action till paid, reserving all questions of expenses."

On the report of Lord Kinnear, the Court ordered the names of the respondents (the trustees) to be placed on the list of contributories as prayed for, but reserved the question of the respondents' liability for calls, and remitted to the Lord Ordinary to hear parties therein.

Counsel for the Defenders (Reclaimers) in the Action, and Respondents in the Note—Sir C. Pearson—C. S. Dickson. Agents—Horne & Lyell, W.S.

Counsel for the Pursuers (Respondents) in the Action, and the Petitioners in the Note—D-F. Mackintosh—Salvesen. Agent—J. Smith Clark, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, December 10.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Mure, Lord Young, Lord Adam, Lord Lee, Lord Kinnear, Lord Trayner, and Lord Wellwood.)

H. M. ADVOCATE *v.* SWAN.

Justiciary Cases—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 2, 5, *and* 8, *and Schedule A—Indictment—Relevancy—Omission of "Falsely and Fraudulently" from Indictment—Specification.*

The Criminal Procedure (Scotland) Act 1887, sec. 5, enacts that "it shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime." Sec. 8 enacts that "it shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently,' . . . . or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant."

J. S. was charged before the High Court of Justiciary on an indictment which bore, "the charge against you is that," time and place specified, "you did pretend to J. H. that you were the son of a farmer in Aberdeenshire, and possessed of a sum of money amounting to £1900 in the Grand Trunk Railway, and that you were about to receive payment of said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay, and had no intention of paying." Objection was taken to the relevancy, on the ground (1) that the acts charged were not alleged to have been done falsely and fraudulently, and (2) that the libel did not specify the advantage or benefit which the panel obtained by the use of the false and fraudulent pretences.

The Court (Lord Young expressing no opinion) *held* that the qualifying allegations enumerated in section 8 of the Criminal Procedure Act are to be implied in all cases where without them the indictment would fail to set forth facts relevant and sufficient to constitute an indictable crime, and that the words "falsely and fraudulently" must be implied to qualify the word "pretend" in the indictment, and accordingly *repelled* the first objection, but *sustained* the second objection.

Case of *Dingwall* v *H.M. Advocate*, May 26, 1888, 15 R. (J.C.) 69, *overruled*.

Question (*per* Lord Adam and Lord Kinnear)—Whether an indictment would be relevant which might be read to charge one

or other of a variety of crimes according as one or other of the qualifying allegations set forth in section 8 of the statute were read into it?

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35) provides as follows:—Sec. 2. "All prosecutions for the public interest before the High Court of Justiciary, and before the Sheriff Court where the Sheriff is sitting with a jury, shall proceed on indictment in name of Her Majesty's Advocate, and in all cases in which by the existing law and practice such prosecutions proceed on criminal letters, indictment shall be used instead thereof, and such indictment may be in accordance with the forms contained in Schedule A appended to this Act, or as nearly conform thereto as the circumstances permit, and shall be signed by Her Majesty's Advocate or one of his deputes, or by a procurator-fiscal, and the words 'by authority of Her Majesty's Advocate' shall be prefixed to the signature of such procurator-fiscal." Sec. 5. "It shall not be necessary in any indictment to specify by any *nomen juris* the crime which is charged, but it shall be sufficient that the indictment sets forth facts relevant and sufficient to constitute an indictable crime." Sec. 8. "It shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done 'wilfully' or 'maliciously,' or 'wickedly and feloniously,' or 'falsely and fraudulently' or 'knowingly,' or 'culpably and recklessly,' or 'negligently,' or 'in breach of duty,' or to use such words as 'knowing the same to be forged,' or 'having good reason to know,' or 'well knowing the same to have been stolen,' or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant." The following example of indictment occurs, *inter alia*, in Schedule A, viz.—"You did pretend to Norah Omond, residing there, that you were a collector of subscriptions for a charitable society, and did thus indnce her to deliver to you one pound one shilling of money as a subscription thereto, which you appropriated to your own use."

James Swan was indicted before the High Court of Justiciary on 10th December 1888. The indictment against him bore—"The charge against you is, that on 7th November 1887, and on various subsequent occasions between said date and October 1888, at the house in Harbour Street, Stranraer, occupied by John Hamilton, publican, you did pretend to the said John Hamilton that you were the son of a farmer in Aberdeenshire, and possessed of a sum of money amounting to £1900 in the Grand Trunk Railway, and that you were about to receive payment of the said money, and did thus induce him to give you credit to the amount of £46, 9s. 9d., which you failed to pay, and had no intention of paying."

Counsel for the panel objected to the relevancy, on the ground (1) that the acts charged were not alleged to have been done falsely and fraudulently, and (2) that the libel did not specify the advantage or benefit which the panel obtained by the use of false and fraudulent pretences.

Argued for the panel—The indictment did not set forth facts relevant and sufficient to constitute an indictable crime. There was no relevant averment of false representation—*H. M. Advocate* v. *Witherington*, June 17, 1881, 4 Coup. 475, *per* Lord Justice-General, 486. The word "pretend" did not imply false and fraudulent pretence in its ordinary signification, and it had no special legal signification. *In dubio* no criminal meaning would be attached to an ambiguous word in an indictment—*H. M. Advocate* v. *Kerr*, November 26, 1860, 3 Irv. 627. The only objections to this argument must be founded on the Criminal Procedure Act. It might be said (1) that by virtue of sec. 8 of that Act the qualifying words "falsely amd fraudulently" were implied; and (2) that the schedule of the Act gives to the word "pretend" the meaning of "falsely pretend." Neither of these objections could prevail. Section 5 of the Act required in every indictment words relevant and sufficient to constitute an indictable crime. Section 8 must be read in the light of the provisions of section 5. It could not be contended that words which were essential to the statement of a crime in the major proposition under the old practice did not fall under the requirements of section 5. In the following cases occurring prior to the Act indictments were rejected on account of the omission of such essential words—*James Miller*, November 24, 1862, 4 Irv. 238 (threatening letters); *Mackenzie and Whyte*, November 14, 1864, 4 Irv. 570 (indecent exposure); *Milne and Barry*, April 8 and 9, 1868, 1 Coup. 28 (administering drugs); *Kerr*, November 26, 1860, 3 Irv. 627 (exposure of infant); *Philips*, April 23, 1863, 4 Irv. 385 (using sword); *Rae* v. *Linton*, December 11, 1874, 3 Coup. 67 (presenting cheque where no funds). Section 8 did not remove the necessity for such words as were held to be essential to relevancy in these cases. The class of expressions to which section 8 applied were such as were in use to be inserted in the minor proposition under the old law, and the absence of which rendered the indictment irrelevant, but which did not require to appear in the statement of the crime in the major. Were the words "falsely and fraudulently" to be struck out of an old indictment, such, for example, as the indictment in *Witherington*, *supra*, there would still remain not only the major proposition setting forth the crime, but a specific statement in the minor of the representations made, and of the actual state of the facts showing the falsity of these representations. Section 8 must be read subject to the condition enacted by section 5, viz., that there are set forth facts relevant and sufficient to constitute an indictable crime. Any argument based upon the schedule to the Act was disposed of by the decision of the majority of the Court in the case of *Dingwall*, May 26, 1888, 15 R. (J.C.) 69. The indictment was further irrelevant from want of specification. All that was said was that someone was induced "to give credit." That statement conveyed no information as to the nature of the crime. This defect could not be cured by amendment—Criminal Procedure Act 1887, sec. 70; *Macdonald*, February 29, 1887, 15 R. (J.C.) 47.

Argued for the Lord Advocate—The first objection stated was met by the provisions of sec-

tion 8 of the Act. That section provided that the words "falsely and fraudulently" shall be implied in every case in which, according to the existing law and practice, their insertion would be necessary in order to make the indictment relevant. The words implied by that section were not mere expletives. They were words going to the essence of the crime. The operation of this section was not excluded by section 5. The two sections must be read together. This view was confirmed by a reference to the examples in the schedule. In the schedule applicable to forgery and culpable homicide, for example, words which went to the essence of the crime had to be supplied by section 8. The example of indictment applicable to the present case was that of "Norah Omond." The present indictment was in accordance with the form there given. The public prosecutor was by section 2 authorised to prosecute upon indictments framed in accordance with the forms in the schedule, or as nearly conform thereto as the circumstances permitted. It could not be contended that an indictment so framed was not relevant. Authorities cited — *H.M. Advocate* v. *Parker and Barrie*, November 5 and 6, 1888, 26 S.L.R. 39; *H.M. Advocate* v. *Macleod and Mackenzie*, May 14, 1888, before Lord Trayner (not reported).

With reference to the second objection, counsel moved to be allowed to amend the indictment.

At advising—

Lord Justice-Clerk—I am not able to hold this indictment to be relevant in its entirety, as in my opinion the statement of the result of the inducements alleged to have been held out by the accused is not sufficiently specific. I think the panel is entitled to know what the things were which he is alleged to have obtained upon credit—whether money, clothing, or board and lodging, or whatever they may have been, and that it is not sufficient to say that a person was induced to give him credit to a certain amount. Upon that ground I am of opinion that the indictment is irrelevant, and would propose to your Lordships so to hold.

The indictment, however, has been brought before this Court principally on another point—a point of general law—upon which it is right that we should give our opinion, seeing that it has already been dealt with in a previous case, in which there was a difference of opinion upon the bench. I mean the case of *Dingwall*, which has been quoted to us in argument. This question arises upon that part of the charge which specifies what was done by the prisoner, and which constitutes, according to the statement of the prosecutor, the inducement upon which credit was given. The indictment sets forth that the accused did "pretend" certain things, and "did thus induce . . . . to give you credit," and it is said, on the part of the accused, that this is an irrelevant statement, inasmuch as the word "pretend" does not of itself necessarily imply a false pretence, and that words such as "falsely and fraudulently" should have been set forth in the indictment in order to make it relevant. He contended that the words "falsely and fraudulently" are not qualifying adjectives merely, and that although section 8 of the Criminal Procedure Act 1887 says that such words need not be inserted in the libel, but are to be implied, that section refers only to words of style of an expletive character, and does not apply when the words are essential to describe a criminal act. It is said that these words are of the essence of a charge of falsehood, fraud, and wilful imposition, without which the indictment sets forth no crime at all.

It is obvious that the main intention of the Act was to put an end to the syllogistic form of indictment which contained major and minor propositions, the major proposition setting forth that a certain thing or course of action was a crime, and the minor accusing the prisoner of having done what was named in the major by doing certain acts described in the subsumption which the prosecutor alleged amounted to the crime named in the major proposition. The object in view in the passing of the Criminal Procedure Act, in so far as it relates to the libelling of the charge, was to bring the indictment down to a statement of acts done, leaving it to the judge to direct the jury what crime was constituted by these acts if the jury find them to have been committed. It was not, however, the intention of the Act of Parliament that the accused should not be able to imply from the words of the indictment that a crime according to the law of Scotland had been committed. But the Act by its clauses, and by the illustrations in the schedule, indicates that in the ordinary case the statement by the prosecutor is to be limited practically to acts done. The only cases in which anything further is required are (1st) those in which the acts done must be followed by certain consequences in order to constitute the crime charged; and (2nd) those cases in which the nature of the crime may vary according to the state of mind of the perpetrator, being either a directly malicious state, or one culpable in a minor degree only. An instance of the first is the case of crime by bodily violence. The consequence in the case of violent assault might be death or injury. It is necessary in such a case to state whether death or only injury resulted. An instance of the second class of cases is the crime of fire-raising, where there may be a criminal intent, or only a culpable fault. The prisoner therefore in cases of fire-raising is entitled to have information whether his offence is alleged to have been done by him "wilfully," or only "culpably and recklessly." With the exception of these two classes of cases, I know of no class of crime in reference to which it is necessary under this statute and its schedule to do more than to state the acts which are alleged to have been done.

Now, this indictment states in the first part of it the acts done by the accused, and it is to this part of it that the Act of Parliament applies. The Act provides rules for the instruction of the prosecutor both by clause and schedule. Section 2 gives to the public prosecutor, and to the public prosecutor alone, be it observed, the right to use the forms provided by the schedule, and if he do use the forms, and does not in doing so commit a breach of the Act otherwise, he makes a relevant indictment. In the present case he has followed the forms contained in the schedule, and I am unable to see how it can be said that he has not framed a relevant charge under the statute. But in addition to following the form provided in the schedule,

and in the act of doing so he has taken advantage of section 8. I think that the Legislature in passing that clause wished to make it plain that the absence of such words as are set forth in that clause—"wickedly and feloniously"—"falsely and fraudulently," &c.—from the schedule was an absence which was intended by Parliament. It has been said that these and the other qualifying allegations in section 8, which are declared to be no longer necessary in an indictment, and are to be implied in every case in which they were necessary under the existing law and practice for the purpose of making a relevant indictment, are mere expletives or epithets, and that the clause is not to be read as applying where the words are essential to set forth the criminality of the acts done. I do not understand that argument when applied to a statute which expressly provides that the words are to be implied whenever they are necessary to make the indictment relevant. I entirely dissent from that view, and am of opinion that the Act intends that whether as expletives or as essential parts of the charge—as in this case I think they are—the words are to be implied and not set forth upon the face of the indictment.

In the old form of indictment the question whether certain facts amounted to a crime by defrauding depended on the use of certain words. "Falsely and fraudulently" were necessary in the old form to the relevant setting forth of the crime of falsehood, fraud, and wilful imposition. In some cases these and such like words were used only once, in others more frequently, being sometimes prefixed to each statement in succession in the narrative. But whether used once at the beginning of the narrative of the subsumption or repeated oftener the allegation contained in them was essential, and their absence made the indictment irrelevant. They cannot therefore in such cases be considered as mere expletives, but are of the essence of the charge, and the statute directs that they shall be read into every indictment where they are necessary, not to make the indictment to be in accordance with the old form, but to constitute what would have been an irrelevant charge under the old law into a relevant charge. I think it is plain from section 8 that they are not to be left out when they are mere adjectives or expletives only, but are to be left out always, the direction being that they shall be implied whenever they are essential to make a relevant charge. It becomes more plain that this is so when the expressions in clause 8, which are not adjectives, are considered. Such expressions as "knowing the same to be forged," "well knowing the same to have been stolen," the insertion of which is declared to be unnecessary by section 8, are in no sense expletives or adjectives, but are essential matters to be proved before guilt can be affirmed. Therefore the section refers not to the omission of non-essentials, but to the omission of essential matters, with the declaration that they are to be held to be in the indictment by implication. It is to be noticed that the schedule contains forms which indicate nothing criminal apart from the implication ordered by section 8—as, for example, the charge of causing death by collision. On the other hand, no example in the schedule contains such words as are in section 8 except that of fire-raising, and the words used there are not used for the purpose of bringing the panel to the bar on a relevant charge, but for his information as to the particular quality of the acts with which he is charged, because in the particular case there are alternative crimes, to either of which the words of the narrative are applicable. It is to inform him whether the more heinous or less heinous of two crimes is to be proved against him. The use of these words in that specimen charge in the schedule is just the exception which proves the rule instead of being, as is suggested by Lord M'Laren in the case of *Dingwall*, an indication of what should be done in other cases.

Lord Young—I concur with the Lord Justice-Clerk in thinking that this indictment is irrelevant, and, I suppose in accordance with what will be the opinion of all your Lordships, we will find it so, and that this finding will be accompanied with an expression of opinion upon another point which has been argued to us, and upon which, as we shall dismiss the indictment as irrelevant, I do not think we are entitled to give any opinion. I assume that this indictment would be relevant if the words "falsely and fraudulently" were inserted before the word "pretend," and the question is whether these words are to be held as inserted by the provisions of section 8 of the Criminal Procedure Act 1887. Upon this question I think there is a good deal of difficulty. When I became a Judge I think I was alone in the opinion that the syllogistic form of indictment, as it has been called, was inexpedient, and that it should be discontinued. I remember indicating that opinion upon one occasion, and it drew from my brethren the strongest condemnation. I thought the major and minor proposition and subsumption all out of place. I thought it was an evil that the prosecutor should be required to commit himself to the name of the crime which he charged, and that if before the trial he committed an error in naming the offence, calling it theft instead of embezzlement, or robbery instead of theft, the ends of justice should thereby be defeated. Accordingly, it is entirely in accordance with my opinion that the syllogistic form should be departed from, and that the Court should reserve to itself to put a name upon the offence if the facts amount to a crime at all. But I had thought that it was so obviously proper that the prisoner should be informed of the whole facts alleged against him, and that these, upon a plain and simple statement of them, should amount to a crime by the law of the country, that it was with a feeling at least akin to surprise that I saw a different view entertained by others, that it was not necessary to set forth what amounts to a crime in law in plain and simple language, but that it was enough to set forth what amounts to no crime at all, and imply words which would make it a crime if read in. The question is—and it was marvellous to have it seriously argued—whether the words "falsely and fraudulently," admitted to be necessary to the charge, should be omtted or put in, or whether they should be put in the body of the indictment or upon the back of it. I asked in a former case if any reason could be suggested for habitually omitting them. The only suggestion that could be made, and the only suggestion that occurred to me, was that it was to save printing—the expense of printing the words "falsely and fraudulently." It is as expensive to print them

on the back of the indictment as in the body of it, and if economy was the object—and economy is always exceedingly laudable—one could see many other things in which economy of that kind might be promoted—"The Right Honourable James Patrick Bannerman Robertson"—all that might be omitted, it would save a good deal of printing, what we are really interested in being "Her Majesty's Advocate." Then it is required by that economical provision of the statute that the procurator-fiscal's signature should be prefixed with the words "by authority of Her Majesty's Advocate." Why not imply that? That is printed, but it is a great object to save the words "falsely and fraudulently." I am myself very much disposed to try, even by being ingenious, to read the statute so as to make it in this respect sensible and useful. It may not be fatal to the indictment that words are wrongly spelled, or that there is false grammar, but why persist in wrong spelling or false grammar because the statute says that no objection can be taken on that account. Even if there was no objection to the omission of these words, why appeal to the whole Court to save the expense of printing them in the body of the indictment rather than upon the back? By printing them there we would conform to the rule in England, and, so far as I know, in every civilised country, and in this, prior to this Act of Parliament, that we must set forth in the plainest and simplest language what amounts to crime. The economy of printing is not to save any possibility of blunder. There is no doubt the words to be implied are printed in the statute. Put them in the indictment and there is no room for objection. This is a case like that of *Dingwall*, where a young man who had been employed in a bank in Perth as a clerk, and had been promoted to the position of under-teller in a branch of the bank in Leith, represented to a piano-seller that he had been employed as a teller in the bank at Perth, and was promoted to a similar position in the bank in Leith, and thereby obtained a piano on the three years' system, and immediately raised money upon it by selling or pawning it. I held that he had there been guilty of a crime, although he made no false or fraudulent representation at all. He used the property in a dishonest, criminal, and punishable manner, and the case was represented as really one of theft. The prosecutor argued the case in the view, which I thought quite a right one, that if a man intending to raise money by selling or pawning a piano, hires it on the three years' system, and at once turns it into money, he is guilty of a crime although he has made no false representation at all. It was represented as really a case of theft. I asked why it was not charged as theft, and so submitted to the jury? But it was charged as falsehood, fraud, and wilful imposition, and the falsehood represented to the Court consisted in this, that whereas he was only a clerk in a bank in Perth, or assistant-teller, and had been promoted to an assistant-tellership in the bank at Leith, he had said that he was the real teller. I thought there that there was no proper charge of falsehood, fraud, and wilful imposition irrespective of the words "falsely and fraudulently." I do not think that you will find that the serious crime of falsehood, fraud, and wilful imposition is thought to consist in whether a man was the son of a crofter and said he was the son of a farmer, or a teller in a bank while he was assistant-teller, or such trivial distinction. I am not in favour of lengthening the lash of the criminal law. Publicans and others may be left quite well to take care of themselves, and to see that the customer or proposed customer does not deceive them in such a way. The law which punishes the obtaining of goods upon false pretences applies to a totally different case. That was my view in the case of *Dingwall*—a view which I still entertain. In this case I see the greatest difficulty in holding that the indictment is relevant without these words being expressed. I do not think that here the schedule has been followed in framing the indictment. The schedule referring to "Norah Omond" is not a schedule for the crime of falsehood, fraud, and wilful imposition. The schedule does not give forms for particular crimes, but forms without any reference to known crimes, and in this respect it is deficient. I am not for encouraging prosecutors to omit words which are necessary to the criminality of what they charge merely to save printing.

As to the latter part of the indictment referring to the result of the false representations, I am clearly of opinion that the indictment is irrelevant, and I think the proper course to take is to find the libel irrelevant and to dismiss it.

Lord Mure—I agree with the Lord Justice-Clerk on both of the objections which have been argued to the Court, and on the general question I am of opinion that the plea which was stated in the Inferior Court, and which was in these terms—"The indictment is irrelevant, in respect that the acts charged are not averred to have been committed falsely and fraudulently, and do not constitute a crime"—is intended to mean that the statement in the indictment does not constitute an indictable crime. This objection is met by referring to section 8 of the Criminal Procedure Act 1887. I assume that if this indictment had been framed in the old form, and the words "falsely and fraudulently" had been omitted, it would have been held irrelevant, but by section 8 their omission is not fatal to the indictment. Section 8 provides—[*His Lordship then quoted the section*]. Therefore it is not necessary to use these words "falsely and fraudulently" or any such qualifying words where, according to the former practice, they were necessary to a relevant indictment. The Act of Parliament is very precise upon this point, for it says, "It shall not be necessary to use" them, and that they "shall be implied"—not "may be," but "shall be" implied. I therefore hold that by interpreting this section, and applying it to this indictment, we have a relevant indictment in so far as this objection is concerned.

I am also of opinion with the Lord Justice-Clerk that this indictment is irrelevant on the ground that the result of the fraudulent pretence is not sufficiently set forth.

Lord Adam—I think that our only duty is to construe the statute, and accordingly I express no opinion on the question whether it might have been otherwise or better expressed. I proceed to consider whether the objections to this indictment are well founded. There are two objections. One of them raises a general question;

the other refers to the manner in which the result of the false representations in this particular case is libelled at the close of the indictment. Now, on the general objection, which relates to the relevancy of the allegation as to the representations made by the prisoner, I could have understood its being enacted that while words which the Legislature held unnecessary to a criminal charge should no longer form part of indictments, still an indictment must contain a statement of all that is necessary to constitute the essential elements of a crime. But it is clear that this Act is not constructed on that principle. I think that is clear beyond doubt when we look at the part of the schedule which relates to the charge of uttering. Section 8 provides that the Court is to imply the qualifying allegation "in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant." I think that clearly means that you are to imply not merely superfluous words or unnecessary words, but words which before the passing of this Act would have been essential to the validity of the indictment. My opinion is quite clear upon that point. I might give an illustration of it. Suppose we had here at the bar the very "Norah Omond," with reference to whom the example is given in the schedule, charged in the very words of the schedule, every argument which has been used would have applied to that case just as they are said to apply to this case. If that be so, how can we in interpreting this Act of Parliament hold that these words are irrelevant and insufficient, and that the objection is good here.

But while I am ready to imply any qualifying allegations that may be necessary to constitute a crime, the difficulty may still arise that there may be cases where, if certain of the qualifying allegations were read, they would constitute one crime, while others would constitute another crime. There is an example of that provided for in the schedule, but I am not prepared to say that there may not be others, and I wish to reserve my opinion upon the question whether in such a case there would be a relevant indictment.

I wish to say further that I think it is quite right and proper that we should express our opinion upon this question of relevancy. Two points arise, and both are relevant to the question.

Lord Lee—I concur in thinking that this indictment is not relevant for the reasons stated by the Lord Justice-Clerk. But assuming it had been sufficient in that respect, I am of opinion that the allegations are otherwise relevant and sufficient. I read section 5 of the Act along with section 8, and so reading it, I am humbly of opinion that this indictment must be read as setting forth that the accused did "falsely and fraudulently pretend," and so forth, and I cannot doubt that it is so far relevant. With these observations I express my concurrence in the opinion of the Lord Justice-Clerk, and it is hardly necessary to say that I reserve my opinion in any such case as that figured by Lord Adam.

Lord Kinnear—I agree in what has been said by the Lord Justice-Clerk and Lord Adam, and have nothing to add except that I agree with Lord Adam both in his opinion and reservation, and that I should have great difficulty in holding an indictment relevant which might be converted into one or other of a variety of crimes, according as you read into it one or other of a variety of phrases set forth in the statute, and I am not satisfied that the case of fire-raising is the only possible one.

Lord Trayner—The question which arises here arises on the construction of the Criminal Procedure Act 1887, and it occurs to me that there would be no room for the objection stated had it not been for a supposed inconsistency between sections 5 and 8 of that Act. Had we had to deal with section 8 alone I think there would have been no question that we are bound to supply the words "falsely and fraudulently," and I suppose it is conceded that these words, if put in, would have made the indictment good, except as regards the latter part as to which your Lordships are all agreed, and I agree.

It is said here as in the case of *Dingwall*, which I understand is being reviewed in this case, that what is required to make a good indictment is as is provided by section 5—[*His Lordship quoted the section*]—and that is read as meaning this, that the indictment shall in itself, and independent of any help from section 8, set forth facts relevant and sufficient to constitute an indictable crime. Now, I think it is impossible to read section 5 in the way in which the panel's counsel read it, or in the way in which it was read by the majority of the Court in the case of *Dingwall*, because if so read it is in direct inconsistency with the schedule. If there is a way of reading the statute so as to make its clauses consistent, that must be adopted. Now, if section 5 be read with section 8, and with the illustrative schedules, it is demonstrated that there is a relevant indictment. The very best illustration, I think, which could be given of the meaning of the Act is afforded by the schedule indictment which charges the uttering of a cheque which had been changed from £8 to £80. Upon that schedule form no one could entertain the opinion that there are facts relevant and sufficient, because the guilty knowledge is altogether wanting; and indeed in that form there is nothing said or alleged against the accused except such as is consistent with perfect innocence. But if you read section 5 and section 8 together you find what is wanting. The law implies that whatever kind of knowledge or motive of action induced the criminal to do the thing complained of is to be inferred as matter of statement, and must be proved as matter of fact before a verdict can follow.

There is one other view I think should not altogether be overlooked. The purpose of the statute was to simplify procedure. It was also intended not only to take away the syllogistic form of the old indictment, but to make the statement in more popular, and therefore in more easily comprehended language. I think these words of qualification were left out because they were not necessary to be stated for the information of the prisoner or of the jury.

I am therefore of opinion with the rest of your Lordships that this indictment, in so far as it refers to the result of the imposition, is irrelevant, and *quoad ultra* that it is relevant.

Lord Wellwood—On the indictment before us I agree with the Lord-Justice Clerk on both points, and have nothing to add.

Lord Justice-General—In the state of your Lordship's opinion I have no vote in this matter, but I think it right to indicate that my opinion is in accordance with that of the majority of the Court.

The Court repelled the objection to the relevancy of the libel stated at the previous diet, that the acts charged were not alleged to have been been done falsely and fraudulently, but in respect that the libel did not specify the advantage or benefit which the panel obtained by the use of false and fraudulent pretences, found the libel irrelevant and dismissed the prisoner.

The diet was deserted *pro loco et tempore.*

Counsel for the Crown—Wallace, A.-D. Agent—Crown Agent.
Counsel for the Panel—M'Lennan—Ross Stewart. Agents—.

COURT OF JUSTICIARY.

GLASGOW CIRCUIT.

Thursday, December 27.

(Before the Lord Justice-Clerk.)

H. M. ADVOCATE *v.* HENDERSON.

Justiciary Cases—Criminal Law Amendment Act 1885 (48 *and* 49 *Vict. cap.* 69), *secs.* 9 *and* 20 *—Rape—Evidence — Competency of Panel as Witness.*

Section 9 of the Criminal Law Amendment Act provides that "if upon the trial of any indictment for rape . . . the jury shall be satisfied that the defendant is guilty of an offence under sections 3, 4, or 5 of this Act, but are not satisfied that the defendant is guilty of the felony charged in such indictment, . . . the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid." Section 20 provides that "every person charged with an offence under this Act, . . . and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing, at every stage of such charge, except an inquiry before a grand jury."

A person charged with rape tendered himself as a witness at the trial. *Held* that section 9 does not entitle a jury to convict a person charged with rape of any of the statutory offences enumerated therein unless the statutory offence is charged in the indictment, and that there being no such charge, the accused was not within the provisions of section 20.

John Henderson, cattle-dealer, Netherton Farm, Langbank, Renfrewshire, was charged before the Circuit Court of Justiciary at Glasgow on 27th December 1888 on an indictment which set forth "that on 8th October 1888, in the farm-house of Gleddoch Farm, near Langbank aforesaid, you did ravish Elizabeth Thomson, house-keeper there." He pleaded not guilty, and the case went to trial. Before closing the case for the defence counsel for the panel tendered him as a witness, and craved to be allowed to examine him in his own defence, founding on section 20 of the Criminal Law Amendment Act 1885 (48 and 49 Vict. cap. 69). That section provides—"Every person charged with an offence under this Act, or under section 48 and sections 52 to 55, both inclusive, of the Act 24 and 25 Vict. c. 100, or of any such sections, and the husband or wife of the person so charged shall be competent but not compellable witnesses on every hearing, at every stage of such charge, except an inquiry before a grand jury." Section 9 of the same Act provides—"If upon the trial of any indictment for rape, or any offence made felony by section 4 of this Act, the jury shall be satisfied that the defendant is guilty of an offence under section 3, 4, or 5 of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault."

Argued for the panel—Section 9 of the Criminal Law Amendment Act 1885 gave the jury the power of convicting the panel of various offences under that Act upon the present indictment. It followed that he was entitled to avail himself of the provisions of section 20—*H.M. Advocate* v. *Barbour*, October 17, 1887, 1 White, 466.

Argued for the Lord Advocate—The panel was not "charged with an offence under the Act," and therefore section 20 did not apply to his case.

At advising—

Lord Justice-Clerk—This is not, I think, a point of very serious difficulty. The prisoner here is not charged with any statutory offence, and so I do not think he can be examined as a witness on his own behalf under section 20 of the Criminal Law Amendment Act (48 and 49 Vict. cap. 69). That section allows a person charged with an offence under that Act to be examined as a witness in his own behalf, but that is not meant to apply to cases where the panel is only charged with an offence at common law. No doubt section 9 of that Act makes it possible for a panel charged with the crime of rape to be convicted of one of the statutory offences described in sections 3, 4, and 5 of the Act, but it does not mean that he can be convicted of one of these statutory offences without it being charged in the indictment. It has always been necessary where a panel is charged with a statutory offence for the prosecutor to libel the statute under which the offence is charged, and I do not think the Act was meant to alter that rule. It would be a great novelty in Scottish practice that a prisoner charged with a common law offence should be

convicted of a crime under a statute, and I cannot hold that section 9 of the Act referred to introduces such a novelty.

It is true that under a subsequent Act—the Criminal Procedure Act 1887—it is made possible to convict a man of an attempt to commit a crime where the completed crime is charged. Section 61 provides that "attempt to commit any indictable crime shall itself be an indictable crime, and under an indictment which charges a completed crime the person accused may be lawfully convicted of an attempt to commit such crime." And the latter half of the same section provides that "under an indictment which charges a crime which imports personal injury inflicted by the person accused, resulting in death or serious injury to the person, the person accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that such assault or other injurious act was committed with intent to commit such crime." That is quite different from a provision that a panel charged with a crime at common law might be convicted of an offence under a statute without that statute being libelled, and it is evidently not the intention of the Legislature to introduce such an innovation by that section. That this is so is very clear from section 62 of that Act, which provides that "where any act set forth in an indictment as contrary to any Act of Parliament, is also criminal at common law, or where the facts proved under such an indictment do not amount to a contravention of the statute, but do amount to a crime at common law, it shall be lawful to convict of the common law crime." Now, the effect of that section is to allow a prisoner charged with a statutory offence to be convicted in certain cases of a crime at common law, but it does not make the converse case possible, viz., that a panel charged with a crime at common law should be convicted of an offence under a statute. It has, as I have already said, always been necessary in Scottish practice for a prosecutor who proposes to charge under a statute to specify that statute, and the Acts to which I have referred do not, I think, change that rule. Consequently, as the panel here is not charged with any offence under the Statute of 1885 (48 and 49 Vict. cap. 69), he cannot have the benefit of section 20 of that Act.

The Court refused the motion.

Counsel for the Lord Advocate—Duncan Robertson—A. O. M. Mackenzie. Agent—Procurator-Fiscal of Renfrewshire.

Counsel for the Panel—Comrie Thomson—James Reid. Agent—W. Bartlemore.

COURT OF SESSION.

Saturday, December 22.

FIRST DIVISION.

BRAND, PETITIONER.

(*Ante*, vol. xxv., p. 332.)

Parent and Child — Bastard — Nomination of Guardian by the Mother — Competency — Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *secs.* 2 *and* 3.

Although the mother of a pupil bastard has no power to appoint by will a guardian to him, the Court gave effect to her wishes where she had by will made such an appointment, being satisfied that the nominee was in a position to attend to the child's welfare.

The mother of a bastard who had been placed by her under the care of charitable persons of the Protestant faith, having become a Roman Catholic, made a will appointing a person of the latter faith her executor and the tutor of the bastard, and expressing a desire that the latter should be brought up a Roman Catholic.

The Court being satisfied with the scheme proposed by the executor for the custody and education of the bastard, gave him the custody thereof, notwithstanding the opposition of those in whose care the child had been placed by the mother.

James Brand, contractor, Glasgow, presented this petition for the custody of John Ingram Hammel, who was born in April 1882, and was the illegitimate son of Ann Hammel, who died at the Convent of the Good Shepherd, Dalbeth, near Glasgow, in October 1886. While residing at the Convent Ann Hammel executed a settlement dated 31st August 1886, by which she bequeathed her whole means to Mr Brand in trust for her son. The deed further provided as follows:—"I hereby nominate, constitute, and appoint the said James Brand to be my sole executor, and to be tutor, curator, and guardian to my said son; and being a Roman Catholic myself, it is my desire that my said son be brought up in that faith." The testator left no property.

The petitioner averred that Ann Hammel died domiciled in Scotland, and that he accepted the office conferred upon him.

In May 1883, to allow Ann Hammel to enter service, the child was taken care of temporarily by the respondents Mrs Flora Shaw and Miss Flora Shaw, wife and daughter of Charles Shaw, solicitor, Wellington House, Ayr. In 1885 Ann Hammel, in consequence of bad health, and by the aid of the respondents, was received into the Convent, and feeling her strength failing she desired to make arrangements for her child, and applied to the respondents to have him returned. This request was not complied with, and Ann Hammel accordingly instituted legal proceedings in the Sheriff Court at Ayr to compel the respondents to restore the custody of the child, but before these proceedings were completed she died, and the petitioner was sisted as pursuer in the action.

With reference to the proceedings in this action the petitioner averred that "after protracted proceedings in the Sheriff Court it was ultimately decided by the Sheriff on 29th September 1887 that the action was incompetent, and should be dismissed. This interlocutor having been appealed by the present petitioner to your Lordships the same was on 24th February 1888 recalled, and it was found 'that the compearing pursuer Brand has no title to sue.' This judgment was pronounced, as the petitioner understands, and according to the terms of the opinions as reported in 15 R. 449, on the ground that the mother's title to sue the conjoined actions was personal to her and intransmissible, in the sense that no one could take up and continue these actions after her death, and that the petitioner, in order to carry out the mother's wishes, must proceed by petition at his own instance."

The petitioner further stated that he was not aware where the child was beyond the circumstance that it was under the custody of the respondents. He had made arrangements for the due education and upbringing of the child in accordance with its mother's last wishes, and he was prepared to submit to the Court, if necessary, a scheme for its care and custody.

It was further contended that the petitioner was entitled to have the child restored and delivered to him. He founded on the right of the mother at common law to the custody of the child, and on her consequent power to entrust him with the care of the child after her death. He also founded on the Guardianship of Infants Act 1886 (49 and 50 Vict. c. 27), and the power thereby conferred on the mother of any pupil to appoint by deed or will a guardian, or in Scotland a tutor, to such pupil after her death. In any event, and if there should be no technical title either by statute or at common law, the petitioner submitted that the Court in regulating the custody of this child would have regard to the wishes of the deceased mother as expressed in her said settlement.

Answers were lodged for Mrs Shaw and Miss Flora Shaw, who averred that when the child was given into their custody in 1883 the arrangement was understood by all parties to be a permanent one; that the child was at first sent to a home in Kent, and thereafter to Aberlour Orphanage, where it at present was, and that the entire expense of its maintenance was defrayed by the respondent Miss Shaw. They further averred that Ann Hammel when she entered the Convent was a Protestant, and that her change of religion, the legal proceedings taken by her, and the testament executed by her, were all due to the influence to which she was subjected in the Convent. Before the date of the legal proceedings Ann Hammel had never applied either verbally or in writing to have her child removed from the respondents' custody and transferred to Roman Catholic supervision.

Argued for the petitioner—Although there might be no abstract right at common law either to the father or mother of an illegitimate child to nominate a guardian, yet the authorities showed that in the case of the father the Court would (if no good cause was shown against it) give effect to his expressed testamentary will—*Johnstone*, M. 16,374; *Whitson* v. *Speid*, May 28, 1825, 4 Sh. 42; Statutes 1555, cap. 5, and 1672, cap. 2. Though a bastard has no legal father, yet the Court has always given him the advantage of any benefit which could be derived from these statutes—*Wilson*, March 10, 1819, F.C.; *Kyle, Petitioner*, June 15, 1861, 23 D. 1104; Stair, i. 6, 6; Ersk. i. 7, 2; Bell's Prin. sec. 2071. But the Guardianship of Infants Act 1886 materially altered the common law, and considerably extended the mother's rights, and under sec. 3, sub-sec. 1, a nomination such as the present became competent—*Macpherson* v. *Leishman*, June 4, 1887, 14 R. 780. This Act applied equally to illegitimate as well as to legitimate children. The interests of the child, which was a paramount element in determining a case like the present, would be equally well attended to whichever party prevailed, and if the Court desired some determining consideration they found it in the express wish of the mother, especially as both parties here derived their title from her—*in re Agar-Ellis*, 10 L.R., Ch. Div. 49.

Argued for the respondents—It could not be disputed that if the mother had been alive she could at once have recovered the child, but she could make no provision to regulate its custody after her death—Stair, i. 6, 6. In the cases cited there had been money left by the testator, in addition to nomination of tutor, and that made a material difference. As far as the discretion of the Court went no change of custody should be made; the proposed change would not be for the better; the advantage of the child was the governing consideration of the Court, and it was to be kept in mind that the mother had given the custody of this child to the present respondents. Anything done thereafter by her was under undue influence. With regard to the Statute of 1886, it only dealt with legitimate children, and so did not apply in the present case.

The prior proceedings, so far as they bear upon the present question, and are not narrated above, are referred to in the opinion of the Lord President, in which also are quoted the material sections of the Guardianship of Infants Act 1886.

At advising—

Lord President—In dealing with this case it is impossible not to recognise the charitable manner in which the respondents interfered for the protection of this poor woman, who is now dead—to protect her from the consequences of her own misconduct. But while that is undoubtedly so, the question before us is not very much concerned with considerations of that kind. It is quite conceded on both sides that whatever is to be done in providing for the education of this child could be quite well done by either of the parties before your Lordships. Both are unexceptionable and equally trustworthy. But there is one part of the case which involves a question of law, and it is quite necessary that we should dispose of it before we proceed to the other considerations. Now, Ann Hammel when she was in Dalbeth Convent raised an action against the respondents for the purpose of obtaining possession of her child, which had been taken charge of by the respondents, and at the same time that she raised that action she executed a will, in which she appointed Mr Brand, the petitioner, to be her executor, and also to be the curator of her illegitimate child. That action had proceeded a certain length in the Sheriff

Court when Ann Hammel died, and then Mr Brand proposed to sist himself as pursuer in place of the deceased under the title which he said he obtained by virtue of the will to which I have referred, and the judgment which was pronounced when he proposed to sist himself as a party was that he had no title to sue. That was on the ground, as the petitioner himself sets forth, that the mother's title to sue was personal to her, and intransmissible in the sense that no one could conduct and continue that action after her death, and that the petitioner, in order to carry out the mother's last wishes, must proceed by petition at his own instance—I do not think that the last part of the sentence formed any part of the judgment, but it may be perhaps matter of inference—and accordingly he presents this petition now, and instead of basing it entirely on the expressed wishes of the deceased Ann Hammel, he asserts his right under the will to the office of guardian, and that he supports by a reference to the Guardianship of Infants Act 1886. Now, it appears to me that the Act referred to gives no title whatever either to the mother of an illegitimate child, or to anyone on her behalf, in her child which she had not possessed at common law. In short, I am of opinion that the Act does not apply to the mother of an illegitimate child. The 2nd section provides that on the death of the father of an infant "the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother." And the 3rd section provides that the mother may "appoint any person or persons to be guardian or guardians of such infant, after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly." The 2nd sub-section of that section provides that the mother may by her "will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians" appointed by the mother. Now, it seems to me that throughout these enactments it is presumed that there is a father of the child—a father whom the law recognises, and who has independently of this statute certain legal rights of guardianship, and that it applies to any case in which there is a father having such legal rights—in short, it applies to the case of a mother, and gives certain rights to the mother in competition with the rights of the father of a child and those of a tutor-at-law. But in the case where there is no father that the law can recognise, and no tutor-at-law, the statute can have no application. Independently of the statute no mother has any right—either the mother of a legitimate child or of an illegitimate child—and therefore the only rights given by statute to the mother are in the case of the mother of a legitimate child.

Having cleared that legal difficulty we come now to consider the case on its merits. The history of this mother is told, I think, very clearly and candidly by the respondents in their defences to the action in the Sheriff Court, and I shall refer to two or three of the statements there for the purpose of endeavouring to explain what are the considerations to be kept in view in this matter. After Mrs and Miss Shaw had taken charge of this unfortunate woman and her child, and had provided a situation in service for the mother, it appears that she again lapsed into criminal courses, and she was found to be in prison in Ayr. But the respondents go on to say in the sixth article of their statement of facts in the Sheriff Court—"As the petitioner was very penitent, and was wishful to be sent on her release from prison to some place where, as she could not take care of herself, she would be looked after by others, Mrs Shaw obtained her admission to a Roman Catholic Institution at Dalbeth called the Convent of the Good Shepherd." It seems therefore that the residence of Ann Hammel in this Convent was brought about by the interposition of the respondents themselves. They recommended her to go there, and provided for her admission. It was arranged, they say, "that pursuer was to remain there till Mrs Shaw removed her. The pursuer has since remained in this institution. Under the influence of the religious sisterhood who manage this institution the pursuer some time ago, it is believed, embraced the Roman Catholic faith." Then, in the seventh article of their statements they say that "during the time that the pursuer has resided at Dalbeth Mrs Shaw has occasionally visited her, and received letters from her, and neither verbally nor in writing did the pursuer prior to the said action being raised against Mrs Shaw ever express a wish for the custody of the child, or that the boy should be taken from the defender. On the last occasion Mrs Shaw saw the pursuer prior to said action (which would be in or about June 1886) the pursuer stated that she was desirous of leaving the institution. On the recommendation of the Sisters Mrs Shaw urged the pursuer to remain for sometime longer, and Mrs Shaw promised to remove her when she was fitter to be taken away." And then in article 8 they say that some letters received by Mrs Shaw were "not believed to be in accordance with the real desire of the pursuer, or sent with her authority, or at least as a weak-minded woman she is entirely under the influence and direction of the nuns. The pursuer has never, since its delivery to the defender, taken any interest in her child, and the defender believes and avers that the present proceedings have been raised without her authority and consent, and that if left to herself, and freed from the influence of her present surroundings, she will totally disclaim them." Then they add—"The pursuer has been visited by Mrs Shaw since the raising of the action against the latter, but as the interview permitted was in the presence of nuns it is believed that the real wishes of the pursuer could not be ascertained. The pursuer stated that the child, if returned to her, was to be placed under the guardianship of a Roman Catholic gentleman."

Now, I think the effect of these averments is this, that when Mrs Shaw and her daughter recom-

mended that Ann Hammel should be taken into this Convent at Dalbeth they must have been very well aware that in such a position she would be subject to a good deal of religious influence, and they admit that under the urgency of that influence she had professed the Roman Catholic faith, and had before she died, and in pursuance of that profession, executed the will by which Mr Brand was attempted to be made the legal guardian of her child. Now, in these circumstances it does not appear to be of much relevancy for the respondents to say that she was under the pressure of very strong influence in changing her religious profession. I do not doubt that [is so in point of fact. I do not think anybody can doubt that is so. In all such changes it is a matter to be assumed that a good deal of it is due to influence. One is supposed to understand that every minister of religion, and probably every Christian layman, is bound to use his influence to persuade those who come in contact with him to embrace what he believes to be the true faith, and if the profession of a particular creed is to be construed as a mere sham and pretence, and not the real impression of the person's wish or belief because influence was used, I am afraid we should require, in every case of the kind, to make inquiries of the most troublesome and difficult kind. But the Court have no such duty laid upon them. They must accept the facts as they find them, and what we find in this case is that this woman Ann Hammel, before her death and during her residence in this Convent, professed the Roman Catholic faith, and expressed her desire and wish in her will that her child should be brought up in accordance with Roman Catholic principles. The Dean of Faculty, on behalf of the petitioner, put the case very well, I think, thus—He said all other considerations may be equal, the child may be in perfectly safe hands if left either to the petitioner or in this Convent, the well-being of the child, its material prosperity, its health and morals will be equally well attended to in the hands of whichsoever party it may fall under, but there is one consideration which ought to weigh, and that is the expressed wish of the parent. Now, the mother of the child is undoubtedly the proper custodier of that child, especially when it is of tender years, and probably if Ann Hammel had not died she would have succeeded in the action she raised in the Sheriff Court. I do not see very well how she could have failed to obtain an order in that action for delivery of the child. It may have been very ungrateful in her to take that course, but we have nothing to do with that. She had a legal right to do so, and although she had no legal right to appoint a guardian to the child, and cannot do so with effect, still the connection between her and the child, both natural and legal, is such that I cannot help thinking that her expressed wish on this subject ought to receive effect unless there is some strong reason to the contrary. Therefore I am, generally speaking, for granting the prayer of this petition; but I understood the petitioner's counsel to say—and to say very properly—that the child in reality is a ward of this Court, and that they will be prepared to present a scheme for the maintenance and education of the child to be approved of by the Court, and if that course is followed, I think we can settle this matter without further discussion

Lord Mure—I am of the same opinion as expressed by your Lordship on all these points.

Lord Shand—When one is made aware, as the Court has been, of the circumstances of this case, he must be satisfied that it was very important for Ann Hammel, the mother, and for the child itself, that they found such friends as Mrs and Miss Shaw, for undoubtedly both the mother and child have received great kindness at the hands of these parties, and it is clear that the child has been fully maintained and cared for by them during the last five years. It is natural, and only natural, that in such circumstances a certain lively interest, and indeed attachment, must to some extent have arisen between these ladies and the child, but while that is so, it is the case that where the custody of a child is taken from the parents, or from some natural guardian, it can only be subject to this, that a time may arise when that parent or guardian may assert his right, to which there may be no answer. In this case we have it clearly shown that there is no material question arising as to the interest of the child with regard to moral or physical advantages. It cannot be said, on the one hand, that if the child were left in the custody of Mr and Mrs Shaw it would lose great advantages, nor can it be said, on the other hand, that if the child be delivered up, as the petitioner asks it shall be, it will suffer disadvantage. In the one case its education will go on in Aberlour Orphanage; in the other case it will go on in some similar home under the charge of the petitioner, but it will be educated in a different religious belief. I assume of course in saying so that the petitioner now offers to have a scheme prepared and approved of by the Court, and is ready to assure the Court that that scheme will be so satisfactory in point of character, and with reference to the duration of the education that will be given, as to make it clear that the child will not suffer from being taken out of the care of those who have been so kind to it. That being so, I have come to the conclusion that there is no doubt or difficulty in this case.

I think the only other element in the case is the mother's recorded expression of what she desired. We find that in the settlement that was executed on 31st August 1886 it is stated by the deceased that, being a Roman Catholic "myself, it is my desire that my said son be brought up in that faith," and she nominates and appoints Mr Brand, who is known to be of that religious belief, to be the curator of the child. Reference has been made to the proceedings and statements in the action in the Sheriff Court. Of course they go to confirm what has been stated, and so far I regard them as satisfactory, but for myself I am bound to say that if there had been nothing of the kind in the case, my view would have been precisely in the terms of that settlement. I agree that of course we must see that the settlement in that matter really records the wish of the person who directs. I also agree with what your Lordship in the chair has said with reference to the influence that may have induced a change of the mother's religious belief. It is true this Court is entitled to inquire in a question of property as to whether a person has been in a weak and facile state of mind, and when he executes a settlement whether undue influence has been used to deprive that person of property. There there is

some intelligible issue, but it appears to me it would be out of the question for this Court to direct inquiry with reference to what is or is not probable in reference to a question of change of religious belief. I venture for myself to say that where there was a change of faith, although it might be considered sudden, that would make no difference on my opinion. I agree, further, in thinking that the Guardianship of Infants Act in its provisions relates entirely to the guardianship of legitimate children, but nevertheless the statute is not in my opinion to be altogether laid aside in considering this case. The provisions of the statute are an advance in determining the propriety and expediency of giving the mother a larger power of guardianship of infant children than the law formerly allowed even in a question with the father or his representatives. The reasons of the provisions apply with even greater force in the case of the mother of an illegitimate child, because the law recognises no competing right in the case of a putative father as in the case of the parent of a legitimate child, and while the Court ought not and cannot by judgment alter the existing law as the Legislature has made it, it nevertheless in questions such as the present will administer it within temperate limits so as to adapt it to modern views. These considerations, combined with the fact that it has been held in the case of *Macpherson*, which was cited in the course of the argument, that the mother of an illegitimate child during her life has an absolute right to the custody of that child, are in my opinion sufficient to show that the Court in this case ought to give effect to the application made by the petitioner. The mother has a legal right to the custody of her child apart from the right of the mother of a legitimate child to appoint a guardian to it. The result is, that effect is to be given to the direction she has left, and I am content to put my judgment on that ground alone, and accordingly I concur in thinking that the application should be granted.

Lord Adam—I think this case comes to a very narrow point. I agree with your Lordship that the petitioner has a right to demand custody of this child, that nobody else has a right to demand custody of it, and that the plan which the Court proposes to adopt is the best in the circumstances. Now, there is no question here about the moral or material welfare of the child. It is admitted on both sides that these interests will be as well attended to by the one side as by the other. That being so, it appears to me that the two conflicting elements of the case are these. On the one side there is the fact that the respondents have now, and have had for a considerable time, the care and custody of this child, and I cannot say that that is not a circumstance which would weigh a good deal on my mind unless a stronger case were made out on the other side for the custody of the child. But the countervailing circumstance on the other side is the desire of the mother. Now, I myself have no doubt that we have the deliberate desire of the mother expressed in her settlement as it is called. I have as little doubt that that was written under influence, but I do not think it was written under what in any sense can be called undue influence. I think that a person in the circumstances in which this woman was, becoming an inmate of a Roman Catholic Convent and associating with and being under the care of Roman Catholics, was subjected to an influence which resulted in a change of religion. I am very far from thinking it did not. Having become a Roman Catholic apparently shortly before the raising of the action in the Sheriff Court, it was a very natural desire for her to express that her child should be brought up in her own faith, and in the custody of those who agreed with her in that faith. Therefore I have come to the conclusion that the desire which this mother expressed was her desire, and not brought about by undue influence in any sense. That being so, the question in my mind is, is that expressed desire to weigh against the fact that this child has been in the hands of the respondents for a considerable time, and has been well taken care of? I think the expressed desire of the mother is a matter of such weight that it ought to be given effect to in this case. I have therefore come to the same result as your Lordships have arrived at.

The following scheme was submitted by the petitioner:—"The petitioner having in view the present age of the boy John Ingram Hammel, and the manner in which he has hitherto been brought up, proposes the following scheme for his further education and upbringing — The petitioner's proposal is, that the boy should be sent for a year or two to a junior school where he will be under the charge of ladies, and be properly prepared for his ultimate admission to a school for older boys. After being at the latter school until the age of 13 the petitioner proposes to assist the boy into and through an apprenticeship of four to five years' duration in some trade or business whereby he may be able to support himself. The petitioner has inquired and considered as to the junior and senior school respectively most suitable for carrying out this scheme for the boy's education, with the following results:—The junior school which the petitioner has in view in the first place is the boarding school for little boys attached to St Elizabeth's House, Bullingham, Hereford, under care of Sisters of Charity. The terms for this school are from £16 to £18 per annum. The school for older boys to which it is proposed that the child should be sent after his preparation at the said junior school is St Francis' Home, Shefford, Bedfordshire. This school is under the direction of the Very Reverend Canon Collis, and the ordinary terms are £25 per annum for each boy."

The Court, on the petitioner appending a note to the scheme undertaking to find caution, allowed extract to proceed on caution being found.

Counsel for the Petitioner—D.-F. Mackintosh, Q.C.—Vary Campbell—W. Campbell. Agent—W. B. Glen, S.S.C.

Counsel for the Respondents—Sir C. Pearson—Maconochie. Agents—J. & F. Anderson, W.S.

Wednesday, June 13.

OUTER HOUSE.

[Lord Trayner, Ordinary.

LADY MURIEL BOYLE *v.* THE EARL OF GLASGOW AND OTHERS.

Entail—Authority to Charge Estate—Appointment of Curator ad litem *to Pupil Respondent—Entail Amendment Act* 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 31—*Disentail—Provisions for Younger Children—Entail (Scotland) Act* 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 24.

In 1883 an heir of entail in possession by petition obtained authority to charge the entailed estates with a sum of £150,000. The three persons called as next heirs were his eldest daughter, her child—a pupil—and his second daughter, also in pupillarity. One curator *ad litem* was appointed to the two pupil respondents, and he on their behalf granted a deed of consent to the charge. By his marriage-contract the heir of entail made certain provisions for his younger children, the amount of which depended on the amount of the free rental of the entailed estates. He became bankrupt, and in 1885 conveyed his estate to trustees, *inter alia*, for payment of his creditors, and it appeared in the settlement of his affairs that the interests of his second daughter as "younger child" had been prejudiced by the estates being charged with the above sum. She raised an action concluding, *inter alia*, for declarator that this charge, and the interest thereon, must not be taken into account in calculating the amount of her provisions, or of her security therefor, and for reduction to that extent of the decree authorising the charge. *Held* that the deed of consent granted on behalf of the second and third consenting heirs in the application of 1883 was disconform to the requirements of section 31 of the Act 11 and 12 Vict. cap. 36, in respect a separate curator *ad litem* had not been appointed to each of the pupil respondents, and decree *granted* in terms of the above conclusions.

Cases of *Hamilton, Petitioner*, February 3, 1853, 15 D. 371, and *Dalrymple, Petitioner*, July 10, 1857, 19 D. 964, commented on.

By antenuptial contract of marriage between the defender the Earl of Glasgow, then the Hon. George Frederick Boyle, and the Hon. Montagu Abercromby, with consent of her curators, dated dated 28th and 29th April 1846, the defender the Earl of Glasgow, *inter alia*, bound and obliged himself, in the event and so soon as the succession to the entailed lands and estates of Hawkhead, Crawfurd-Lindsay, and Glengarnock should open to him, to grant to the marriage-contract trustees a bond or bonds of provision in favour of the child or children of the marriage who should not succeed to the entailed estates to the fullest extent allowed by the deeds of entail of the said estates.

The Earl of Glasgow succeeded to the entailed estates in 1869, and granted a bond of provision on 28th July 1869 in favour of his younger children, binding himself, and the heirs of entail succeeding to him, to make payment to his younger children at the time of his death of the ordinary Aberdeen Act provisions, or failing such provision being sufficient, then such sums as were to the fullest extent allowed by the deeds of entail. The Crawfurd-Lindsay and Glengarnock entail authorised provisions to younger children by way of an annuity not exceeding in the whole 5 per cent. of a capital equal to four years' rent, to be restricted if there was one child at the time the provision became due to an annuity equal to 5 per cent. on the amount of one and a-half years' rent, or if two younger children to an annuity of a capital equal to three years' rent. The Hawkhead entail authorised the granting of provisions to younger children not exceeding two years' free rent if there was one child, three years' free rent if two children, and four years' free rent if three or more children.

On 21st December 1882 the defender the Earl of Glasgow, as heir of entail in possession of the estates of Crawfurd-Lindsay, Glengarnock, and Hawkhead, presented a petition to the Court under and in terms of the Acts 11 and 12 Vict. cap. 36, as amended by subsequent Acts 38 and 39 Vict. cap. 61, and 45 and 46 Vict. cap. 53, for authority to charge the said entailed lands and estates with debt to an amount not exceeding £150,000 sterling. Lady Gertrude Cochrane, the Earl of Glasgow's eldest daughter, her daughter Miss Louisa G. M. Cochrane, and the pursuer Lady Muriel Boyle, the Earl of Glasgow's second daughter, the three next heirs, were called, and appeared as respondents to the petition.

Section 31 of the Rutherfurd Act (11 and 12 Vict. cap. 36) provides that "it shall be competent to the Court of Session, where any heir of entail whose consent is required under this Act shall be under age or subject to any legal incapacity, to appoint, in the course of any application to which such consent is required, a separate tutor *ad litem*, or curator *ad litem*, or *curator bonis*, or other guardian to each such party; and such tutor *ad litem*, or curator *ad litem*, or *curator bonis*, or other guardian being so appointed by the Court, shall be charged with the interest of such party in reference to such application."

Miss Louisa G. M. Cochrane and Lady Muriel Boyle were both in pupillarity, and the Court appointed one curator *ad litem* to both of the pupil respondents to the petition. Lady Gertrude, with consent of her husband, and the curator *ad litem* appointed to Miss Louisa G. M. Cochrane and Lady Muriel Boyle, on their behalf, granted deeds of consent to the said sum of £150,000 being charged on the estates, and after sundry procedure the Lord Ordinary officiating on the Bills on 3rd April 1883 authorised the Earl of Glasgow to charge the entailed estates as prayed for in the petition. The estates were so charged.

The Earl of Glasgow having become bankrupt on 5th June 1885, conveyed his estate to George Auldjo Jamieson, C.A., Edinburgh, and Frederick Pitman, W.S., Edinburgh, in trust, *inter alia*, for payment of his creditors.

On 9th February 1887 the Earl of Glasgow obtained the authority of the Court, under the Act 45 and 46 Vict. cap. 53, to sell the estates of Hawkhead, Crawfurd-Lindsay, and Glen-

garnock, and they were sold for a *cumulo* sum, after deducting preferable debts, of £300,782, 7s. 2d. Subsequently on 28th April 1887 the defender the Earl of Glasgow, with consent of his trustees, presented an application to the Court, founding upon the Entail Acts, for authority to uplift and acquire in fee-simple the said sum of £300,782, 7s. 2d., which had been consigned in the Union Bank of Scotland (Limited).

By section 24 of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53) it is provided that "where provisions to husbands, wives, and children, annuities or terminable charges, are secured upon the estate, or where courtesy or terce are not excluded, due provision shall be made under the authority of the Court for their payment out of the capital or income, as the case may be, of the estate or fund into which the entailed estate is converted, or otherwise to the satisfaction of the Court, and the entailed estate shall thereafter be effectually freed and disencumbered of such provisions, annuities, charges, courtesy, or terce by discharge to be granted by the persons in right thereof, or by decree of the Court declaring the entailed estate to be so freed and disencumbered, which discharges or decree shall be recorded in the appropriate register of sasines."

In this application the Earl of Glasgow sought to diminish the amount of the provisions to be secured to his younger children by deducting from the rents of the estates, and from the revenues of the realised prices of the lands sold, the interest upon the aforesaid bond of £150,000 before fixing the amount of these provisions.

The Lord Ordinary officiating on the Bills on 29th July 1887 approved of the instrument of disentail executed by the said defender, and authorised him to uplift and acquire the sum of £149,501, being the balance of the sum of £300,782, 7s. 2d. after deducting expenses and prior debts, and authorised the bank to pay this sum to the trustees of the defender with the exception of the sum of £28,905, 4s., which had been separately consigned in bank to await the decision of the question raised in this present action.

In these circumstances the pursuer Lady Muriel Boyle brought the present action against the defender the Earl of Glasgow, and George Auldjo Jamieson and Frederick Pitman, his trustees, and also against the Right Hon. Lady Gertrude Boyle or Cochrane, and Thomas E. F. Cochrane and Archibald D. Cochrane, her sons, and the Hon. Thomas H. A. E. Cochrane, as administrator-in-law for his wife, and as tutor to Thomas G. F. Cochrane and Archibald D. Cochrane, and for his own interest, concluding, *inter alia*, for declarator that the interlocutor or decree dated 3rd April 1883 authorising the defender to charge the entailed lands of Crawfurd-Lindsay, Glengarnock, and Hawkhead with debt to the amount of £150,000, and for that end to execute in terms of the statutes a bond and disposition or bonds and dispositions in security, (2) the bond and disposition in security following upon this interlocutor, granted by the defender the Earl of Glasgow, and (3) the interlocutor and decree in said petition dated 19th April 1883 approving of the bond and disposition in security and whole proceedings—ought not to be taken into account in fixing the amount of the provisions payable to the younger child or children of the defender the Earl of Glasgow, or in calculating the sum which was to be consigned or set apart to secure the said provisions, in any proceedings for sale of the said entailed estates or for disentail thereof, or of the price obtained therefor; and that in a question with the defenders the pursuer was entitled to have the maximum amount of said provisions fixed, and the sum to be consigned calculated and ascertained, without any deduction in respect of the said sum of £150,000, and as if the said interlocutors had not been pronounced, and the said bond and disposition in security had not been granted, or as if the maximum amount of said provisions had been secured on the entailed estates preferably to the said sum of £150,000; reserving always the full force and effect of said bond and disposition in security in all other respects, and in particular, reserving to the creditor or creditors therein, and to those in their right, all their rights and preferences under the said bond and disposition in security, and all that had followed or might follow thereon, as if the decree in the present action had never been granted; and for reduction of the foresaid interlocutors and decrees of 3rd and 19th April 1883 and 29th July 1887, but in so far only as might be required to give full effect to the foregoing conclusions, and under the reservations above expressed.

The pursuer pleaded—"(1) In respect of the obligations contained in his marriage-contract the defender the Earl of Glasgow was in 1883 and is now bound to make provision for his younger children, as set forth in the conclusions of the summons. (2) In respect of the said obligations, *et separatim* in respect of the bond of provision libelled, the said defender was and is bound to secure the maximum amount of younger children's provisions, by trust or otherwise, undiminished by any sum borrowed or to be borrowed by him on the security of the fee of the estates, and the pursuer is now entitled to have a sum adequate to secure that amount consigned or set apart out of the prices of the lands sold without any deduction in respect of the interest of the sums so borrowed. (3) In the ascertainment of the rental on which the said provisions are to be calculated, and on which the sum to be consigned or set apart as aforesaid is to be fixed, the pursuer is entitled to be restored against the said interlocutors and bond and disposition in security to the effect concluded for, in respect—1st, That the borrowing power was obtained and exercised by her father in defeat of the marriage-contract obligations *contra fidem tabularum nuptialum*. 2nd, That said power was obtained and exercised by her father, who was her administrator-in-law, in proceedings in which he had an adverse interest to her, to which the pursuer as a younger child was no party, and in which the interests of the younger children, as such, were not *sub judice*, or, at all events, were not represented or protected in any way. (4) The various proceedings sought to be reduced, having been carried through in absence of the pursuer, and the interests of the younger children having been unrepresented therein, the pursuer is entitled to have decree of declarator and reduction to the effect concluded for. (5) The procedure in the petition referred to in condescendence 6 having been irregular and disconform to section 31 of

the Act 11 and 12 Vict. c. 36, the decree and bond and disposition following thereon is invalid, and should be set aside to the extent and effect concluded for."

The defenders pleaded—"(1) *Res judicata* in respect of the proceedings in the said petition to charge in 1883. (2) Proper provision having been made in said proceedings for the protection of the pursuer's whole rights and interests in the premises, she is not now entitled to reopen any of the questions raised and adjudicated upon therein. (4) The said sum of £150,000 having been validly charged on the fee of said estates, the yearly interest thereon must be deducted in ascertaining the amount of free rental on which the said provisions fall to be calculated. (5) The pursuer is not entitled to have the amount of said provisions fixed without deduction of the interest of said debt in respect that such a method of computation would give her an unjust preference over Lord Glasgow's other unsecured creditors. (6) Assuming that the pursuer has suffered loss through failure on the part of Lord Glasgow fully to implement the obligations of his marriage-contract, her remedy would be to claim a ranking on his estate, and not by way of declarator and reduction as now sought."

On 13th June 1888 the Lord Ordinary (TRAYNER) pronounced the following interlocutor:—"Finds and declares in terms of the first alternative of the first conclusion of the summons: Finds that the deed of consent granted on behalf of the second and third consenting heirs in the application in 1883 at the instance of the defender the Earl of Glasgow to charge his estate with a debt of £150,000 referred to in the summons was disconform to the requirements of section 31 of the Act 11 and 12 Vict. c. 36: Therefore sustains the 5th plea-in-law for the pursuer: Finds, declares, and reduces in terms of the second declaratory conclusion, and of the conclusions for reduction, and decerns, &c.

"*Opinion.*—The principal question to be decided in this case is, whether in ascertaining the amount of the provision which the younger children of the Earl of Glasgow are entitled to have imposed as a burden on the entailed estates, or on the price of such parts thereof as have been sold, the interest payable on a sum of £150,000 should or should not be deducted? That £150,000 was charged on the entailed estates under the authority of the Court, as stated in article 6 of the condescendence.

"Under the application of the Earl of Glasgow for authority to uplift and acquire in fee-simple the price derived from the sale of certain parts of the entailed estates, and in which the question now under consideration was also raised, I expressed the opinion that the interest of the £150,000 ought to be deducted from the rents or revenue of the estates before fixing the amount of the younger children's provisions, on the ground that as the £150,000 had been validly charged on the estates the interest thereof must be treated like any other burden affecting the estates, which diminished 'the clear yearly rent or yearly value thereof . . . to the heir of entail in possession.

"The present action has been brought, *inter alia*, for the purpose of setting aside the proceedings under which the £150,000 was authorised to be charged on the entailed estates, in so far as those proceedings or the charge thereby authorised were prejudicial to the pursuer's rights in a question as between her and the Earl of Glasgow.

"It appears that the pursuer was called as a party to the application for authority to charge as one of the three heirs of entail next in succession to the Earl of Glasgow (the petitioner), whose consent was necessary before the charge could be authorised, the other heirs called being the pursuer's eldest sister Lady Gertrude Cochrane, and Miss Louisa G. M. Cochrane, Lady Gertrude's daughter. Both the pursuer and Miss Cochrane being under age, it was necessary that a curator *ad litem* should be appointed to them or each of them, not only for the protection of their interests under the applications, but in order that consent to the application, if given, should be validly given. The Lord Ordinary accordingly appointed a curator *ad litem* to the pursuer and Miss Cochrane, who consented on their behalf to the burdening of the entailed estates with the debt of £150,000.

"The grounds on which the pursuer maintains her right to set aside the proceedings above referred to are these — (1) That the borrowing power (under which the £150,000 was borrowed and charged on the entailed estates) was obtained by the defender 'in defeat of the marriage-contract obligations' conceived in favour of his younger children; (2) that said power was obtained under proceedings to which the pursuer 'as a younger child' was no party; and (3) that said proceedings were irregular, and disconform to the provisions of the Rutherfurd Act.

"With regard to the first and second of these grounds, I seriously doubt whether they could be maintained as sufficient or relevant for setting aside the proceedings complained of if the regularity and validity of these proceedings was not otherwise impugned. On the assumption that the proceedings were regular, and not open to challenge on other grounds, the pursuer would find it very difficult to get the better of the consent deliberately given on her behalf to the measure of which she now complains, on the ground that that measure was in violation of the provisions of her father's marriage-contract. Nor would it aid her very much to say that what she did, or others did for her, was done in the character of an heir of entail, and not that of a younger child, because the knowledge which the heir of entail had when giving the consent could not be separated from the knowledge had at the same time by the same person as a younger child; the characters are no doubt quite separate and distinct in law, but being combined in the same person, the knowledge of that person would be her knowledge alike in either character.

"I do not, however, wish to decide that the grounds of reduction I have referred to are absolutely irrelevant, and it is not necessary that I should do so in view of the opinion I have formed on the third ground pleaded by the pursuer.

"That ground impugns the legality and regularity of the proceedings in question, and the sufficiency of the consent given therein by the pursuer's curator *ad litem*. As I have pointed out already, it was necessary before Lord Glasgow could obtain authority to borrow the £150,000, and to charge it on the entailed estates, that the

consent thereto of the three next heirs of entail should be obtained. Miss Cochrane and the pursuer, the second and third of these next heirs, were both in pupillarity, and could not of themselves give any consent, and a curator *ad litem* was appointed to them by the Court, who granted the necessary consent on their behalf. It is maintained now by the pursuer that the consent so given was irregular and disconform to the provisions of the Rutherfurd Act, and that being invalid in respect of such irregularity the whole proceedings following thereon are invalid, and ought to be set aside, in so far at least as they affect any question between the pursuer and the defender. In this contention I think the pursuer is right.

"The 31st section of the Rutherfurd Act provides that 'it shall be competent to the Court of Session, where any heir of entail whose consent is required under this Act shall be under age or subject to any legal incapacity, to appoint, in the course of any application to which such consent is required, a separate tutor *ad litem*, or curator *ad litem*, or *curator bonis*, or other guardian to each such party; and such tutor *ad litem*, or curator *ad litem*, or *curator bonis*, or other guardian, being so appointed by the Court, shall be charged with the interest of such party in reference to such application.' That language seems to me too plain to admit of any doubt as to its meaning, and that meaning has already been judicially determined. In the case of *Hamilton*, 15 D. 371, two of the heirs whose consents were required were (as in the present case) pupils. One tutor *ad litem* (again as here) was appointed to both, and the Court held that this was not sufficient compliance with the requirements of the statute. The Lord President said—'I think the statute requires that there should be a separate tutor for each pupil, for its object is not merely to supply the place of the legal guardian but to provide three parties, each capable of giving a separate and independent consent to the application. If one tutor be appointed to two pupils there is only one consent for two heirs.' Proceeding upon that view, the Court superseded further procedure until an appointment of a tutor to each pupil had been made. The irregularity of procedure now maintained by the pursuer seems therefore to be concluded by authority.

"The defender, however, says that the precise language of the statute does not appear to have been under the consideration of the Court when the decision in *Hamilton's* case was pronounced, because no notice is taken of the introductory words of the section—'It shall be competent for the Court of Session,' &c., and he refers to the case of *Dalrymple*, 19 D. 964, where from the report it undoubtedly appears that the Court appointed one tutor to two pupil heirs, and on his consent granted application before them. Even had this been so I would have followed the authority of the case of *Hamilton*, but there is no conflict between the cases, for the report of *Dalrymple's* case appears to be wrong. On page 208 of Duncan's Entail Procedure I find this footnote—'From the terms in which the report of the case of Sir Hew Dalrymple is expressed (19 D. 964), the reader might be led to infer that one tutor *ad litem* only had been appointed to the two pupil heirs, who were children of the other heir consenter. But such is not the case. A separate tutor *ad litem* to each of these pupils was appointed.' *Dalrymple's* case is therefore an additional authority in favour of the pursuer.

"As regards the introductory words of the clause, I cannot doubt that they were considered by the Court in *Hamilton's* case, looking to the fact that the question decided was brought before the Court on a report by Lord Curriehill as to whether the provisions of the 31st section of the Rutherfurd Act had been sufficiently complied with. The whole section was necessarily thus before the Court. But whether or not attention was specially directed to the words 'it shall be competent', &c., they do not appear to me to create any difficulty. It was not necessary to have any statutory authority to enable the Court to appoint a tutor or a curator *ad litem* to a pupil or minor litigant who had no legal guardian to act for him. I think the competency conferred on the Court was to appoint such a guardian for this particular matter, apart and distinct from any existing legal guardian, who might otherwise be entitled to act for the pupil. It took the matter of consent under the Entail Acts away from the legal guardian, if the Court thought right, and authorised the appointment of a separate guardian *ad hoc*—a guardian who should 'be charged with the interest of such party in reference to such application.' But certainly the statute did not leave the Court to exercise the power conferred on it simply according to its discretion. It provides that where the Court exercises the power it shall exercise it in a particular way, namely, by appointing a separate tutor or curator to each party whose consent is necessary, and who, from nonage or other incapacity, is unable to consent for himself. The defender submits that the words of the statute, 'it shall be competent to the Court of Session,' &c., warrant the Court, if it thinks right, to nominate one tutor to two pupils. Such a reading of the clause is in my opinion not permissible, for it comes to this—it shall be competent to the Court to do something different from that which is here directed to be done.

"I am of opinion therefore that no valid consent as required by statute was ever given by the pursuer to the charging of the entailed estates with the £150,000 in question, and that that burden, as in a question between the pursuer and defender, not having been regularly or effectually placed on the estates, the interest paid or payable in respect of that burden does not fall to be deducted in ascertaining the extent of the pursuer's rights as a younger child of Lord Glasgow.

"The first conclusion of the summons, as to the extent of those rights under Lord Glasgow's marriage-contract, was not seriously disputed."

Counsel for the Pursuer—Sir C. Pearson—Low—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—D.-F. Mackintosh—Dundas. Agents—J. & F. Anderson, W.S.

Friday, July 20.

OUTER HOUSE.

[Lord Trayner, Ordinary.

J. & J. CUNNINGHAM *v.* GUTHRIE AND ANOTHER.

Shipping Law—Bill of Lading—Delivery Order—Title to Sue.

The only title to a cargo shipped under a bill of lading, which the master is bound to recognise or entitled to act upon, is the bill of lading itself.

The holders of the bill of lading for a cargo forwarded it to the master at the port of discharge, endorsed as follows:—"Captain K. will please deliver the contents of the within bill of lading against production of orders signed by us." Signed delivery-orders for parts of the cargo were from time to time presented by J. & J. C. to the master, who gave delivery in terms thereof. When the cargo had been all delivered, except about 60 tons, the master refused further delivery until certain claims which he had advanced for freight and demurrage were paid or secured to him, whereupon J. & J. C. raised an action for delivery of the 60 tons, founding upon a delivery-order granted by the holders of the bill of lading. *Held* that the pursuers, not being holders of the bill of lading, had no title to sue.

This was an action by J. & J. Cunningham, merchants, Leith, against Thomas C. Guthrie, shipowner, Glasgow, the registered managing owner of the sailing ship or vessel "Earl of Derby," of Glasgow, and John Kerr, the master of the vessel, for declarator that the defenders were bound to deliver to the pursuers 450 bags or thereby of nitrate of soda believed to weigh about 60 tons, recently discharged from the "Earl of Derby," and lying in a warehouse in Leith, and for delivery of the bags against payment by the pursuers to the defenders of the amount of freight payable in respect of the carriage of the bags, and alternatively for damages.

The defenders pleaded that the pursuers had no title to sue.

The facts appear sufficiently from the Lord Ordinary's opinion.

The Lord Ordinary (Trayner) on 20th July 1888 pronounced this interlocutor—"Sustains the first plea-in-law for the defenders, dismisses the action, and decerns: Finds the pursuers liable in expenses, &c.

"*Opinion.*—The ship 'Earl of Derby,' of Glasgow, arrived at Leith on or about 1st May last with a cargo of nitrate of soda. The bill of lading for the cargo was held by Henry Bath & Son of London (to whom it had been endorsed by the shippers), who forwarded it to the master of the vessel endorsed as follows:—'Captain Kerr will please deliver the contents of the within bill of lading against production of orders signed by us.' Delivery-orders for parts of the cargo were from time to time presented by the pursuers to the master, who gave delivery in terms thereof. When the cargo had all been delivered, except about 60 tons, the master refused further delivery until certain claims which he had advanced for freight and demurrage were paid or secured to him. The present action is for delivery of the 60 tons or thereby forming the balance of the cargo, which the pursuers say they are entitled to demand in respect of a delivery-order by Bath & Son, and they offer payment of the freight demandable for that portion of the cargo. The defenders plead that the pursuers have no title to sue this action, as they are not the holders of the bill of lading.

"I hold it to be quite settled that no one is entitled to demand delivery of cargo for which bill of lading has been granted unless at the time of the demand he is the holder of the bill of lading. The bill of lading is the only title to the cargo which the master is bound to recognise or entitled to act upon. It is the document 'upon the sight of which the shipmaster is bound to give up the goods, and without which he cannot be forced or entitled to do so'—Bell's Com. (7th ed.), i. 213. If the master delivers the cargo on any other title than the bill of lading, he does so at the risk of being called on to make good the cargo or its value to the person who subsequently claims it as holder of that document.

"The pursuers, however, distinguish the present from the ordinary case by pointing out that the master is in possession of the bill of lading, and that the indorsation thereon authorising him to deliver the cargo on production of delivery-orders signed by the firm who are in right to the bill of lading secures him against a demand for the cargo at the instance of any other person. This is quite true. But the pursuers ignore the fact that while the bill of lading imposes certain obligations on the master of the ship, it at same time confers corresponding rights upon him. The person who demands and takes delivery of the cargo in respect of the bill of lading undertakes thereby the whole obligations imposed by the bill of lading on the consignee towards the master, and it is against him primarily (sometimes against him alone) that the master can enforce his rights. The person who takes delivery of cargo in respect of a delivery-order is not the consignee; that character remains with the person holding the bill of lading and granting the delivery-order. It appears to me that the master is not bound to deliver cargo to anyone who is not at same time bound to answer for the consignee's obligation. Indeed, that is matter of contract. The bill of lading stipulates that the master of the vessel shall deliver the cargo to the shipper 'or his order or assigns,' and to nobody else. This stipulation is in the interest of both parties to the contract; it is in the interest of the shipper, so that his goods shall not be delivered to anyone except himself, or the person to whom he gives right by endorsation as 'his assign;' it is in the interest of the master, so that he shall not be bound to deliver to anyone but the shipper or his assign, who will be responsible for the shipper's obligations.

"It is said by the defenders that this somewhat novel mode of procuring cargo on delivery-order is a device to deprive the master of his rights. Whether that be so or not, it is quite apparent that to order a shipmaster to deliver cargo on such delivery-orders would or might seriously inconvenience the shipmaster in the

enforcement of his rights. To this inconvenience (even if it be nothing greater) I think the shipmaster is not to be subjected. It is to be observed also that under a bill of lading, such as we have here, the master is not bound to deliver his cargo in parcels to a number of persons as holders of delivery-orders. A ship is not to be treated as a warehouse. The ship has received a full cargo from one shipper, and the master is to deliver it to that shipper or his assigns as a *unum quid*. It is quite different in the case of a general ship, where many parcels are received to be delivered to as many assignees. Freight in such a case is charged at such a rate as covers the trouble and expense of many deliveries and collection of freight from many consignees, but where a full cargo is shipped to be delivered to the shipper or his assigns this is not so.

"In this case the master no doubt honoured several of the delivery-orders, but that was done by him *ex gratia*; he was not bound to do it, and he was entitled to decline doing so when he found or believed that to continue doing so would imperil the rights of his owners.

"I was referred to the case of *Meyer*, 5 Taunt. 74, and *Nathan*, 5 Taunt. 558, and some other cases, as showing that cargo may be transferred without endorsation or delivery of the bill of lading. In England this is undoubtedly so, because in England property in moveables is passed by a completed contract of sale, but in Scotland a floating cargo cannot be transferred (so far as I know) in any way except by endorsation of the bill of lading, which is constructive delivery of the cargo. But the English cases referred to only show that property in a cargo may be transferred without delivery of the bill of lading as in a question between buyer and seller. They do not touch upon the question whether such transfer can take place so as to prejudice the rights of the master or owner of the vessel carrying the cargo. On the contrary, the right of the master to refuse delivery of the cargo to a person otherwise having right to it, who did not produce the bill of lading, was recognised in the case of *Nathan*.

"The pursuers' only title to the balance of cargo now claimed by them is a delivery-order by the consignees. That, I think, is no title on which they can demand delivery. If they have bought this cargo from Bath & Son, they can insist on their giving them a good title to delivery, namely, the endorsed bill of lading. If they refuse this they have their remedy against them. But to order the captain of a vessel to deliver cargo on any other title than the bill of lading would, I think, be a violation of well-established legal rule, and would be sanctioning a practice likely to lead to great confusion, and an unjust interference with the rights of shipmaster and shipowners."

Counsel for the Pursuers—Dickson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, July 25.

OUTER HOUSE.

[Lord Kinnear, Ordinary.

RUSSELL *v.* CAMPBELL.

Lease—The Registration of Long Leases (Scotland) Act 1857 (20 *and* 21 *Vict. c.* 26), *secs.* 4, 5, *and* 16—*Assignation in Security—Completion of Title.*

The Registration of Long Leases (Scotland) Act 1857, which provides for the registration of leases of thirty-one years and upwards in the Register of Sasines, provides by section 4 that "it shall be lawful for the party in right of any such lease recorded as aforesaid, and whose right thereto is recorded in terms of this Act," to assign it in security for debt, and that the recording of such assignation should complete the right. Section 5 provides that "where the party in right of any such lease or assignation in security as aforesaid is not the original lessee in such lease, or the original assignee in such assignation in security, he shall, before presenting such lease or assignation in security for registration, expede" a notarial instrument, which shall be recorded along with the lease or assignation. Section 16 provides that the registration of leases, assignations, assignations in security, and notarial instruments shall complete the right under the same respectively, to the effect of establishing a preference in virtue thereof as effectually as if the grantee or party in his right, had entered into actual possession of the subjects.

A person in right of a long lease, but not the original lessee, assigned the same in security. Thereafter the assignee in security expede a notarial instrument in the form provided by section 5, proceeding upon the documents by which the granter of the assignation had obtained right to the lease, and upon the assignation in security, and recorded the notarial instrument and the lease. The granter of the assignation in security thereafter assigned the lease to another person. In a suspension brought by the assignee, who alleged a properly recorded right and possession, against a threatened sale of the lease by the assignee in security, *held* that the latter not being a person "in right" of a lease could not avail himself of section 5, and that his title was not validly completed under the statute.

Mrs Mary Borland or M'Callum, wife of John M'Callum, ship-carpenter, Saltcoats, was in right of two long leases of subjects in Chapel Street, Saltcoats, granted by the trustees of the Earl of Eglinton, the first being dated 20th September and 31st October 1828 for the term of ninty-nine years from Whitsunday 1829, the second being dated 3rd October and 17th November 1831 for the term of ninety-nine years from Whitsunday 1831. She had acquired right to the leases by virtue of the following writs, viz.—(1st) Assignation of the lease or tack first above mentioned

granted by James Logan, the original lessee, in favour of Thomas Borland, carter in Saltcoats, and Isabel Shaw, his wife, dated 24th May 1839; (2nd) assignation of the lease or tack, second above mentioned, granted by Robert Smith and Mary Shaw or Smith, his spouse, the original lessees, in favour of Thomas Borland and Isabel Shaw or Borland, his spouse, dated 25th May 1839; and (3rd) deed of settlement executed by Thomas Borland, dated 30th August 1881, and recorded in the Sheriff Court books of the county of Ayr, 13th February 1882, containing a general conveyance in favour of Mary Borland or M'Callum. On the various dates following Mrs M'Callum granted the following writs in favour of James Campbell, writer in Saltcoats, purporting to assign the leases in security in his favour—(1st) Bond and assignation in security for £70, dated 16th February 1882; (2nd) do. for £30, dated 8th June 1882; (3rd) do. for £40, dated 21st November 1882; (4th) do. for £33, dated 26th March 1883. On 14th July 1885 Campbell expede a notarial instrument following upon (first) the assignation by James Logan to Thomas Borland, dated 24th May 1839; (second) the assignation by Robert Smith to Thomas Borland, dated 25th May 1839; (third) the settlement by Thomas Borland, dated 30th August 1881, and registered in the Sheriff Court books of Ayr, 13th February 1882, and also upon the bonds and assignations in his favour. The notarial instrument in his favour was, along with the said two leases, recorded upon 15th July 1885 in the division of the General Register of Sasines for the county of Ayr.

On 15th May 1886 Mrs M'Callum, with consent of her husband, assigned the leases to Thomas Russell, fruit broker in Glasgow. Russell made up his title to the leases by expeding a notarial instrument on the writs specified above, by which Mrs M'Callum acquired right to the leases, and the assignation in his favour and recording the same, and the said two leases, with warrants of registration in his favour, on 24th May 1886.

On 7th December 1887 Campbell served upon Russell a schedule of intimation, requisition, and protest threatening to expose for sale and sell the leases under the bonds and assignations in security in his favour. Russell presented a note of suspension and interdict craving to have Campbell interdicted from entering into possession of, advertising, or exposing for sale or selling the leases. In addition to the facts above set forth he averred that upon completing his title to the leases he entered into possession of the subjects let by the leases, and duly intimated the change of ownership and his entry into possession to the landlord, and also to the principal tenant and sub-tenants or occupants thereof; that since acquiring the leases he had paid the tack-duty due thereunder, made the annual return for the valuation roll, and paid all the taxes, assessments (certain of these being paid to Campbell as collector), and public burdens exigible in respect of the subjects. He had also received from the sub-tenant of part of the subjects a quarter's rent due at the term of Whitsunday 1888, and re-let the same for the year current.

This statement was denied by the respondent, who averred that he had been in possession of the subjects since 10th July 1885 by drawing the rents of the sub-tenants and re-letting the subjects; that on the said date he intimated his intention to enter into possession to Mrs M'Callum, and he had ever since been in possession with her full assent.

The complainer pleaded—"(1) Neither the foresaid leases nor the said Mrs Mary Borland or M'Callum's right thereto having been recorded in terms of the said Registration of Long Leases Act prior to the granting of the respondent's said bonds and assignations in security, no real security was constituted by respondent's said bonds and assignations in security on the said leases, and the respondent should be interdicted from selling said leases as craved. (2) The foresaid assignation in favour of the complainer being preferable to the said alleged securities of the respondent, he is entitled to interdict as craved with expenses. (3) The respondent's alleged title not having been perfected or completed by possession following thereon, the defences should be repelled, and interdict granted as craved."

The respondent pleaded—"(1) The complainer's averments are irrelevant and insufficient, and the note should be dismissed. (2) The respondent's title being completed by possession and by public intimation, the note should be refused. (3) The respondent's title being validly completed under the statute, the note should be refused. (4) The complainer not being an onerous or *bona fide* assignee, and being personally barred from questioning the respondent's title, the note should be refused."

The Registration of Long Leases (Scotland) Act 1857 (20 and 21 Vict. c. 26) provides by section 4—"It shall be lawful for the party in right of any such lease (*i.e.*, a lease for thirty-one years or more), recorded as aforesaid (*i.e.*, in the General Register of Sasines or the particular register for the district), and whose right thereto is recorded in terms of this Act, but in accordance always with the conditions and stipulations of such lease, and not otherwise, to assign the same in whole or in part in security for the payment of borrowed money, or of annuities, or of provisions to wives or children, or in security of cash-credit, or other legal debt or obligation, in the form as near as may be of the Schedule B to this Act annexed, and the recording of such assignation in security shall complete the right thereunder, and such assignation in security so recorded shall constitute a real security over such lease to the extent assigned." Section 5 provides—"Where the party in right of any such lease or assignation in security as aforesaid is not the original lessee in such lease or the original assignee in such assignation in security, he shall, before presenting such lease or assignation in security for registration, expede an instrument under the hand of a notary-public in the form as nearly as may be of the Schedule C to this Act annexed, and the keeper of the register, on such notarial instrument being produced to him, but not otherwise, shall thereupon record such lease or assignation in security, together with the said instrument." Section 15 provides—"Leases, assignations, assignations in security, translations, instruments, discharges, renunciations, and other writs duly presented for registration in pursuance of this Act shall be forthwith shortly

entered in the minute-book of the register in common form, and shall, with all due despatch, be fully registered in the register-book, . . . and the date of entry in the minute book shall be held to be the date of registration. Section 16 provides—"The registration of all such leases, assignations, assignations in security, translations, adjudications, writs of acknowledgment, and notarial instruments as aforesaid, in manner herein provided, shall complete the right under the same respectively, to the effect of establishing a preference in virtue thereof as effectually as if the grantee or party in his right, had entered into the actual possession of the subjects leased under such writs respectively at the date of registration thereof."

Parties having been heard upon the question raised by the third plea-in-law for the respondent, the Lord Ordinary (KINNEAR) on 25th July 1888 pronounced the following interlocutor:—"Repels third plea-in-law for the respondent; and before further answer allows the parties a proof of their respective averments of possession, and of the averment bearing upon the fourth plea-in-law for the respondent, and appoints the proof to be taken before the Lord Ordinary on a day to be fixed, the respondent to lead.

"*Opinion.*—The leases in question had not been recorded in terms of the statute when the assignation in favour of the respondent were executed, and I do not understand it to be disputed that at common law the immediate effect of the assignation was to give the respondent a mere personal right as against the cedent, but no real right or security whatever until possession had been obtained. The parties are in controversy upon the question whether possession has been obtained in fact. But the respondent maintains that it is unnecessary to consider the disputed question of fact, because by recording a notarial instrument proceeding upon the transmission of the leases to the cedent, and his own assignations from her, along with the leases themselves in the Register of Sasines, he has in law obtained possession by virtue of the Registration of Leases Act 1857. The first question therefore is, whether his argument upon the statute is well founded.

"The sections requiring consideration are the 3rd, 4th, 5th, 15th, and 16th. The 3rd and 4th are applicable only to assignations absolute, or in security, of recorded leases, and with regard to such leases there can be no question when these two sections are read along with the 15th that in order to vest the assignee effectually with the right of the grantor if the assignation is absolute, or to complete the security by the constitution of a real right over the lease if it is in security merely, the assignation itself must be recorded. It seems to follow that the respondent could only obtain the benefit of the 4th section, which authorises the execution and registration of assignations in security, by first procuring the registration of the lease, and then recording the assignation in his favour. But he maintains that it was unnecessary to resort to this circuitous procedure, because the 5th section is directly applicable to the position in which he stood when he had obtained an assignation of an unrecorded lease, and that under that section his title has been effectually completed.

"The 5th section provides that where the party "in right of any such lease"—that is, of any lease for thirty-one years or more—"is not the original lessee in such lease, he shall, before presenting such lease for registration, expede" a notarial instrument in the form as nearly as may be of Schedule C; "and the keeper of the register, on such notarial instrument being produced to him, but not otherwise, shall thereupon record such lease, . . . together with the said instrument." The 16th section provides that the registration of leases, assignations, assignations in security, and notarial instruments, "shall complete the right under the same respectively to the effect of establishing a preference thereof as effectually as as if the grantee or party in his right had entered into the actual possession of the subjects" And reading these two sections together, the respondent maintains that any assignee of a lease which has not yet been recorded may complete the right under his assignation, whether it be absolute or in security, either at common law by entering into possession, or under the statute by expeding a notarial instrument, and recording it with the lease.

"I am unable to assent to this argument, because it does not appear to me that an assignee in security, who has nothing to found upon but his assignation, answers the description of the party in right of the lease. He has nothing but a personal claim against the cedent while the assignation is unrecorded, and when it has been recorded he has a mere encumbrance upon the right of the lessee.

"A lessee who may have granted an assignation in security upon which nothing has followed is still the only party in right of the lease, and therefore the only person in a position to make use of the power conferred by the 5th section. This is the proper construction of the words if they are used in their technical sense, and it is in conformity with the other provisions of the statute. The 15th section requires in terms that assignations, whether absolute or in security, shall be recorded in full, and it would be a singular anomaly to give to the registration of a notarial instrument, expede by a creditor, all the effect for which the registration of the assignation in full is declared to be indispensable. The purpose of the notarial instrument is not to constitute or transfer rights, but to connect titles, and accordingly the terms of the schedule shows that the purpose of the 5th section was not to give a real right under an adverse title in questions with the actual lessee, or persons deriving right through him, but to enable the successors of a deceased lessee to complete the title in the same way as the lessee himself. In this view it may be doubtful whether the complainer's title has been properly recorded any more than the respondent's. But it is unnecessary to determine that question at present, because if the respondent cannot stand upon his recorded title alone, as giving him a preference under the statute, the facts as to the possession must be ascertained."

Counsel for the Complainer—Guthrie. Agent—Walter R. Patrick, Solicitor.

Counsel for the Respondent—Vary Campbell. Agent—A. Kirk Mackie, S.S.C.

Thursday, August 9.

OUTER HOUSE.

[Lord Shand, Ordinary on the Bills.

BARON POLWARTH, PETITIONER.

Entail—Disentail—Provision for Younger Children—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *sec.* 6.

An heir of entail in possession bound himself by his marriage-contract to secure certain provisions in favour of his younger children by bond and disposition in security over his estates. In a petition for disentail he proposed (following the case of the *Earl of Fife*, unreported) to make these provisions a burden on the estate postponed to a limited power of borrowing over the estate. *Opinion* (*per* Lord Shand) that they ought not to be so postponed, and in accordance therewith a bond and disposition in security of the younger children's provisions was executed in favour of trustees.

This was a petition under the Entail Acts—11 and 12 Vict. c. 36; 16 and 17 Vict. c. 94; 38 and 39 Vict. c. 61; and 45 and 46 Vict. c. 53—presented on 11th June 1888 by the Right Honourable Walter Hugh Hepburne Scott, Baron Polwarth, heir of entail in possession of the entailed lands, baronies, and estates of Mertoun, Harden, Maxton, and others, in the shires of Berwick, Roxburgh, and Selkirk, for authority to record an instrument of disentail of those estates.

The entails were dated prior to 1st August 1848, and the petitioner was born prior to that date. A deed of consent by the petitioner's eldest son and heir-apparent was produced in process.

The Lord Ordinary (TRAYNER) remitted to Mr H. B. Dewar, S.S.C., to inquire into the circumstances set forth in the petition, and to report whether the Acts of Parliament and Acts of Sederunt had been complied with.

Mr Dewar returned a report, in which, after narrating the facts connected with the entails, and the procedure in the petition, he reported, with reference to the statutory schedule of debts and affidavit, that there remained unsecured certain antenuptial Aberdeen Act provisions in favour of the petitioner's younger children. The report then proceeded as follows, viz.—"Certified abstract rentals of the estates and of the yearly burdens thereon are produced, from which it appears that taking the present free rental of £9575, 8s. 10d. as the only available basis for establishing the future provisions payable at the petitioner's death, the three years' free rents, on the assumption of Lady Polwarth predeceasing her husband, would amount to about £25,338, 12s. 3d., which would be as nearly as possible the maximum amount of the children's provisions. On the authority of the case of the *Earl of Glasgow*, November 12, 1886, 14 R. 59, the reporter is humbly of opinion that it will be necessary for the petitioner to give security for that amount, and on inquiry the reporter finds that the form of security least inconvenient to the petitioner would be a bond and disposition over the lands about to be disentailed. Assuming for the purposes of this calculation the free rental, after deducting public burdens, to be as above stated, £9575, 8s. 10d. before deducting interest of debts, and estimating the market value of even these well-known and valuable estates in the depressed times to be not more than twenty-five years' purchase, this would make their present value about £240,000. It is also assumed that the probability is, that between the present time and that at which these provisions became payable, namely, upon the death of the petitioner, the value of land will not have become lower than at present. The reporter, moreover, is humbly of opinion that the younger children are not necessarily entitled to a first security over the lands about to be disentailed. They are entitled to have (Rutherfurd Act, sec. 6) 'such provision as may appear just made for such debts or provisions.' Accordingly the reporter respectfully suggests that if a bond is granted in their favour it should contain a clause reserving to the petitioner power and liberty to borrow and charge upon the fee of the estates a sum or sums not exceeding in all £100,000, in addition to the sums already charged thereupon, amounting in the aggregate to £27831, 0s. 2d., so that such sum or sums not exceeding £100,000 shall have precedence and priority of the foresaid sum of £25,338, 12s. 3d. of children's provisions. This humbly seems to the reporter to be not only reasonable, but is in accordance with the practice of the Court. In the (unreported) case of the *Earl of Fife* there were £120,000 of younger children's provisions in four sums of £30,000 each, held by four sets of marriage trustees. These trustees demanded that the £120,000 should be a first charge upon the entailed estates of Mar and others, which were being disentailed, to which Lord Fife objected for the very practical reason that this might interfere unduly with his borrowing upon the security of the disentailed lands at the lowest rate of interest. Upon this the present reporter brought the point under the Lord Ordinary's notice (Lord Curriehill the younger), and suggested a clause in terms similar to the clause suggested above, only giving Lord Fife power to borrow any sum not exceeding one million pounds sterling to take precedence upon record of the £120,000 of provisions. The Lord Ordinary thought the suggestion a reasonable one in the circumstances, the marriage trustees acquiesced, and effect was given to it.

"In the present case the reporter, without requiring a valuation to be made by a man of skill, has made careful inquiry in regard to the nature of the estates from the point of view of inquiry whether such a postponed bond as he suggests for the children's provisions would 'afford sufficient protection (Rutherfurd Act, sec. 6) to the younger children—would, as it were, be sufficient caution for the safety of their provisions—he has had an analysis made out of the different classes of property that form the estates, and showing the number of years' purchase of the rental from each of these which he considers safe and moderate for the purposes in view, and he respectfully refers thereto. The result is that he thinks the value of the estates might fairly be taken for the purposes in question at not less than £260,000."

On 9th August 1888 the Lord Ordinary officiating on the Bills (SHAND) pronounced this interlocutor — ". . . Before disposing of the question which has arisen in regard to the extent of the petitioner's obligations to provide for his younger children by bond and disposition in security affecting the estates sought to be disentailed, Appoints the petition to be intimated to the Right Hon. George Arden Baillie Hamilton, Earl of Haddington, Tyninghame House, Haddingtonshire, and the Hon. Henry Robert Scott, barrister-at-law, London, being the surviving trustees under the antenuptial contract of marriage entered into between the petitioner and Lady Mary Hamilton Gordon, now Lady Polwarth, with consents therein mentioned, dated 29th January 1863, in whose names it is provided execution shall pass for implement by the petitioner of the provisions made by him in said marriage-contract, and ordains them to lodge answers thereto, or a minute stating the claim which they make for the securing of children's provisions to affect the estates sought to be disentailed as a condition of any disentail thereof, if so advised, &c.

"*Note.*—Without expressing a final opinion on the matter, which I should certainly not do until I had the benefit of argument, I may say that my impression is, that the reporter Mr Dewar is right in holding, notwithstanding the peculiar terms of the petitioner's marriage-contract, that the petitioner is bound to make provisions for his younger children to the extent stated in Mr Dewar's report, but that, on the other hand, I do not agree in Mr Dewar's view that the provisions to children should be made a postponed burden on the estate after a large amount of debt has been, in the first place, made a charge thereon. The argument on the petitioner's behalf on one or other of these points might lead me to form a different opinion, but if I were to give effect to this in the absence of any one to represent the creditors in the obligation, the youngest children, serious injustice might be done. I am therefore clearly of opinion that in this, as in all other cases, where a creditor's right to have an estate about to be disentailed burdened with debts due to him is in question, and the heir seeking to disentail proposes to create a burden less than *prima facie* appears to be the full amount, or to give a postponed security only, the creditor must be called by intimation or service so that his interest may be represented and preserved. I have therefore pronounced the interlocutor ordering intimation to the gentlemen charged with the protection of the petitioner's children's interests by his marriage-contract."

The petitioner thereafter lodged a minute in process, in which he stated that with reference to the views indicated by Lord Shand he was quite willing to grant the required bond and disposition in favour of his younger children without its being postponed to a power to borrow, as proposed by the reporter, and accordingly craved the Lord Ordinary to remit to Mr Dewar to adjust and see executed and recorded the necessary deed.

Counsel for the Petitioner — H. Johnston. Agent—George Bruce, W.S.

Tuesday, January 8, 1889.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BLAIR *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Bankruptcy—Sequestration—Recal—Affidavit—Extrinsic Objection—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 22.

The affidavit of a petitioning creditor in a sequestration was *ex facie* conform to statute, but it appeared on a proof that he had never been put upon oath. The Court, holding that this irregularity was a ground for recal of the sequestration, pronounced an interlocutor recalling it, on being satisfied that no rights or preferences of creditors would be affected by the recal.

The estates of William Blair, bookseller, in Dundee, were sequestrated on 28th August 1888 at the instance of the North British and Mercantile Insurance Company. He thereafter presented a petition to the Court craving recal of the sequestration, in which he averred, *inter alia*—"The affidavit and claim produced with the said petition by the said company bears it was deponed to by Mr Philip Robert Dalrymple Maclagan, secretary of the said company, and that the oath was administered by Mr Frederick William Carter, one of Her Majesty's Justices of the Peace for the county of the city of Edinburgh. Notwithstanding that the said affidavit and claim bears that Mr Maclagan was solemnly sworn and interrogated by Mr Carter, it is believed and averred that Mr Carter did not put Mr Maclagan upon oath or interrogate him in any manner of way in relation to the contents of the said affidavit."

In answers lodged for the North British and Mercantile Insurance Company it was replied that the petitioner's averments were irrelevant, and ought not to be admitted to probation.

The Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds that the petitioner has set forth no relevant or sufficient grounds for recal of sequestration: Therefore refuses the petition, and finds the respondents entitled to expenses, &c.

"*Opinion.*—The first ground upon which the petitioner maintains that the sequestration should be recalled is that the affidavit on which sequestration was awarded was not made upon oath. He states that he believes and avers that the Justice of Peace before whom it bears to have been made did not put Mr Maclagan, the respondents' secretary, upon oath, or interrogate him in any manner of way in relation to the contents of the said affidavit. This is denied by the respondents, and the affidavit is *ex facie* regular, and sets forth that the compearer was 'solemnly sworn and interrogated.'

"Now, the proceedings being *ex facie* regular, it is in the discretion of the Court to allow or refuse inquiry. The petitioner asks for a proof at large to contradict the formal document on which sequestration was awarded. Such averments are easily made, and it would manifestly lead to great inconvenience and expense to

creditors if an inquiry were granted in every case in which the bankrupt chose to assert that, contrary to the statement on the face of the affidavit, the petitioning creditor had not in point of fact sworn to the verity of the oath. But I am clearly of opinion that if inquiry is ever to be allowed in such cases it must be upon averments much more specific than those made in the present case. To use the words of the Lord President in *Gillon* v. *Cæsar*, November 1, 1882, 10 R. 61, 'the petitioner would require to state what are his means of knowledge of the alleged fact that there is something wrong, and in what manner he proposes to prove his averments.' In the course of the discussion in the present case I invited the counsel for the petitioner to give some further information upon these points, but he was unwilling to do so, and preferred to take a judgment upon the petition as it stood." . . . .

The petitioner reclaimed, and was allowed a proof of his averment that the petitioning creditor had never been put on oath, after he had made the following addition thereto—"Mr Maclagan did not attend before Mr Carter to get the oath administered, but after signing the affidavit sent it along to Mr Carter to be signed by him. Mr Maclagan and Mr Carter never met with reference to this matter."

The result of the proof was to show that no oath had been administered, but that the Justice of Peace (Mr Carter) had merely put some such question as the following to Mr Maclagan, secretary of the Insurance Company—"Is this all true?" Mr Maclagan and Mr Carter both declared that in their experience it was not the practice to administer the oath to a creditor.

It appeared from the book containing the proceedings in the sequestration that there was only £25 available for distribution, and that the balance of the heritable debt chargeable against the bankrupt amounted to £17,000, and that the sequestration had had no effect in creating or cutting down preferences or in equalising diligence.

Argued for the petitioner and reclaimer—The sequestration must be recalled on account of the omission to administer the oath as the statute required. The omission of a statutory requisite made the recal of the sequestration necessary—Bankruptcy Act 1856, sec. 21; *Wylie* v. *Kyd*, June 21, 1884, 11 R. 968; *Gillon* v. *Cæsar*, November 1, 1880, 10 R. 61; *Scottish Widows* v. *Buist*, July 4, 1876, 3 R. 1078, *per* Lord President, p. 1081; Ersk. Inst. iii. 5, 10; *Ballantyne* v. *Barr*, January 29, 1867, 5 Macph. 330; *Hall* v. *Colquhoun*, June 22, 1870, 8 Macph. 891; *Campbell* v. *Myles*, May 27, 1853, 15 D. 685; 28 and 29 Vict. c. 9; *Gibson* v. *Greig*, December 17, 1853, 16 D. 233, *per* Lord Ivory, 239; *Turnbull* v. *M'Naughton*, June 27, 1850, 12 D. 1097. Assuming that the Court had a discretion to recal or not, this was a case in which they would recal, as the sequestration was injurious to the petitioner without being of any benefit to the creditors.

Argued for the respondents—There was clearly a discretion in the Court here, the proceedings being *ex facie* regular—*Ballantyne* v. *Barr*, *supra*; *Laurie* v. *Motherwell*, November 22, 1888, 26 S.L.R. 98. The Court in the exercise of its discretion would not recal unless the awarding of the sequestration had caused injustice to someone. Recal would affect not only the rights of the petitioning creditor, but also of the others who had relied on the sequestration granted at his instance. The practice followed here was a prevalent one, and the validity of numerous sequestrations might be affected by recal in this case. Probably there was no more solemn attestation than that contained in a notary's protest, and yet the Court had sustained protests where the procedure set forth in the protest had not really taken place—*Macartney* v. *Hannah*, February 11, 1817, Hume, 76.

At advising—

Lord President—The ground on which we are asked to recal this sequestration is, that the petition for sequestration which was presented by a creditor whose debt was of the requisite amount was not accompanied as the statute requires by an oath. The oath which is produced, or what is called the oath, appears *ex facie* regular, but it now turns out that it is not an oath at all. That, however, has been ascertained by evidence, and did not appear *ex facie* of the proceedings. It is therefore not imperative on us to recal the sequestration because of that defect; it is in the discretion of the Court to say whether they will recal the sequestration on that ground or not.

The distinction which has been established in a number of cases that have been referred to at the bar between objections arising *ex facie* of the proceedings, and objections which require to be established on proof, is now perfectly well settled in practice. In the one case the failure to observe the statute on the face of the proceedings is fatal; in the other case, where the defect in the proceedings or the objection to the proceedings requires to be verified by evidence, it is in the discretion of the Court to say whether they will sustain the objection or no. Now, in the present case it has been established that there was no oath taken at all, but the petitioning creditor, who appears as secretary of the North British and Mercantile Insurance Company, subscribed the paper which is also subscribed by one of Her Majesty's Justices of the Peace for the county of the city of Edinburgh, in which it is set out that the claiming creditor was solemnly sworn and interrogated, and that he deponed to the verity of the debt, and the paper winds up with these words—"All which is truth as the deponent shall answer to God." Now, it is no longer disputed—it cannot be disputed—that in so far as the paper sets forth that the secretary of this company was put upon oath, and that he deponed to the truth and verity as he should answer to God—so far as these statements are concerned this paper is entirely false, because no oath was administered. The lodging of an oath in a petition for sequestration is by no means a light or unimportant matter in the view of the Bankruptcy Act. There are several sections bearing upon it, as showing very clearly what the purpose and object of requiring the oath is. The 21st section provides that such a petition shall be accompanied by "an oath to the effect hereinafter specified," and "the effect hereinafter specified" is this, that the deponent shall swear to the verity of the debt claimed by him—that is in the 22nd section—and shall set out the security which he holds for the debt, if any. Now, it must be kept distinctly in view that this is an

oath of verity, and not an oath of credulity, and therefore it is quite clear from the sections to which I have already referred, that if a creditor makes a false statement, and swears to the verity of a debt which is not a debt, or makes any other wilfully false statement, he will be liable to be prosecuted for perjury. That is a result which would flow from the ordinary common law. But the statute does not even stand at the common law, because it attaches a very great importance to the form and effect of this oath which is lodged with a petition for sequestration. There is a special section applicable to this matter—section 178—which provides this—"If any person shall be guilty of wilful falsehood in any oath made in pursuance of this Act, he shall be liable to a prosecution either at the instance of Her Majesty's advocate or at the instance of the trustee, with the concurrence of Her Majesty's advocate, provided that in the latter case the prosecution shall be authorised by a majority of the creditors present at a meeting to be called for the purpose, and such person shall on conviction, besides the awarded punishment, forfeit to the trustee for behoof of the creditors his whole right, claim, and interest in or upon the sequestrated estate, and the same shall be distributed, either under the sequestration, or, if it be closed, under a process of multiplepoinding as is hereinbefore provided."

Now, looking at these provisions in the statute, one cannot fail to see that the Legislature have attached very great importance to the making of this oath, and it cannot in the least derogate from the importance of this oath that by another Act of Parliament it is provided that in certain cases an affirmation may be substituted for an oath in cases of this description, because that statute makes very special provisions as to the conditions on which affirmation shall be allowed to take the place of an oath. The 2nd section of the Statute 28 and 29 Vict. cap. 9, provides that if a person called as a witness, or required or desiring to make an affidavit or deposition in course of civil or criminal proceedings, shall "refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following—'I do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely, and truly affirm and declare,'" and so on, which is the substance of his affidavit. Now, the first observation I make here is that it is not merely the expression of a desire on the part of the person who seeks to affirm in place of swear that entitles him to do so. The judge or judges or magistrate must be satisfied of the sincerity of his objection to take the oath, and the party himself who proposes to make an affirmation instead of an oath must use the very words of the statute. There is no alternative form—nothing in the shape of an affirmation but "the words following" must be used, and among "the words following" are these, "that the taking of any oath is, according to my religious belief, unlawful." But still further, the next section provides that any false statement made in such an affirmation will subject the party making it to the pains of perjury. Now, if an affirmation of this kind, made under this statute, and with all these conditions and safeguards, had been laid before us, of course we should have sustained it. But what have we got? We have got a paper which is neither an oath nor an affirmation, and which therefore does not bind the conscience of the party, and does not subject him, if false, to the pains of perjury. It is therefore quite impossible to say that this paper can be taken as coming in place of or serving the purpose of an oath as required by the terms of the Bankruptcy Act.

Now, except for one consideration that would be conclusive of the whole matter, but no doubt we have here power to exercise a discretion for the reasons I have already stated, and in the exercising of that discretion we are bound to look at the circumstances of the case. If there had been a sequestration here, the awarding of which had had the effect of reducing undue preferences, or equalising diligences, or creating a right or cutting down a right, or of preferring one or more creditors, that might have been a reason for considering whether it was necessary in the circumstances of the case, for doing justice between the parties, absolutely to recal this sequestration. But in the present case it is not said—and obviously cannot be said—that the awarding of this sequestration, or the first deliverance on the petition, has had any of these effects. There has been no diligence cut down, no undue preference created, no equalising of diligence—nothing in short that yields to any particular creditor a right, or has deprived any particular creditor of a preference, which he would otherwise have had, and therefore I think this case is a very simple case under the Act of Parliament. It is said that in exercising our discretion we should not interfere with the sequestration unless its existence is to work some injustice to some person—in short, unless it is necessary, in order to do justice between the parties in Court, that the sequestration be recalled. I do not think that is the proper view. I think there are many considerations which ought to operate with us in exercising this discretion, and one of those which operates chiefly on my mind in the present case is this, that the recalling of this sequestration will be a most excellent example, and that if we were in the circumstances of this case to refuse to recal it that would be *pessimi exempli*, and would tend to perpetuate a practice which is utterly illegal, and I think is also immoral. Therefore I am for recalling the sequestration.

Lord Mure—I am of the same opinion. This practice which your Lordship has alluded to has crept in to a great extent. It has been seen in other cases, but it is not in accordance with the statute, and, as matter of fact, does not comply with one of its provisions. As I read the Bankruptcy Act, when a petitioning creditor presents his application to enable him to obtain sequestration, the oath is absolutely essential. I concur with your Lordship, that when the proceedings are *ex facie* regular the Court have a discretion, and may dispose of the sequestration as circumstances may appear to warrant one way or the other. Here I think no harm would be done by stopping the sequestration that is

going on, because on the admitted facts of the case it appears that the sum covered by the sequestration is about £25, and the balance of the heritable debt which is claimable against the bankrupt is £17,000. I think it would be of the greatest possible advantage to the parties (for there is nothing but a fight about expenses to go on) that the sequestration shall come to an end. I concur with your Lordship in your remarks on the irregularity of the course of making an affidavit in the way in which I understand it has been done here, for the affidavit is framed as if the oath had been actually administered. There is no oath, in the sequestration, of any creditor, and yet the debtor is put into a position of sequestration by the producing of an oath which had not in fact been taken. I think we are obliged in this case, in the exercise of our discretion, to recal.

Lord Shand—I think the principles on which the Court should proceed in questions of this nature as to the recal of a sequestration have been very distinctly stated and settled in the case of *Ballantyne* v. *Barr*, and in the recent case of *Motherwell* v. *Lawrie*. If the proceedings disclose a case in which *ex facie* of the oath of the petitioning creditor there is something clearly wrong, then the sequestration ought to be recalled. Anyone looking at the oath is bound to see that it is not an oath which would warrant sequestration, and a third party cannot say he suffers any hardship if he does not examine the proceedings including the oath. If, on the other hand, the oath is in all respects *ex facie* regular, and a third party, a creditor, relies on that, the considerations are quite different when an application for recal of the sequestration comes to be made. The Court has held that in this class of cases there is a discretion to recal the sequestration or not, according to their view of what is just in the circumstances.

Accordingly, I think the question here is, whether in the discretion of the Court this sequestration ought or ought not to be recalled? It is a sequestration in which everything would appear to a third party to be *ex facie* regular. Now, in that aspect of the case, if it had appeared, now that we have the sederunt-book and the whole proceedings, that the recal of the sequestration would be a serious injury to the creditors generally, because it would leave or make preferences granted by the bankrupt unchallengeable which might otherwise have been set aside, I should have had the utmost difficulty in saying that the sequestration should be recalled. As was pointed out in the case of *Motherwell* v. *Lawrie*, section 42 of the Bankruptcy Act contains this important provision—"In all questions under this Act or preceding Acts regarding sequestration of the estates of debtors, the sequestration shall be held to commence and take effect on and from the date of the first deliverance on any petition for sequestration, which shall be held to be the date of the sequestration, although the sequestration be not actually awarded until a later date;" and again, under the title of "effect of sequestration on ranking of creditors," there are very important provisions in sections 107 to 111, both inclusive, of the statute which all take effect from the time when the first deliverance in the sequestration is granted. One of these is to the effect that the order shall operate as "a decree of adjudication of the heritable estates of the bankrupt for payment of the whole debts of the bankrupt, principal and interest." The second is that sequestration "shall be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding." There is an interruption of prescription by section 109, and cutting down of preferences by sections 110 and 111 of the statute.

Now, if the case had presented this aspect—that there were creditors here ranking who had relied on the sequestration in ignorance of the fact that the alleged deponent, the petitioning creditor, had not taken an oath, as he ought to have done, and their interests had therefore been prejudiced, because they had been induced to rest satisfied with this sequestration, and so had not taken proceedings themselves—then I should have said that in its discretion the Court ought not to recal the sequestration.

But in the circumstances I entirely concur with your Lordship. I am of this opinion because the question is now one entirely between the bankrupt and the petitioning creditor. The bankrupt maintains that this creditor who seeks to maintain the sequestration is not in a position to do so, and neither the trustee nor any other creditor has resisted the recal. Your Lordship has gone fully into the provisions of the statute in regard to the necessity for an affidavit. Nothing could be more express than the enactment of section 22, which refers back to section 21—requiring that there shall be an oath taken—and that such oath shall be taken before the judge ordinary, magistrate, or justice of the peace. That is because these are the only parties who are in use or are entitled to administer oaths. The purpose for which the party goes before the judge ordinary, magistrate, or justice of the peace is, that he shall take an oath as the statute requires. Then, as your Lordship has pointed out, both under a declaration in terms of provisions of the Act 28 and 29 Vict. cap. 9, and under an oath duly made, a person who has made any false statement is, in the first place, liable to prosecution for perjury, and in the next place, is liable to forfeiture of his claim on the estate. These are circumstances showing the importance of the oath to be administered, but we do not require these circumstances, for section 21 makes it clear that an oath must be administered.

We have had previous cases of this kind. There was one in which in a competition for a trusteeship one of the parties stated that all the oaths on the other side were open to objection on this ground (*Wyllie* v. *Kyd*, 11 R. 968). I confess I was impressed with the conviction that the averment could only be stated to delay the case, or at least as a mere haphazard statement. I could not have believed that such an intolerable practice as appears from this proof could have existed. There is this to be said for the person appearing before the Justice on this occasion, that apparently business men had got lulled into the view that they may call a thing an oath which is not an oath, and I concur in thinking that the sooner business men are taught that this is an unsound view the better, and that we should recal this sequestration, if for no other reason with the view of marking decisively the

impropriety of proceedings of this kind.

I should like to add that I put my judgment on the general question, and not on the specialities of this sequestration. There may be little, if any, estate for division amongst unsecured creditors, but I can understand that the heritable creditors may find the sequestration valuable in enabling them to give a title. In cases of sale it is notorious that a title by the trustee in a sequestration is a valuable title, for it is generally free from exception, and I can understand why creditors should resort to sequestration in order to be able to give such a title. But if they do so they must comply with the provisions of the statute, which in this case I am satisfied has not been done.

LORD ADAM—In my opinion the difference between *ex facie* objections and latent objections is perfectly sound, and well established in law, and I think it is also quite clear that the latter class, namely, latent objections which must be a subject of proof and inquiry as to whether they are established, will take place probably in nine out of ten cases in applications for recal of sequestration, for if they are not *ex facie* the sequestration will be granted, and therefore inquiries into latent objections will take place in the sequestration. And that being so, I have no doubt that it has been held in such cases that when the latent objection is established it is entirely in the discretion of the Court whether the sequestration be recalled. It occurs to me that where the truth of the latent objection has been established the sequestration should be recalled, unless it can be shown that there are interests involved which should lead to a different result, and accordingly I think the question is—Is it or is it not established as against the recal of the sequestration that other creditors have acquired rights which would be prejudicially affected by a recal? I think that would be the proper inquiry. If that be not shown, then I think that it should be recalled. Now, in the present case it has not been established, certainly it has not been so to my satisfaction, that any other creditor would be prejudiced. No preference has been acquired, no preference has been cut down, and so far as we can ascertain, nothing has been done whereby the interests of other creditors would he affected by the recal of this sequestration. If the affidavit is a bad one I do not know that the fact that it is a particularly bad one, as it is in this case, would affect the question whether the sequestration should be withdrawn as affecting the interests of the other creditors. In this case, though there is really no oath at all, if I had been satisfied that the other creditors would be prejudicially affected I would hesitate to recal, but being satisfied that they are not prejudicially affected, I concur with your Lordships that the sequestration should be recalled.

The Court recalled the sequestration.

Counsel for the Petitioner—Watt. Agent—William Officer, S.S.C.

Counsel for the Respondents—Balfour, Q.C.—Low—Maconochie. Agents—J. & F. Anderson, W.S.

Saturday, January 12.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

THOMSON *v.* M'BAIN (THOMSON'S TRUSTEE).

Bankruptcy — Master and Servant — Implied Agreement—Claim for Wages for which there had been no Agreement—Presumption—Proof.

A long period of service raises a presumption that remuneration therefor was intended even although there was no agreement for wages.

A father lodged a claim in his son's sequestration, averring that he had served his son as vanman for seven years without receiving wages. It was admitted that there had been no agreement for wages. The trustee rejected the claim as collusive. On appeal, the Court *recalled* the trustee's deliverance, and allowed the claimant a proof of his averments as to the circumstances connected with the constitution of his alleged debt.

On 16th January 1888 Donald Thomson, merchant, Fearn, Ross-shire, granted a trust-deed for behoof of his creditors, and on the same day he granted a promissory-note for £160 in favour of his father Donald Thomson senior, and also a holograph acknowledgment that he was indebted to his father in this sum, being the amount of eight years' wages for his services as vanman. Donald Thomson senior lodged no claim under this trust-deed.

The attempted settlement under the trust-deed having fallen through, sequestration of the estates of Donald Thomson junior was obtained on 13th April 1888, and George M'Bain junior, C.A., Aberdeen, was appointed trustee.

Donald Thomson senior claimed in the sequestration. The trustee, on the ground that it was a collusive claim, rejected it.

Against this deliverance Donald Thomson senior appealed to the Sheriff of the Lothians and Peebles.

In his examination the bankrupt said—"I assisted in maintaining my father since I started business; my sister also contributed. My father lived with me till about three or four months ago. He acted as my vanman, but I gave him no wages, merely his meat and clothing. I never agreed to give my father wages."

In the minute lodged in the appeal the appellant averred, *inter alia*, that he was employed for eight years by the bankrupt as his vanman. Had he not so acted the bankrupt would have required to employ another assistant, and to pay him wages. He had rendered the service, but had received no wages, and long prior to February 1888 the present claim had not only been made, but had been admitted and arranged by the bankrupt.

The respondent (the trustee) averred that the claim was not lodged until sequestration proceedings were commenced. The appellant was just in the natural position of being maintained by his son, and partly in return for such maintenance, and partly to occupy his leisure time, he drove the van.

The appellant pleaded—(1) That as he had rendered services he was entitled to recompense, and this not having been given him, he was entitled to claim for the same.

The respondent pleaded—"(1) The respondent having already fully examined the documents and circumstances, which very clearly disclose the facts of the case, further proof is unnecessary. (2) The claim of the appellant being a collusive one, the appeal should be dismissed with expenses."

The Sheriff-Substitute (HAMILTON) on 3rd December 1888 dismissed the appeal, and affirmed the deliverance of the trustee.

Donald Thomson senior appealed to the Court of Session, and argued—That the trustee had throughout acted without due deliberation, and in the absence of any evidence he had decided that the appellant was a conjunct and confident person. Before the present claim was rejected there ought to be inquiry—*Anderson* v. *Halley*, June 11, 1847, 9 D. 1222; *M'Naughton* v. *M'Naughton*, 1813, Hume's Dec. 396; Fraser on Master and Servant, p. 44; *Ritchie* v. *Balgarnie*, January 14, 1875, 2 R. 297; *Jones* v. *Jones*, January 25, 1888, 15 R. 328.

Argued for the respondent—There was nothing incompetent in what the trustee had done. A contract of hiring had been averred. Wages were claimed as due, but no effort had been made to prove the contract, and looking to the relationship of the parties, the trustee had done rightly in rejecting this claim as collusive—*Ritchie* v. *Ferguson*, November 16, 1849, 12 D. 119. A contract of employment did not necessarily involve a contract of wages. Here food and clothing were given for services rendered, and this was accordingly a case of presumed discharge—*Russell's Trustees* v. *Russell*, December 11, 1885, 13 R. 331.

At advising—

LORD PRESIDENT—I think your Lordships are all agreed that in the present case it is impossible to take any notice of the documents which have been put in in support of this claim, for the reason that instead of supporting it they rather tell against it.

The question, however, remains, whether enough has not been averred in this record to entitle the appellant to a proof. The appellant is the father of the bankrupt, and for seven years he alleges that he has acted as vanman to the bankrupt without receiving any wages. Now, the law in such cases is, I think, very correctly laid down by the Lord President in the case of *Anderson* v. *Halley*, 9 D. 1222, and following upon that decision it is quite clear that if the averments of the claimant are made out he will be entitled to wages. I am therefore for allowing the appellant a proof of his averments, the proof to take place before the Sheriff.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. I see that Lord Fraser in his work on Master and Servant (p. 44), under the heading of "Implied Contracts," and dealing with the result of the Scottish cases as to whether wages are due if there is no contract, makes the following observations—"The case of *Ritchie* v. *Ferguson*, 12 D. 119, shows that when the acts for which remuneration is claimed may fairly be referred rather to good feeling, self-interest, or some other cause than to service for hire, there is no ground in equity or in law for any presumption in favour of the servant. The question of remuneration seems rather to depend not upon any general presumption, but upon a consideration of the whole circumstances under which the services were performed." Now, that expresses exactly my opinion on the merits of a case such as this after we have, as the result of inquiry, the facts fully before us. But then Lord Fraser goes on to say—"If any general presumption in favour of the servant exist, it is at best a weak one, and easily rebutted by circumstances indicating that the services were intended to be gratuitous." Now, I think that this last sentence hardly brings out the result of the decisions, and that it should not be expressed quite in this way. To my mind the principle of the decisions seems to be that when there is a long extended period of service, though nothing is said about wages, a presumption arises that remuneration was intended to be given at some time or other. This presumption may no doubt be easily rebutted on evidence, and therefore I am of opinion that in all such cases there ought to be inquiry.

Under section 126 of the Bankruptcy Act the trustee might in so small a matter have taken the evidence himself. He has not done so, and the case has already been before the Sheriff, and accordingly I agree with your Lordship that any inquiry which is to take place should be taken in the Sheriff Court.

LORD ADAM concurred.

The Court recalled the interlocutor appealed against, and remitted to the Sheriff to allow a proof.

Counsel for the Appellant—Goudy. Agent—T. M'Naught, S.S.C.

Counsel for the Respondent—G. W. Burnet. Agents—Waugh & M'Lachlan, W.S.

HIGH COURT OF JUSTICIARY.

Monday, January 14.

(Before the Lord-Justice Clerk, Lord Adam, and Lord Trayner.)

GALLOWAY *v.* WEBER.

Justiciary Cases—Hotel—Breach of Certificate—Sunday Traveller.

A man who had arrived by steamer in the town where he lived between 12·30 a.m. and 2 a.m. on Sunday, and had gone home and slept at home, was supplied with liquor at a hotel in the town between 11 a.m. and 12 noon on the same day. He was unknown to the servant who supplied him, and stated that he had come by steamer, and was a *bona fide* traveller. The hour of the steamer's arrival was known to the servant, who made no further inquiry.

The innkeeper was charged with breach of his certificate, and was acquitted by the Magistrates. *Held*, on appeal, that the person served was not a *bona fide* traveller, that the servant was not justified in serving him, as he had failed to make due inquiry, and that the innkeeper was improperly acquitted.

John Weber, hotel-keeper, Grand Hotel, Lerwick, was charged before Her Majesty's Justices of the Peace for the county of Zetland, at the instance of James Kirkland Galloway, Procurator-Fiscal of Zetland, upon a complaint which set forth that he did "on Sunday the 9th September 1888 contravene the Public-Houses Acts Amendment (Scotland) Act 1862 by selling, in contravention of the certificate for the sale of excisable liquors, at the Grand Hotel foresaid, held by him, to Thomas Nisbet, residing in Union Street, Lerwick, who was neither a lodger in said hotel nor a traveller, one pint of beer or other excisable liquor."

The cause was tried on the 26th day of October 1888 before David James Mackenzie, Esq., and William Irvine, Esq., two of Her Majesty's Justices of the Peace for the shire of Zetland. The accused pleaded not guilty; and after hearing the evidence the Magistrates acquitted him.

The Procurator-Fiscal took a case. The facts set forth in the case were as follows:—"The said Thomas Nisbet returned home to Lerwick on 9th September 1888 after an absence of seven months; that he was unknown by sight to the accused, or to the waiter Charles Dautchsmann after mentioned; that the steamer arrived at Lerwick on the 9th September at an hour variously stated as between 12·30 a.m. and 2 a.m. on Sunday morning; that Thomas Nisbet, on the arrival of the steamer, went to his home in Union Street, Lerwick, and went to bed; that by the steamer two commercial travellers came, who were met by the said John Weber's servants, and who lodged in the Grand Hotel that night; that after the arrival of the steamer the whole occupants of the hotel went to bed; that between 11 a.m. and 12 noon on the said 9th September Thomas Nisbet proceeded to the Grand Hotel, Lerwick, in company with Robert Tait, Albany Street, Lerwick, who went for the purpose of visiting his sister-in-law Barbara Jaromson, who is a domestic servant in the Grand Hotel, and twice asked Charles Dautchsmann, waiter in the said hotel, to supply him with drink, and was refused; that he thereupon stated that he had come by the steamer, and was a *bona fide* traveller, but did not inform the waiter that he had been at home and slept; that he was thereupon supplied with a pint of beer; between the arrival of the steamer, the time of which was known to Mr Weber, and the time when the beer was supplied, all the parties had had a night's sleep, and about twelve hours had elapsed; that Robert Tait, who accompanied him, did not ask for, and was not supplied with drink."

The questions of law for the opinion of the Court of Justiciary were—"Was Thomas Nisbet a *bona fide* traveller within the meaning of the Acts when so supplied with liquor? Was the said John Weber or his servant justified in supplying the said Thomas Nisbet with refreshments on the faith of the statement made by him? Was the said John Weber properly acquitted by the Magistrates?"

Argued for the appellant—The first question must be answered in the negative. Nisbet, after his arrival at Lerwick, went to his own home, where he remained all night. His journey was at an end. He could not be called a traveller at all. The second question must also be answered in the negative. The steamer was known to the hotel-keeper to have arrived on Sunday morning sometime between half-past 12 o'clock and 2 o'clock. No doubt the servant who supplied the liquor was not aware that Nisbet's home was in Lerwick, but he could have ascertained that on inquiry. He made no proper inquiry. It followed that the acquittal was improper.

Argued for the respondent on the first question—The *onus* of proving the case lay on the appellant, and he had failed to satisfy the Justices—*Johnston* v. *Laing*, March 25, 1876, 3 Coup. 250 (*per* Lord Young, 253): *Copely* v. *Burton*, June 28, 1870, 5 L.R., C.P. 489 (decided prior to the Statute 37 and 38 Vict. c. 49, which defined the expression "*bona fide* traveller"). It was not necessary that the traveller should be any distance from home—*Peplow* v. *Richardson*, February 5, 1869, 4 L.R., C.P. 168; *Dickson* v. *Linton*, November 19, 1886, 1 White, 282. The journey may have ended, but the necessity for the refreshment arose out of the circumstances of the journey. On the second question—The question was stated on the footing that the servant was justified in taking Nisbet's statement as true. The question was whether he was sufficiently careful in his inquiry. If not, it was either an error in judgment or an act of disobedience to his employer. An error in judgment would not justify a conviction—*Copely* v. *Burton*, *supra*; *Mullins* v. *Collins*, January 24, 1874, 9 L.R., Q.B. 292; *Roberts* v. *Humphreys*, May 28, 1878, 8 L.R., Q.B. 483—nor would a wrongful act by a servant if in disobedience to the master's orders—*Greenhill* v. *Stirling*, March 19, 1885, 5 Coup. 602.

At advising—

Lord Justice-Clerk—I am clearly of opinion that we must answer the first question in the negative. Nothing can be clearer than at the time the liquor was supplied Nisbet was not a *bona fide* traveller. I am also clearly of opinion that if any person whose duty it was to test the respondent's claim to be served with liquor had so done, he would have found that he was not a *bona fide* traveller unless Nisbet had told him some falsehood. The second question resolves itself into this, whether the waiter acting for his master discharged the duty which lay upon him of making reasonable inquiry as to his character as traveller before supplying liquor to a person unknown to him upon a Sunday? and I am clearly of opinion that we must answer that question in the negative. All that the waiter was told was that this man had come by the steamer, and that he was a *bona fide* traveller. The latter statement is not a statement of fact, but of inference from fact. Therefore the only fact before the waiter was that Nisbet had come by the steamer. Having come by the steamer, which had arrived early that morning, he had ceased to be a traveller at the moment of landing, the fact being that he was a resident in the place. The presumption against the hotel-keeper is that if the inquiry had been continued these facts would

have been ascertained. Whatever we may think about the *bona fides* of the waiter—and I do not think we need assume that he was in wilful breach of the statute—I cannot hold that the inquiries made by him, and the information he received, were a justification for him holding Nisbet to be a *bona fide* traveller.

Another question has been raised by Mr M'Lennan, which goes rather to the third question in the case, namely, whether Weber, the proprietor, is liable in a question of this kind for the fault of his servant? One or two cases have been quoted for the purpose of asking us to hold that although the waiter was wrong he must be held to be in breach of his master's instructions, and to have committed a fault for which his master is not liable. I cannot assent to any such doctrine. If the master gives his servant express instructions not to do a certain thing, and the servant knowingly in breach of these instructions does it, the master may not be liable, because the servant is not doing it in the employment of the master; but if a servant, as is alleged here, is *bona fide* considering for the master, and in the interest of the master, whether a certain person should be supplied with liquor, then the mistake which the servant makes in that matter is the mistake of the master. Having answered the first two questions in the negative, I have no difficulty in answering the third in the negative also.

Lord Adam—The first question is—"Was Thomas Nisbet a *bona fide* traveller within the meaning of the Acts when so supplied with liquor?"—so supplied meaning, supplied at the Grand Hotel, Lerwick, on Sunday the 9th September 1888. It appears from the facts stated that Nisbet had come to Lerwick, where his home was, about midnight on the night previous, had gone home, gone to bed, and been for nearly twelve hours in his own house. In these circumstances I think it is nothing short of ridiculous to say that this journey had not ceased. I think it is not arguable.

The next question is—"Was the said John Weber or his servant justified in supplying the said Thomas Nisbet with refreshments on the faith of the statement made by him?" I am of opinion with your Lordship that no innkeeper, or servant of an innkeeper, is justified in supplying liquor on Sunday unless he makes due and proper inquiry. The statement made here by Nisbet was that he had come by the steamer, and was a *bona fide* traveller. The statement that he was a *bona fide* traveller gives no information. The only statement there is that he had come by the steamer. Now, if every man who has landed from a steamer 12 hours before is to be presumed to be still *in itinere* that might be sufficient. But that is ridiculous. It was the clear duty of the servant to have gone on to ask some more questions. There was no proper or reasonable inquiry, and I must therefore come to the same conclusion as your Lordship. It follows that I necessarily come to the same conclusion upon the third question. I would rather not express any opinion as to what is reasonable inquiry, because that is a question of fact in every case.

Lord Trayner concurred.

The Court answered the first two questions of law in the negative, and the third in the affirmative.

Counsel for the Appellant—R. K. Galloway. Agent—Thos. Carmichael, S.S.C.

Counsel for the Respondent — M'Lennan. Agent—John M. Rusk, S.S.C.

COURT OF SESSION.

Tuesday, January 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

SCHAW *v.* BLACKS.

Right in Security—Pro indiviso *Property—Maills and Duties—Competency—Personal Bar.*

A *pro indiviso* proprietrix borrowed a sum of money, and in security thereof granted a bond and disposition over her *pro indiviso* share of the property. The bond was in ordinary form, and contained a clause of assignation of rents.

In an action of maills and duties by the creditor in the bond, the granter pleaded "no title to sue." The Court repelled this defence, holding that she could not object to the title of her own assignee, reserving the question which would have arisen if the defence had been stated by the tenants or by the other *pro indiviso* proprietors.

Mrs Margaret Kilgour or Black, wife of Roger Black, solicitor, Kirkcaldy, was proprietrix of two-fifths *pro indiviso* of the lands of Bruntshiels, in the county of Fife. In 1881 Mrs Black borrowed from Robert Schaw, Edinburgh, a sum of £1600, and in security of the loan she, with the consent of her husband, granted a bond and disposition in security over her share of the *pro indiviso* estate. The bond contained the usual clauses, including a clause of assignation of rents. The lands of Bruntshiels were divided into fourteen enclosures, which were let as grass parks. The said parks were rouped for the year 1888 in common form, and it was provided by the articles of roup that the rents were to be paid to Mr John Inglis of Colluthie, one of the *pro indiviso* proprietors, for behoof of himself and the other proprietors of Bruntshiels.

In July 1888 Schaw raised the present action of maills and duties against Mr and Mrs Black, calling also as defenders the other two *pro indiviso* proprietors of Bruntshiels, and also the tenants of the grass parks. He averred that the £1600 was due and resting-owing, and that the interest from the term of Martinmas was also unpaid. The only compearing defenders were Mr and Mrs Black, who admitted that the money, principal and interest, was due, but averred that the tenants of the parks were in no way bound to pay any portions of the grass rents to them, and that they were only payable to Mr Inglis of Colluthie for behoof of all the joint proprietors.

The pursuer pleaded that as he was a heritable

creditor infeft in the subjects he was entitled in default of payment to enter into possession of the lands, and to uplift the rents, and that he was entitled to decree of maills and duties.

The defenders pleaded, *inter alia*—"(1) No title to sue; and (2) that the action was incompetent."

On 16th November 1888 the Lord Ordinary (KINNEAR) sustained the defenders' second plea-in-law and dismissed the action.

The pursuer reclaimed, and argued that the Lord Ordinary's judgment had proceeded upon a mistaken view of the nature of Mrs Black's right; hers was not a joint right, but a right in common, which was practically the same as the right of tenants-in-common in the law of England — Williams on Real Property, p. 162. The distinction in the law of Scotland between joint property and property in common was not clearly laid down either in the text-books or in the decisions. As an instance of joint property, the right possessed by one of a body of trustees was the simplest example; while, on the other hand, the case of heirs-portioners best illustrated the position of the holders of a right in common. Mrs Black's right here, though not strictly speaking an heir-portioner right, was analogous to it, as she could sell, alienate, or burden her *pro indiviso* share. On the distinction between joint and common rights—2 Bell's Com. p. 544; Ersk. Inst. ii. 6, 53; Bell's Prin., sec. 1072; Rankine on Land Ownership, 485. As to the powers of *pro indiviso* proprietors, the result of the decisions was that in all questions between the said proprietors and third parties in matters relating to the common property the consent of all the *pro indiviso* proprietors was necessary, as, for example, in the case of suing a removing from the common property—*Grozier* v. *Downie*, June 13, 1871, 9 Macph. 826; on suing a declaration of marches—*Young* v. *Tennant & Company*, June 11, 1860, 22 D. 1415. When as in the case of questions in which the rights of the *pro indiviso* proprietors only were at issue, greater laxity in the matter of consents prevailed—*Stewart* v. *Wand*, February 5, 1842, 4 D. 622; *Johnstone* v. *Crawfurd*, July 3, 1855, 17 D. 1023; *Monson*, December 11, 1857, 20 D. 276; *Lawson* v. *Leith and Newcastle Steam Packet Company*, November 26, 1850, 13 D. 175. II. Personal bar—The present defence, while it might have been formidable in the mouths of the tenants or of the other *pro indiviso* proprietors, could not be listened to from the present defenders, who being the pursuer's authors and the debtors in the bond, were barred from calling in question the pursuer's title. They had by the bond assigned the rents, and could not now be heard to plead that that assignation was invalid. Neither the tenants nor the other *pro indiviso* proprietors were in any way opposing what the pursuer here sought to obtain.

Argued for the defenders Mr and Mrs Black—The title of the pursuers was to a *pro indiviso* property, and an action of maills and duties was not competent to parties holding, like the defenders, a joint right. If so, it was not competent to the pursuer, who was merely their assignee, and whose right could not be higher than that of the cedent. The case was ruled by *Cargill* v. *Muir*, January 21, 1837, 15 S. 408, and the opinion of the Lord Ordinary in that case exactly defined the nature both of the defenders' and of the pursuer's rights in the present case. Here it was not only the property which was held *pro indiviso*, but also the right—*M'Neight* v. *Lockhart*, November 30, 1843, 6 D. 128. The defence here stated was competent either to the tenants or to any of the *pro indiviso* proprietors, and it was not to be assumed that because no defences were put in by any of the other defenders that they on that account were to be held as consenters to the present action.

At advising—

LORD PRESIDENT—I think this is a very special case, and that the decision in it will not establish any general rule of law, nor will it interfere with any of the decisions which have already been pronounced in this class of cases.

Here the defender granted a bond and disposition in security over her two-fifths of the *pro indiviso* estate. The bond contained the usual clauses, and among them was the clause of assignation of rents, and this clause of assignation of rents implied a power to enter into possession of the lands by an action of maills and duties. But the granter of the bond now says to his creditor, the present pursuer, "You are not to enter to these lands to the effect of drawing the rents, even though you restrict your claim to two-fifths of the rents of the subjects; and you shall not in any way make use of the clause of assignation of rents contained in the bond."

If this defence had been stated either by the tenants or by either of the other *pro indiviso* proprietors a very different question from that now before us would require to have been determined; but the sole defenders here are the debtors in the bond, Mrs Black and her husband. All the other parties called as defenders are quite willing that the pursuer should be paid out of these rents the proportion effeiring to Mrs Black. The arrangement by which the rents of these parks were to be paid to Mr Inglis of Colluthie, one of the other *pro indiviso* proprietors, though a convenient enough plan for the management of this estate, is not one which can in any way interfere with or control the rights of a heritable creditor. There is no other objector to what the pursuer proposed should be done except the granter of this assignation, and it is very clear, I think, that the compearing defenders cannot take this objection to the pursuer's title.

LORD MURE—I agree with your Lordship that the circumstances of this case are very special, and being so, we have sufficient in them for the determination of this question without going into the difficult and somewhat involved matters which were raised in the course of the discussion. In the present case all the *pro indiviso* proprietors have been called, and also the tenants, as defenders.

The tenants do not defend the action, nor do the other two *pro indiviso* proprietors, but a special defence has been put in by the third *pro indiviso* proprietor, who is also the debtor in the bond, and who pleads that the pursuer has no title to sue, that the action is incompetent, and that there is no relevant case.

Now, looking to the facts of this case, it does not appear to me that the defender has any

possible answer on the merits. In the absence of the other *pro indiviso* proprietors they must be held, if not concurring in what the pursuer is doing, at least as not objecting to it; and as neither they nor the tenants offer any opposition to what the pursuer is asking, the other *pro indiviso* proprietor, who is also the debtor in the bond, cannot be heard to state the objection which she here takes to the pursuer's title.

Lord Shand—The principal defender in this case is proprietor *pro indiviso* of two-fifths of the estate of Bruntshiels, which is let in grass parks to tenants whose rents form the subject of the present litigation. Her right being one *pro indiviso* is a right over the whole estate, but it only extends to so much of the rents as corresponds to her two-fifths share of the property. She has conveyed away her rights in the property to the pursuer. She granted a bond and disposition in security for money lent to her by the pursuer, conveying to him, as the condition of the loan, her two-fifths share of the estate, and assigning the rents effeiring to that share.

Now, if the objection which she has stated here had been taken by the tenants on the estate I do not see reason to doubt that it would have been well founded. They contracted for payment of their rents as a whole, and they would, I think, be able to maintain successfully that they were not bound to apportion the rents and pay them among the different *pro indiviso* proprietors and their assignees according to their several rights. In like manner, the other *pro indiviso* proprietors might succeed in maintaining that one of their number was not entitled to have the rents split up—directly drawing his or her share from the tenants—but that the rents should be paid over in one *cumulo* sum to the person having the authority of all the proprietors to grant a discharge. The Lord Ordinary has so held, and I see no reason to doubt that he is right.

A good deal has been said in the course of the argument as to the views expressed by the Judges in the cases of *Cargills* v. *Muir*, 15 S. 408, and *Lawson* v. *Leith and Newcastle Steam Packet Company*, 13 D. 175, with reference to what are called joint rights as contrasted with the rights of tenants-in-common, as they are called in the law of England.

I do not think that it is necessary to give any opinion on the matters discussed. I rather take it to be clear that neither a joint owner nor a tenant in common could in his own name sue for the whole rent nor for his own share of the rent. An instance in our law of joint proprietorship, in the sense of the joint ownership in the law of England is that of trustees holding a conveyance in ordinary terms for trust purposes. In joint ownership the property is vested in A and B and the survivor. On the death of one of them his right goes necessarily to the survivor. A tenancy-in-common, on the other hand (as it is called in England), seems to arise where each of the *pro indiviso* proprietors has a certain share or right in the property, which he may himself dispose of as he thinks fit by a deed granted by himself. It appears to me that the right here held by the creditor in the bond and also by each of the *pro indiviso* proprietors is a right of this latter kind, because each of the proprietors may dispose of his own share of the estate, and upon his death there is no vesting of his share in the surviving *pro indiviso* proprietors. The law seems to be the same in England as in this country, that in actions on the contract of lease—as distinguished from actions to protect the property from injury or to vindicate claims of damage because of its wrongful destruction—one *pro indiviso* proprietor has not a title to sue—Woodfall on Landlord and Tenant, p. 12; *Descharme* v. *Horsgood*, 10 Bing. 526. I assume the Lord Ordinary is right in his general view of the case, but I think the fact that the defender Mrs Black, in the position in which she stands, has no case on the merits. She conveyed away to the pursuer all her rights. The specialties of this case are that neither the tenants nor the other *pro indiviso* proprietors object to the action, and I think Mrs Black has averred no right or legitimate interest to do so. Had she raised an action for the rents, or rather her share of them, she would have been successful unless the tenants stated a defence, which they have not done here, and her creditor is not to be put in a worse position than she herself was in.

On the whole matter, I am of opinion that Mrs Black has no legitimate interest or right to maintain her defence, which is simply an attempt to prevent effect being given to her own assignation without any legal ground for so doing, and that we ought to recal the Lord Ordinary's interlocutor and grant decree to the pursuer in terms of the conclusions of the summons.

Lord Adam—I concur; but I reserve my opinion as to the main question here till the point is raised in a question with a tenant or a joint proprietor.

The Court recalled the Lord Ordinary's interlocutor, repelled the defences, and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer — Gloag — Martin. Agents—Henderson & Clark, W.S.

Counsel for the Compearing Defenders (Mr and Mrs Black)—Sir C. Pearson—Shaw. Agent—John Rhind, S.S.C.

Friday, January 18.

FIRST DIVISION.

[Sheriff of Forfarshire.

HENDERSON *v.* ROBB AND OTHERS.

Bankruptcy—Cessio—*Creditor*—*Title to Sue.*

When decree of *cessio* has been granted, a creditor can only sue an alleged debtor of the estate by obtaining the use of the trustee's name (which he can compel by finding security for expenses), or an assignation to the claim.

On the 25th of March 1886 decree of *cessio* was granted in the Sheriff Court at Forfar against Joseph Robb, farmer, Glenquiech, and William Carnegie was appointed trustee on his estate. William Henderson, crofter, lodged in the process of *cessio* an affidavit and claim for £100.

William Henderson thereafter raised an action against David Robb and David Howe, farmers,

and Archibald Smith, solicitor, Kirriemuir, whom he averred to be debtors to the bankrupt estate, for payment of the sum of £100 either to himself or to William Carnegie, trustee on the estate of Joseph Robb.

The pursuer's averments were to the following effect—He lent Joseph Robb two sums of £50 in 1883, for which he held an acknowledgment by Joseph Robb written across a bill stamp. At the date of the decree of *cessio* Robb was tenant of the home farm of Glenquiech for the period of seven crops from 22nd November 1879 under a lease entered into between John A. S. Maclagan, the proprietor, and himself. On the 1st of April 1886 the defenders and William M'Kenzie, farmer, who had since become bankrupt, at their own hand, and without consulting the trustee in the *cessio*, sold and disposed of the whole plenishing on the farm of Glenquiech, the value of which amounted, according to the bankrupt's state of affairs, to £187. The proceeds of the sale were received by the defender Smith. The defenders never accounted to the trustee or to any of the creditors of Joseph Robb for their intromissions in connection with the said sale. They had since settled with all the other creditors of Joseph Robb except the pursuer, who had repeatedly applied for payment without success. The pursuer applied to the trustee to take steps against the defenders, but he had refused to do so. The defenders, in justification of their proceedings, founded on a pretended trust-disposition and assignation dated April 1884, bearing to be executed by Joseph Robb, John A. S. Maclagan, and the defenders Robb and Howe and William M'Kenzie, whereby Joseph Robb pretended to assign, convey, and make over to and in favour of the defenders Robb and Howe, and the said William M'Kenzie, his interest in the lease from and after Candlemas 1884, and also the crop, stocking, and other effects belonging to him at the said farm, *inter alia*, for the management and cultivation of the farm, the sale and realisation of the produce, payment of an acceptance of Joseph's Robb's to the said William M'Kenzie and the defenders Robb and Howe for £170, dated 29th June 1883, and payable three months after date, which had not been met, and was then in the hands of the defender Smith as onerous indorsee and holder thereof, and for payment of the residue to Joseph Robb. The said pretended trust-disposition and assignation was never published or intimated to the creditors of Joseph Robb. The defenders Robb and Howe and William M'Kenzie did not control or manage the farm, and never entered into possession thereof, or the crop, stocking, and effects thereon. On the contrary, Joseph Robb remained on the farm, and continued in the full and undisturbed possession and management thereof.

The pursuer pleaded—"(1) The defenders having without title, warrant, or authority intromitted with and sold the crop and stocking which belonged to the said Joseph Robb, and had become vested in the said William Carnegie as trustee for Robb's creditors, are liable to such creditors for the amount of their claims. (6) In the circumstances condescended on, and the pursuer being the only creditor of the said Joseph Robb whose claim existed at the date of the decree of *cessio*, and is still undischarged, he is entitled to a direct decree against the defenders."

The defenders pleaded—"(1) The pursuer has no title to sue. (2) The pursuer's averments are irrelevant and insufficient to support an action against the defenders."

The Sheriff-Substitute (Robertson) on 14th June 1888 pronounced this interlocutor—"Finds that the pursuer has not stated a relevant case on which decree could be granted: Therefore to this extent sustains the preliminary pleas, and dismisses the action, &c.

"*Note.*—This action is raised to recover payment from the defenders, conjunctly and severally, of a debt due by Joseph Robb to the pursuer. There is no sort of contract or guarantee between the pursuer and the defenders. The action is raised on the narrative that the defenders have intromitted with the estate of Joseph Robb, he being a bankrupt, and have thus incurred liability.

"The first difficulty I have is, that as a trustee has been appointed on Robb's estate, he is the person entitled to the money sued for assuming it to be due, for behoof of Robb's creditors. It is true I am asked alternatively to give the money to him, but this is surely a peculiar request, seeing that the trustee is no party to the action, and has declined to move in the matter. If a trustee on a cessioned estate declines to take up and enforce a doubtful claim, probably any creditor may do so if he likes at his own risk, and I therefore am not prepared to say that the action is incompetent, or that the pursuer has no title to sue.

"But after reading the record and seeing the productions, I do not think a relevant case is made out or that a proof can be allowed.

"It turns out that what the defenders have done has only been done by virtue of certain deeds granted by Robb long before his bankruptcy, by which he assigned and made over his whole estate to the defenders, and until these deeds are reduced their positon is impregnable.

"The pursuer's case comes to this, that other creditors have got before him, and have done first what the pursuer might have done himself had he taken time by the forelock. His debt was incurred in 1883, and between that date and 1886, when a petition for *cessio* against Robb was presented, the pursuer took no steps apparently to secure himself or to recover payment of his debt.

"After seeing the deeds in virtue of which the defenders have acted, the pursuer has had to rewrite his whole case at the adjustment of the record, a proceeding which probably I ought not to have permitted, and to which the defenders strongly objected. But even after reading his new case I cannot go further in the action until the trust-deed and assignation produced by the defenders are reduced."

The pursuer appealed, and argued—On the question of relevancy—The Sheriff was wrong in thinking it necessary that the assignation should be reduced before the pursuer's claim could be considered—40 and 41 Vict. cap. 50, sec. 11; *Nivison* v. *Howat*, November 22, 1883, 11 R. 182. Further, reduction of the deeds was not necessary for the success of the pursuer in the action, as the assignation could confer no right without being followed by possession. On the

question of title—The trustee had refused to move in the matter, and the pursuer was the only unpaid creditor. He was therefore the only person interested, and was entitled to bring his action directly against the defenders without obtaining the use of the trustee's name, or an assignation to the claim. The objection to his suing directly was merely technical—*Teuton* v. *Seaton*, May 27, 1885, 12 R. 971. There was an alternative conclusion for payment to the trustee, and it could not be doubted that he had a right to sue for payment of the value of the property carried off by the defenders. No doubt in *Rae* v. *Meek*, July 19, 1888, 15 R. 1033, it had been laid down by Lord Shand that a beneficiary could not directly sue a debtor to the trust-estate, but that rule need not apply to a case of bankruptcy. The pursuer's interest being undoubted, it was almost a necessary consequence that he had a title, for where there was an interest there was almost always a title. This was not a case of a third party being simply indebted to the bankrupt; the ground of action was intromission. In the case of heirs of entail, if one raised a question and had it determined, the decision would bind the others. And the same result followed when one member of the public came forward to vindicate a public right. So this question, if decided, would be *res judicata* as regarded the rest of the creditors. On the question of caution—If the pursuer had used the trustee's name, of course he would have had to give security that he would keep him *indemnis*. But the position of the pursuer here was quite different from the position of the pursuer in the case of *Teuton*. There was here no averment that he was *vergens ad inopiam*, or unable to bear the expenses of the litigation. If the pursuer had obtained an assignation to the claim there must have been some averment of *inopia* on his part to support the demand for caution.

The respondents argued—On the question of relevancy—There was no averment that Joseph Robb paid the rent of the farm after the assignation had been granted. That was an important omission from the pursuer's averment of possession. As to the defender Smith the assignation was not in his favour, and throughout he had merely been acting as an agent for others. On the question of title—The pursuer was suing an alleged debtor of his debtor, which he clearly had no title to do. His proper course was either to have obtained the use of the trustee's name or an assignation to the claim. A debtor of a bankrupt was entitled to demand that he should settle any question that might arise with the trustee. In *Teuton's* case the pursuer was merely obliged to find caution—*Sprot* v. *Paul*, July 5, 1828, 6 S. 1083; *Spence* v. *Gibson*, December 13, 1832, 11 S. 212. A decision in this case would not bind other creditors, and so the defenders might be harrassed with litigation. Neither the trustee nor the other creditors having sanctioned the prosecution of this claim, it was incompetent for a single creditor to prosecute it—*Gray* v. *Fraser*, February 6, 1850, 12 D. 684. The trustee had not admitted the pursuer's claim, and it might turn out he was not a creditor at all.

At advising—

Lord President—The pursuer in this case is an alleged creditor of Joseph Robb, tenant of the farm of Glenquiech, for the sum of £100 advanced to Robb in the year 1883. If Robb had remained solvent the action would have been laid against him, but unfortunately he became insolvent, and a process of *cessio* was instituted against him in March 1886, and on the 25th of that month decree of *cessio* was pronounced, and William Carnegie was appointed trustee on his estate.

This action is directed neither against the pursuer's original debtor in the sum of £100 nor against the trustee in the *cessio*, but against parties who are said to have intromitted with the crop and stocking of the farm, and to be liable to account therefor. Now, of course the only party to bring them to account for the debt is the trustee in the *cessio*. The original debtor Joseph Robb is divested, and the decree of *cessio* has had the effect of vesting the estate in Carnegie—not indeed to the full effect which takes place under the sequestration statutes, but still it gives to the trustee an active title to recover the debts due to the insolvent estate. The pursuer, however, says that the trustee will not move, and that therefore he is entitled to take proceedings against the defenders himself, especially as he alleges that he is the only unpaid creditor of Joseph Robb.

I am of opinion that the pursuer has no title to sue. He is doing what has over and over again been found incompetent—that is, trying to sue his debtor's debtor. If the original debtor had been solvent the defenders would have been debtors to him, and now that he is insolvent they are debtors to the trustee, and the pursuer can have no direct action against anyone but the trustee in the *cessio*. The remedy of the pursuer is to claim against the estate, which I suppose he has done, and then, if the trustee declines to sue the alleged debtor, to ask him to put him in a position to do so by granting him the use of his name, or by granting him an assignation to the claim. That of course the trustee will not be bound to do except upon the footing of being kept free from the costs of the litigation, and upon that footing the trustee, if unwilling, may be compelled to grant the use of his name.

Nothing of that kind, however, has been done here. The pursuer sues in his own name, and he has not taken any assignation to the claim. He is therefore simply suing his debtor's debtor.

Lord Mure—I am of the same opinion, and from the nature of the case I regret that I am obliged to come to that conclusion. The pursuer's debt is not disputed on record, and he has an interest to endeavour to recover that debt, but unfortunately in respect of the *cessio* he has no title to sue. The trustee is the party to recover whatever is due to the bankrupt estate, and your Lordship has alluded to the circumstances in which Henderson might prosecute his claim. His course was to call on the trustee to take proceedings, and if he refuse, to ask him for the use of his name, or for an assignation to the claim, on condition of being kept free of the costs of the litigation. That course not having been taken, I am of opinion he has no title to sue.

Lord Shand—I do not think it was suggested in the argument that we have any decision bearing directly on the question here raised, which, as a question of title to sue, is, I think, an import-

ant one. I agree with your Lordship in thinking that there are clear general principles which exclude the pursuer's action on the ground of no title. As Lord Mure has pointed out, one would desire if possible to sustain the pursuer's title, because, in the first place, I do not think the argument against the relevancy of the action has any foundation. The action would be relevant if it had been brought by the trustee. And, in the second place, considerable expense has been incurred in reaching this point of the litigation. It is further said that the pursuer is the only unpaid creditor, and if so, he had the material interest to have the question tried if it be assumed that his averments are true. But though the case in this view looks like one of hardship, I am afraid that if the Court were to yield to that consideration this might hereafter be cited as one of those hard cases which make bad law. We should be sanctioning a principle which might lead to confusion in the administration of insolvent and bankrupt estates, and to the pursuit of claims by creditors who had no real title seeking to have their actions maintained on specialties. It is, I think, clearly safer and better to lay down a rule or to adhere to a rule which rests on general principles.

Now, the material fact of the case is that Robb's estate was transferred under a decree of *cessio* to Carnegie, the trustee in the *cessio*, and that he is consequently now the person in right of the administration of the estate.

If Robb has any debts due to him, Carnegie is vested with the right and duty of recovering these debts. The other creditors of Robb have no right to do so, because Carnegie is vested with the sole title to the estate. The petitioner has raised his summons with alternative conclusions that the money shall be paid to himself, or otherwise to Robb's trustee. But even as regards the second alternative the trustee is the only person with a title to maintain the demand. It would be very embarrassing if separate creditors were entitled to raise the question. An alleged debtor of a bankrupt would be liable to an action at the instance of any creditor of his creditor, which cannot be allowed. The alleged debtor, moreover, is not the proper person to discuss the question whether the pursuer is really a creditor of the bankrupt. That is a question with the trustee. Further, a debtor is entitled to say that he must have the trustee to deal with as being a person with means, and that he shall not have to litigate with a third party.

There is a well-settled rule as to how parties should proceed in such circumstances, which is very well illustrated in the two cases of *Sprot* v. *Paul*, 6 S. 1083, and *Spence* v. *Gibson*, 11 S. 212. In both cases the Court held that the trustee was bound to give his name, if required to do so, on security being found for his expenses, or to give an assignation to the claim, which of course, where the claim is not purchased, may be made subject to the condition that any sums found due should ultimately come into the trust-estate.

That being so, I think there is nothing more to be said, and I agree that this creditor cannot be allowed to move on his own account.

The case is analogous to that of a beneficiary on a trust-estate—the trustees are the parties to sue for debts due to the trust-estate. The beneficiary has no direct title. If the trustee refuses to sue, his title in certain circumstances may be acquired by the beneficiary either by the use of his name or an assignation to his right and title to maintain the action. The beneficiary is not entitled to sue directly for payment of a debt due not to himself but to the trust-estate. This view is borne out by the opinion of your Lordship the Lord President in the case of *Heaton*, 10 R. 1110, and I have only repeated what I said on this latter point in the case of *Rae* v. *Meek*, 15 R. 1050–1051. I accordingly agree in thinking that we must dismiss the action.

Lord Adam—I concur in thinking that it is very clear on principle and is perfectly settled that a creditor cannot directly sue his debtor's debtor. Lord Shand has mentioned some of the reasons why that is the law. It is equally clear that if such a person wishes to recover sums of money due to his debtor he must proceed by arrestment and forthcoming. Much less can a direct action be allowed where the pursuer only alleges himself to be a creditor, and his claim has never been sustained or adjudicated upon as in this case. It is simply a case of an alleged creditor of A suing B, an alleged debtor of A. I must say I think that such an action is contrary to all principle. If that is so, how does the fact of the debtor's estate being under *cessio* give that creditor a right to sue a debtor which he had not before? I think it would require something very clear to bring about that result; whether it is in a sequestration or in a *cessio* the bankrupt estate is vested in the trustee, and he is the only person who has a title to sue a debtor to the estate.

If the trustee refuses to take action, there are quite well-known means by which the creditor should proceed. He can demand the use of the trustee's name, and if the trustee refuses to give it, he can be compelled to do so on condition of being kept *indemnis* as regards the expenses by the creditor who desires to sue the action. How far that entered into the consideration of the course pursued by the defender here I do not know. The creditor's other course is to get an assignation.

Now, where you have two such well recognised courses, which the pursuer might have known, although I regret the expense which has been incurred, I entirely concur that to sustain the pursuer's title to sue would be *pessimi exempli*.

The Court recalled the interlocutor appealed from, sustained the first plea-in-law stated for the defenders, and assoilzied them from the conclusions of the action.

Counsel for Pursuer—Sir C. Pearson—Law. Agents—Fodd, Simpson & Marwick, W.S.

Counsel for Defenders—Sol.-Gen. Darling, Q.C. —Salvesen. Agents—Irons, Roberts, & Co., S.S.C.

Friday, January 18.

FIRST DIVISION.

[Lord Fraser, Ordinary.

STEWART *v.* CAMPBELL AND OTHERS.

Lease—Abatement—Liquid and Illiquid.

A farm was let from year to year under a lease terminable by written notice six months before the term of Whitsunday, and the proprietrix undertook to put the existing buildings into complete repair. She spent a considerable sum on repairs on the entry of the tenants, who continued in occupation for five years, when the lease was terminated. In the third year they asked the proprietrix to put up certain new buildings, but their request was refused. They paid the rent for four and a-half years without reservation of any claim against the proprietrix.

In an action by the proprietrix to recover the last half-year's rent it was pleaded that the tenants were entitled to an abatement, in respect of loss sustained by them during their occupancy from the pursuer's failure to put the buildings into complete repair. *Held* that the demand of the defenders was not justified by the terms of the lease; and that, in any view, a claim of damages for the whole period of occupation had not been timeously made.

By lease dated 4th and 21st June 1883 Mrs Hannah Gow Stewart, proprietrix of the island of Little Colonsay, Argyllshire, let the farm consisting of that island to Mrs Anne Campbell and hér son Duncan Campbell. The lease contained, *inter alia*, the following conditions:—1st, The lease was to be "for the period of one year from Whitsunday 1883, and from year to year thereafter unless terminated by written notice on either side six months before the term of Whitsunday 1884, or before any succeeding term of Whitsunday;" 2nd, the rent was fixed at £55 per annum, payable half-yearly, beginning the first term's payment at Martinmas 1883. By the 3rd article the proprietrix agreed to put the whole buildings on the island let, into a thorough state of repair, and subject to this obligation on her part, the tenants accepted the whole buildings as in good and sufficient repair. By the 4th article the tenants were bound not to crop any part of the lands let, but to use them solely for grazing purposes; and under the 6th article Duncan Buchanan, farmer, Caolis-na-Coan, Ballachulish, bound himself and his heirs, executors, and successors, as cautioners for the rent.

The lease was terminated at Whitsunday 1888, when the tenants were due the proprietrix one half-year's rent, amounting to £27, 10s. At the entry of the tenants the proprietrix had spent a considerable sum on the repair of the dwelling-house on the farm, and the tenants paid the rent for the first four and a-half years of their occupancy without reservation of any claim against the proprietrix. They refused, however, to pay the rent for the last half-year.

On 5th October 1888 the proprietrix raised an action against the tenants, and the cautioner under the lease for recovery of the rent, in which action the cautioner entered appearance as defender.

The defender averred, *inter alia*—"The dwelling house was not habitable at the beginning of the lease, and the steadings and other buildings on the island were from the commencement of the lease, and throughout its continuance, in a very bad state, the barn, stablé, byre, and cart-shed being roofless. Mrs Campbell and Lachlan Campbell therefore repeatedly called upon the pursuer to implement her obligation under the lease, by having the steadings and other buildings put into a thorough state of repair. The pursuer, however, notwithstanding these requests failed to have these repaired in any way. The said repairs were necessary and indispensable for the beneficial occupation of the farm, and were to have been executed before the tenants took possession, but pursuer did not give the tenants full possession, and did not deliver the subjects in the state agreed on. In consequence of the pursuer's failure to have the whole buildings put in a thorough state of repair, the tenants suffered loss and damage during their occupancy to an extent of not less than £80, no part of which has ever been made good by pursuer . . . They have assigned their claims against pursuer to the defender. The defender is entitled to plead all defences competent to the tenants."

The pursuer pleaded—"(1) The defenders being still due, addebted, and resting-owing to the pursuer in the principal sum sued for, the pursuer is entitled to decree therefor, with interest and expenses as concluded for. (2) The objection regarding the state of the buildings not being open to the cautioner, the defences should be repelled as irrelevant."

The defender pleaded—"(2) The obligation by the pursuer in the lease, 'to put the whole buildings on the island let into a thorough state of repair,' being an inherent condition of the lease under which the defender Buchanan signed as cautioner, and the same not having been implemented, the said defender is not liable. (3) The defender Buchanan, as cautioner, being entitled to plead all defences pleadable by the principal debtors, is entitled to set off against the claim for rent the loss and damage sustained by the tenants through the pursuer's failure to implement her obligations in the lease; *et separatim*, in virtue of the assignation in his favour by the tenants, he is entitled to set off the loss and damage against the rent claimed. (4) The pursuer having failed to implement her agreement with the tenants to put the steading and other buildings in repair, whereby the tenants were deprived of the beneficial use and enjoyment of the subjects let, to an extent exceeding the sum sued for, the defender is entitled to absolvitor."

From correspondence produced for the pursuer it appeared that the tenants in the autumn of 1885 had requested her to put up some new buildings, a request which she had refused.

The Lord Ordinary (FRASER) allowed a proof before answer, the defender to lead in the proof.

The pursuer reclaimed, and argued—The defender here pleaded an illiquid claim of damage as a set-off to a liquid claim of rent. The rent being from year to year, the tenants might have given up the farm at the end of any year, but

they had remained for five years, during four and a-half of which they had paid the rent without any reservation of the claim now made. If this defence had been raised the first year in answer to a claim for rent it might have been relevant, but it was too late to plead it now that they had left the farm. The only request made by the tenants appeared from the letters produced to have been one for new buildings which was quite outside the landlord's obligation in the lease. This case was quite distinct from *Munro* v. *M'Geochs*, November 15, 1888, 26 S.L.R. 60, for there the defenders were still tenants in occupation of the farm, and they had from the beginning of the lease retained some of the rent on the ground that the landlord had not fulfilled his obligations as to the buildings.

The respondent argued—The proprietrix had not fulfilled her obligation under the lease to put the whole buildings into repair. The tenant had thus not received the subjects in the condition promised, and had suffered damage in excess of the claim for rent. The defender therefore should be assoilzied, as all defences competent to the tenants were competent to their cautioner. At all events, he was entitled to set off the proportion of loss suffered during the last year against the claim for the last half-year's rent—*Graham* v. *Gudon*, June 16, 1843, 5 D. 1207; *Muir* v. *M'Intyres*, February 4, 1887, 14 R. 470; *Munro* v. *M'Geochs*, *supra*.

At advising—

Lord President—This is a case of a lease for one year, but the parties contemplated that it should be prolonged from year to year—that is to say, the tenant might continue as a yearly tenant as long as the landlord was willing. Either of them might give six months' notice that the lease was to terminate at Whitsunday, and in either case the right of the other party would have ended at that term; and the tenants "bind themselves to remove from the said subjects hereby let at any term of Whitsunday on receiving at least six months' previous notice," and so forth. Now, the tenant voluntarily removed from the farm, having been in possession for five years from Whitsunday 1883 down to Whitsunday 1888. Of course he had become due during that period five years' rent or ten half-years' rent, and nine of these were paid by the tenant regularly and without any objection on the ground of his not having received possession of the entire subjects let, or of his not having received them in the condition promised. Now, for the first time after he has left the farm, and his occupancy has ended, the defender sets up the plea that the farm buildings were not put in repair in terms of the landlord's obligation in the lease. I think that plea cannot be sustained in the circumstances.

In the case of *Munro* v. *M'Geochs*, which is the last of the cases on this subject, the facts were all the other way. The lease there was for nineteen years, and the parties were not entitled to put an end to it even on the ground that the landiord's obligations under the lease had not been fulfilled. The tenant protested from the outset against the condition of the buildings, and only paid a sum to account for the first half-year's rent, and this went on till the question came to be tried. There was nothing like acquiescence or abandonment of the claim. On the contrary, there was a constant demand by the tenant on the landlord that the buildings should be put in repair. I can scarcely conceive a more complete contrast than between that case and the present.

Further, if we look at the correspondence we see that the demand made by the tenant was not justified by the terms of the lease at all. It was not made till August 1885, and then it was a demand for new houses. But there is nothing of that kind in the lease; there is nothing in the lease except a stipulation for repairs on existing buildings. Therefore the demand which was made during the currency of the lease was not a demand in terms of the landlord's obligation. I am accordingly of opinion that the tenant's claim cannot be sustained.

Lord Mure—This is a very special case. The lease is substantially a lease for one year, with a power to either party to give notice to quit. The tenant entered into, and continued in possession of the farm, and paid the rent without giving any notice that he was going to quit to the landlord. In 1885 he wrote to the landlord expressing a wish to have some new buildings put up. These were not put up, but the tenant goes on paying rent for the next two years without any reservation, when he hands over to his cautioner whatever right he may have to demand damages for the loss he has sustained from the buildings not having been properly repaired. I am of opinion that he cannot raise a claim for damages now with the view of proving that the subjects were not handed over to him in the condition promised, but were in need of repair.

Lord Shand—The third head of the lease is in these terms—"The proprietrix agrees to put the whole buildings on the island let into a thorough state of repair." That is an obligation which fell to be implemented by the landlord at the beginning of the lease, and I cannot doubt that the tenant would have been entitled to retain the rent, or at least a portion of the rent, until his landlord did so.

Now, if part of the subjects of a lease is not given to a tenant, or if the buildings are not put into the condition stipulated, so that the tenant in effect does not really get the full use of the subjects let, the tenant may retain a portion of the rent and claim for abatement. In the latter, and it may be in both cases, the mode of making the claim may be by stating the amount of damages. The claim is substantially a claim for abatement, although the damage caused to the tenant may be the measure of the claim. I cannot doubt therefore that if in the first year of the lease the tenant in this case had, as in *Munro* v. *M'Geochs*, intimated that the repairs were insufficient, and this was the fact, he would have been entitled to retain part of the rent, and so for the second, third, and fourth years.

The peculiarity of this case, however, appears to be that a large sum was expended by the landlord during the first year, and the tenant paid the rent down to the end of the fourth year without making any claim for abatement. The only writing we have indicates that the claim made in regard to buildings was a request for new build-

ings with a view to the tenant's going on with the lease for a period of some endurance. There is no retention by the tenant of part of the rent, and no indication that he considered that the terms of the lease had not been fulfilled. I am quite clear that the notion of sustaining a claim for damages for the whole period is out of the question.

The only point of any nicety is, whether in lieu of £80 the tenant can now claim an abatement of £16, and make it applicable to his occupation of the subjects for the last year. With reference to that the obligation is peculiar. The lease is one from year to year, and by tacit relocation the obligations of the parties to each other may be the same in the last as in the first year of the tenant's occupation. But this particular obligation is of a peculiar kind. It is plain that five years before there was an obligation to put the subjects in order. It seems to be also clear that in the first year there was outlay by the landlord on the buildings. In these circumstances, and no objection having been made to the payment of the rent for four years, it would have required very clear notice on the part of the tenant that he held the obligation to have been unfulfilled by the landlord in order to raise a claim now. The tenant now says the obligation should apply to the fifth year of the lease, but I think he is barred by his actings, and the absence of any earlier demand from demanding any abatement even in the last year.

The result is that I think the Lord Ordinary's interlocutor should be recalled and the defences repelled.

Lord Adam—It does not appear to me that this claim on the part of the defender is one of abatement of rent at all. It is a claim that the tenant shall not be called upon to pay any portion of the last half-year's rent in respect of loss or damage sustained during the whole of the currency of the lease. If the claim was one for abatement of rent, the loss for each previous year would have been set off against the rent for that year. That would have been the proper way of stating the claim. But that is not so here, for each portion was paid without reservation, and no claim for abatement was made, and so matters continued till the last half-year, and, as I have said before, no claim is set up to retain the portion of rent corresponding to the extent of the farm in which the tenant was not in possession in that half-year. The claim is that the whole loss incurred during the whole currency of the lease shall be set off against that which is, I think, a proper claim for rent for the last half-year. It is an attempt to set off an illiquid claim of damages against a liquid claim of rent.

That being in my opinion the meaning of the record, I am of opinion that we must recal the interlocutor reclaimed against, repel the defences, and grant decree against the defender.

The Court recalled the interlocutor reclaimed against, repelled the defences, and decerned against the defender Duncan Buchanan in terms of the libel.

Counsel for the Pursuer—M'Kechnie—G. W. Burnet. Agent—D. Maclachlan, S.S.C.

Counsel for the Defender—D.-F. Mackintosh—Watt. Agents—Clark & Macdonald, S.S.C.

HOUSE OF LORDS.

Friday, November 18, 1887.

BOWIE *v.* THE MARQUIS OF AILSA.

(*Ante*, March 18, 1887, vol. xxiv. p. 456, and 14 R. 649.)

Appeal to House of Lords—Petition for Leave to Appeal in forma pauperis—*Public Right.*

In an action for declarator that the pursuer as a member of the public had right to fish with rod and line in a river on the defender's property, the Court of Session assoilzied the defender. In a petition for leave to prosecute an appeal to the House of Lords *in forma pauperis*, the Appeal Committeee *refused* the petition.

In the Court of Session 18th March 1887, vol. xxiv. p. 456, and 14 R. 649.

James Bowie, who was an upholsterer in Glasgow, afterwards residing in Ayr, was apprehended on the night of 11th August 1884 by Robert Armeur, water-bailiff to the Marquis of Ailsa, on a charge of poaching in the river Doon. In October following Bowie raised an action in the Sheriff Court at Ayr against the Marquis, calling Armour also as a defender, in which he prayed the Court "to find and declare that the pursuer as a member of the public has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and other fish which are not salmon, sea-trout," &c., "in the river Doon, at least in that part of it within the tidal influence of the sea,"—then followed a prayer for interdict.

The Sheriff (Brand) assoilzied the defender.

The pursuer appealed.

The Second Division having doubts as to the competency of the action in the Sheriff Court, agreed to allow the action to stand over to give Bowie an opportunity of bringing an action in the Court of Session. Bowie then raised an action in the Court of Session, concluding for declarator "that the pursuer as a member of the public has right to fish with single rod and line for trout," &c.

The Second Division on 18th March 1887 assoilzied the defender in both actions.

The pursuer presented a petition to the House of Lords for leave to prosecute an appeal *in forma pauperis*.

The respondent's agent objected, on the ground that the appellant was trying a question of public right, and that a committee had been appointed to collect subscriptions to assist Bowie in the litigation.

In the Sheriff Court action the pursuer, when examined as a witness, deponed—"I gave instructions for carrying on this case, and it is carried on under my responsibility, and I am not aware that any subscriptions have been promised. I should be very glad of subscriptions."

Alexander Mitchell, fishing-tackle maker, in cross-examination deponed—"I have agreed to subscribe to help to carry on this case. A subscription-sheet was drawn up, and I put my name to it. The sheet did not specify the sums

I and the others who subscribed were to be liable for. Pursuer told me he was going to try this case, and I told him we would assist. I am not sure that I showed this sheet to the pursuer. I handed the money that had been subscribed to the pursuer's agent. The pursuer knew that there was going to be a subscription. I cannot say if he knew that it had actually been subscribed. . . . The subscribers, so far as I can remember, are, in addition to myself, Mr Hanley, pipe manufacturer, and William Douglas, grocer. *Re-examined*—I cannot say how much has been subscribed for this action; it is not much."

The agent for the appellant read affidavits to the effect that the appellant had raised this action for his own protection, and relying on his own resources, in consequence of the criminal process against him by the Marquis of Ailsa for fishing in the tidal waters of the Doon, and that he was not prosecuting this appeal on behalf of the public or of any person other than himself.

LORD WATSON referred to the evidence of Alexander Mitchell, and was of opinion that the petition should be refused.

LORD MACNAGHTEN concurred.

This decision was reported to the House and agreed to.

Agent for the Pursuer (Appellant)—J. B. Allan.

Agent for the Defender (Respondent)—W. A. Loch.

This decision was followed by the Appeal Committee on 6th July 1888 in the appeal of *Fauld and Others* v. *Vere and Others* (Court of Session January 28, 1887, 14 R. 425), where the appellants representing the public were defenders in an action brought by the pursuers for declarator that there existed no public right-of-way over certain roads—See L.R., 13 App. Cas. 372, note.

Friday, August 10, 1888.

MAGISTRATES OF GLASGOW *v.* FARIE.

(*Ante*, Jan. 21, 1887, vol. xxiv. p. 253, and 14 R. 346.)

Minerals—Clay—Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 18—*Railway Clauses Act* 1845 (8 *and* 9 *Vict. c.* 33).

Held (*diss.* Lord Herschell, *rev.* judgment of First Division) that the provision of the Waterworks Clauses Act 1847, sec. 18, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, ironstone, slate, or other minerals under any land purchased," did not apply to a seam of clay forming the sub-soil of the lands conveyed.

The Lord Chancellor holding that the word "minerals" fell to be construed in accordance with the ordinary use of the word in dealing with proprietary rights in Scotland, and did not include clay.

Lord Watson holding that the "land purchased" included the soil and sub-soil, and that the exceptional depth of the sub-soil (even if mineral) was no reason for bringing it within the category of excepted minerals.

Lord Macnaghten holding that the exception was limited to mines in the proper and usual sense of underground workings, and to minerals in such mines.

Lord Herschell was of opinion that the word "mines" was not limited to underground workings or to minerals that could be won only by such operations, and that the word "minerals," as used in the exception, must be taken to mean all such non-vegetable substances lying together in seams or strata as are commonly worked for profit, and to include clay.

In the Court of Session, January 21, 1887, vol. xxiv., p. 253, and 14 R. 346.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, I cannot conceal from myself the importance and the difficulty of the question involved in this case. The consequences flowing from a decision either way seem to me to be very grave, and I desire therefore to say at the outset that I wish to decide nothing but what is necessarily involved in the particular case now before your Lordships. That question may be very summarily stated to be, whether clay is included in the reservation of mines and minerals under the Waterworks Clauses Act 1847?

I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by Lord Justice James in the case of *Hext* v. *Gill*, July 22, 1872, L.R., 7 Ch. App. 699, which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority, so that he yielded to the technical sense which had been attributed to those words, I still think (to use his language) "that a grant of mines and minerals is a question of fact—what these words meant in the vernacular of the mining world, the commercial world, and landowners," at the time when they were used in the instrument it is necessary to consider.

I will not at present say how far I think we are bound by authority, because I desire to keep myself entirely free if the question should arise in this House with respect to any other statute or with respect to any grant not controlled by the statute in question in which the words "mines" and "minerals" occur.

It may be that I am influenced by the considerations to which Vice-Chancellor Wickens referred (L.R., 7 Ch. App. 705) when he said that "some inclination may be thought to have arisen on the part of Judges to give more weight than ought to have been attributed to some small circumstances of context in order to cut down the proper and ordinary meaning of the words 'mines and minerals.'" I think no one can doubt that if a man had purchased a site for his house with a reservation of mines and minerals neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon

which his house was built under the reservation of mines and minerals.

There is no doubt that more accurate scientific investigation of the substances of the earth and different modes of extracting them have contributed to render the sense of the word "minerals" less certain than when it was originally used in relation to mining operations. I should think that there could be no doubt that the word "minerals" in old times meant the substances got by mining, and I think mining in old times meant subterranean excavations. I doubt whether in the present state of the authorities it is accurate to say that in every deed or in every statute the word "minerals" has acquired a meaning of its own independently of any question as to the manner in which the minerals themselves are gotten.

Lord Justice Mellish, in the case to which I have already referred, sums up the authorities by saying (L.R., 7 Ch. App. 712) that the word "mines" (to use his Lordship's language) combined with the more general word "minerals" "does not restrict the meaning of the word 'minerals,'" and he says that the result of the authorities appears to be "that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit unless there is something in the context or in the nature of the transaction to induce the Court to give it a more liberal meaning." I cannot myself assent to such a definition. In the first place, it introduces as one element the circumstance that the substance can be got at a profit. It is obvious that if that is an essential part of the definition the question whether a particular surface is or is not a mineral may depend on the state of the market, and it may be that a mineral one year is not a mineral the next.

If, on the other hand, one is to have recourse to etymology or science, and to disregard the mode of working as reflecting any light on the nature of the substance, it is obvious to inquire whether coal is a mineral. Its vegetable origin would to some minds exclude its being regarded as a mineral, while the substance kaolin was held by Vice-Chancellor Wickens (L.R., 7 Ch. App. 705) to be a mineral. "According to the evidence, kaolin or china clay is a metalliferous mineral, perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it is not commercially profitable to work in England for the purpose of extracting metal from it."

The difficulty of dealing with this case is not diminished but rather increased by the state of the authorities upon the question. In *Bennett* v. *The Great Western Railway Company*, March 18, 1867, L.R., 2 H.L. 27, all that was decided in this House was that the common law principle which would have prevented an owner who had sold his surface land to a railway company from defeating his grant by withdrawing support from the surface land so used, did not apply to a state of things created by the statute in which the statute itself creates the distinction between the surface-owner and the mine-owner, and gives power to the mine-owner to work his minerals unless the railway company purchases or gives compensation to the mine-owner for leaving his mines unworked. In that case it was admitted that the word "minerals" was properly applicable to the substances to be worked, and the only question was the application of the common law principle to which I have adverted. But the Legislature must have meant something when it recognises and acts upon the distinction which as matter of business and understanding in the mining and commercial world I think everyone must be familiar with.

It appears to me that the effect of some of the decisions, pushed to their logical consequences, would be altogether to efface the distinction which all the statutes recognise. One might summarise these decisions and say a mineral need not be metallic, it need not be subjacent, it need not be worked by a mine, it need not be in any one particular distinguished from any part of the substance of the earth, using the word "earth" as applicable to this habitable globe. Even the word "inorganic" must be rejected if applied to some of the substances which form part of the earth. The bones of extinct animals are limestone, and as curiosities for research and scientific inquiry would find a ready market, and would therefore come within that part of the definition which requires that they should be capable of being properly worked. Are they minerals?

I find myself called upon to construe these words with reference to the known usage of the language employed in distinguishing proprietary rights in Scotland, and having relation to Scotch land and Scotch mines or minerals. I am not insensible to the observation that this is only one of a group of statutes which may be supposed to have had the same object, and might be therefore assumed to use the same phraseology in the same sense. Still I am construing the application of general words to a purchase made in Scotland under the statutes, and if there be any difference in the law of Scotland from that of England the Legislature must be supposed to have been familiar with it and to have legislated accordingly.

Now, the case is stated by the Lord Ordinary thus—"Here the thing which the defender claims to work is the common clay which constitutes the sub-soil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the working. When such a right is claimed against the owner of the surface I ask myself—Did anyone who wanted to purchase or acquire a clay field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay field was not within the fair meaning of the reservation. That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed. The consequences of the reservation are different, but the thing to be reserved is to my mind essentially the same, being neither more nor less than the right to work

such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers or superiors and feuars."

If that is the correct view, and I find myself unable to differ from it, I think the case of *Lord Breadalbane* v. *Menzies*, June 10, 1818, F.C., *aff.* 1822, 1 Sh. Apps. 225, is a binding authority in this House. There the words were, "haill mines and minerals of whatever nature and quality," and were held not to include a vein of stone suitable for building.

I feel it impossible to resist the reasoning of Lord Mure in this case, but I hold myself free if the question should arise in England to consider, quite independently of this decision, what may be the law as applicable to an English case. I only regret that the test which Lord Justice James suggested, and which I think would have been the true one, and would have satisfied all difficulties, was not adhered to in *Hext* v. *Gill*. In that case, as I have pointed out before, the substance which was called china clay was assumed to be metalliferous ore, and it was held that though the lord of the manor had reserved it he could not work it, because he had not also reserved a right so to work it at the expense of the surface owner. I hesitate very much to adopt the reasoning of that case notwithstanding the high authority by which it was decided.

I am satisfied with the view so clearly put forward by Lord Mure, and upon the reasoning of that learned Lord's judgment I move your Lordships that the interlocutor appealed from be reversed.

Lord Watson—The question raised for decision in this appeal, which is one of general importance, has led to differences of judicial opinion in this House as well as in the Court of Session. For my own part I have experienced considerable difficulty in forming an opinion upon it owing to the very indefinite terms which the Legislature has used to describe the minerals reserved by statute to proprietors whose land is compulsorily purchased for the purposes of railway or waterworks undertakings. The present controversy is between a statutory body of water commissioners and a landowner who is now asserting his right to work out a seam of clay within a parcel of ground about twenty-one acres in extent, which they acquired from him under compulsory powers in the year 1871, but the question which your Lordships have to consider would, in my opinion, have been precisely the same if the purchasers had been a railway company.

The Court below disposed of the case without inquiry into the facts, and these must consequently be gathered from the statements made by the parties on record, which are unfortunately in some respects conflicting. It appears, however—and it was assumed in the arguments addressed to us—that the seam in dispute is composed of ordinary sub-soil clay, such as is generally found throughout the district; that it lies at a depth of not more than two or three feet below the surface of the soil; that it is of considerable but variable thickness, and that it has been wrought open-cast by the respondent in close proximity to the appellants' lands, where its extreme thickness has proved to be from twenty to thirty feet. Since their acquisition of the ground the appellants have constructed upon it two reservoirs, each capable of storing nearly four million gallons of water, which have been sunk into and now rest upon the clay.

The 18th section of the Waterworks Clauses Act 1847 is identical, *mutatis mutandis*, with section 77 of the English, and section 70 of the Scotch Railways Clauses Act of 1845. It enacts that "the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the waterworks unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. The Act of 1847 is a British statute, whereas there is separate railway legislation for England and Ireland on the one hand, and Scotland on the other, but it appears to me clear that the Legislature intended the words "mines of coal, ironstone, slate, or other minerals" to have the same meaning in all three countries.

In considering whether sub-soil clay, such as we have to deal with in the present case, is one of the "other minerals" meant to be excepted, I have been unable to derive much assistance from such authorities as *Menzies* v. *The Earl of Breadalbane*, 1 Sh. App. Ca. 225, in which it was held that the reservation by a superior in a feu-contract of the "haill mines and minerals" that might be found within the lands disponed in feu did not give him right to a freestone quarry. Irrespective of other considerations which differentiate that case from the present, there is little analogy between a reservation of minerals, coupled with an obligation to support the surface, and a reservation not only of minerals but of the right to work them without giving support. Nor have I been able to obtain much light from *Hext* v. *Gill*, 7 Ch. App. 699, and other English cases referred to in the opinion of Lord Shand, which his Lordship seems to regard as almost decisive of the present question. The only principle which I can extract from these authorities is this, that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Enclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. "Mines" and "minerals" are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used. In *Menzies* v. *The Earl of Breadalbane*, Lord Eldon observed (1 Sh. App. 228) that the "reservation is not contained in a lease, but in a feu; and I take it there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease—it is a question of a very different nature." In *Hext* v. *Gill* the controversy, which related to china clay, worked for the purpose of obtaining the felspar which it contained, arose between the lord of the manor and the purchaser of the freehold of a copyhold tenement within the manor, under a contract which excepted "all mines and minerals," and in these circumstances it was

sufficiently clear that the copyholder had only right to the surface, and had no right to minerals of any kind.

I need not refer in detail to the provisions of the Waterworks and Railways Clauses Acts which follow and are connected with the sections of these Acts already noticed. The relation which they establish between seller and purchaser in regard to all minerals which may be held to be excepted appears to me to be, as Lord Westbury said in the *The Great Western Railway Company* v. *Bennett*, 2 E. & I. App. 42, clearly defined, useful to the railway company or waterworks' undertakers, and at the same time fair and just to the mine-owner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments which might be occasioned to the convenient working of his mineral-field by his parting with a strip which intersects it. On the other hand, those who deprive him of a right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed, but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working, and would in due course be wrought out.

It appears to me that the policy of the Acts in excepting certain minerals from conveyances to compulsory takers of land favours a liberal and not a limited construction of the reservation to the seller. The difficulty which I have felt in construing their enactments is due to the fact that they do not deal with "minerals" as something which may be different from and additional to "mines." They do not except mines and minerals, but "mines of coal, ironstone, slate, or other minerals"—that is to say, they only except minerals which when worked will constitute "mines" within the meaning of section 18 of the Waterworks Act of 1847, and of the corresponding sections of the Railways Clauses Acts. It therefore becomes necessary to consider what meaning ought in these sections to be attributed to the word "mine," and also what are the "other minerals" mines of which are specially excepted? The solution of the second of these queries must necessarily be in a great measure dependent upon the answer to be given to the first.

There is a class of cases in the English books which determine that the word "mine" is, according to its primary meaning, significant merely of the method of working by which minerals are got, but that is not its only or necessary meaning. Shortly after the passing of the Act 43 Eliz. c. 2, it was established by a series of decisions, the soundness of which has often been doubted, that occupiers of mines other than coal mines are exempted from the incidence of the poor rate. That point being settled beyond recal, the Courts gave a restricted meaning to the word "mine," and decided that in the sense of the Act of Elizabeth it must be taken to be a subterranean excavation. It was accordingly held that persons who worked lead, freestone, limestone, or even clay by means of a shaft and underground levels were not liable to be rated in respect of their occupancy, whilst others who worked the same substances by means of excavations open to the light of day were held to be liable as occupiers of land. I do not suggest that the Courts erred in limiting so far as they could the exemption which for some reason or other had been established, but I may venture to express a doubt whether any such exemption or distinction with regard to the mode of working would have been recognised if the Act of 1601 had not become law until the year 1847.

I am unable to assent to the appellant's argument that in section 18 of the Waterworks Clauses Act "mines" must be understood in the same sense which it has been held to bear in the Statute of Elizabeth. Such may have been its original meaning, but it appears to me to be beyond question that for a very long period that has ceased to be its exclusive meaning, and that the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out. It does not occur to me that an open excavation of auriferous quartz would be generally described as a gold quarry, I think most people would naturally call it a gold mine. The whole frame of section 18 indicates, in my opinion, that the Legislature intended it to include minerals got by open working as well as minerals got by what has been termed mining proper. The clause excepts mines of slate, and also of "other minerals," an expression which must at the least include rock strata of the same homogeneous character, and generally worked, or capable of being worked by the same methods as slate.

The fact is of sufficient notoriety to be noticed here, that although in the extreme south-west of the island slate is obtained by subterraneous workings, the reverse is the rule in North Wales and in Scotland where it is quarried. The word "quarry" is no doubt inapplicable to underground excavations but the word "mine" may without impropriety be used to denote some quarries. Dr Johnson defines a quarry to be a "stone mine." In framing section 18 and the corresponding railway clauses the Legislature plainly intended that waterworks' undertakers and railway companies should, at the time when they take land by compulson, pay full compensation for and become at once proprietors of all surface and other strata which are not excepted. To adopt in these clauses the same construction of "mines" which has been followed for the purposes of the English poor-rate would, in my opinion, lead to consequences which the Legislature cannot have contemplated. In that case the extent to which minerals in the lands were sold or excepted at the date of the conveyance would depend upon the mode, underground or open-cast, by which they may be found at some future and far distant time to be workable, or upon the method according to which the landowner might then choose to work them. These factors being indeterminate it would be well nigh impossible at the date of the purchase to arrive at a fair estimate of the compensation payable for it. I cannot conceive that the Legisla-

ture in using the expression "mines of slate" meant to distinguish between the different methods of getting it, and to enact that slate which may never be disturbed shall be taken and paid for at once if it would naturally be quarried, but shall not be taken and paid for until it is actually worked if it would naturally be got by means of an underground level. It was certainly within the contemplation of the Legislature that water or railway works may rest upon excepted minerals, because it is expressly provided that the undertakers or the company are to be entitled to such parts of these minerals as require to be excavated for the purpose of constructing their works. When a railway company or water undertakers excavate in order to obtain a foundation for their works there is no roof to the excepted minerals, and it is difficult to understand how in these circumstances they could be got by proper mining.

I am accordingly of opinion that in these enactments the word "mines" must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got. If coal, ironstone, or slate crops out at any part of the surface taken for waterworks or railway purposes, the undertakers or the company acquire in my opinion no right save the right to use that part of the surface; they acquire no right to the minerals themselves except in so far as these are dug out or excavated in order to construct their works. The important question still remains—What are the minerals referred to other than coal, ironstone, or slate? My present impression is that "other minerals" must necessarily include all minerals which can reasonably be said to be *ejusdem generis* with any of those enumerated. Slate being one of them, I do not think it would be possible to exclude freestone or limestone strata. I may add that, so far as I can see, it is possible that there may be some strata which would pass to the compulsory purchaser if they lay on the surface, but may possibly be reserved to the seller if they occur at some length below it. But I desire to say that in the view which I take of the present case it is not necessary to determine any of these points.

The enactments in question describe the excepted mines of minerals as lying under the land compulsorily acquired, and they appear to me to contemplate that the purchasers as soon as they obtain a conveyance shall become the owners of "the land." That expression, as it occurs in these enactments, obviously refers to surface, and the question therefore arises, what in ordinary acceptation is understood to be the surface crust of the earth which overlies its mineral strata? It is of course conceded that vegetable mould, which commonly forms a large ingredient of the topmost layer of the crust is not within the exception, but it is also the fact that in many districts the cultivatable soil is mainly composed of clay, which is a mineral in this sense, that it is an inorganic substance. I have come to the conclusion that the expression "the land" cannot be restricted to vegetable mould or to cultivated clay, but that it naturally includes, and must be held to include, the upper soil, including the sub-soil, whether it be clay, sand, or gravel, and that the exceptional depth of the sub-soil, whilst it may enhance the compensation payable at the time, affords no ground for bringing it within the category of excepted minerals.

I am accordingly of opinion that the interlocutor of the First Division of the Court of Session ought to be reversed and that of the Lord Ordinary restored.

Lord Herschell—I have the misfortune to differ from the rest of your Lordships who heard the arguments in this case. I confess that my mind has wavered much as to the proper conclusion to be arrived at, and I need hardly say that I have the less confidence in my opinion when I find it differs from those which your Lordships entertain.

The point for decision in this case is a simple one, and may be shortly stated, but to my mind it is one of very considerable difficulty. The appellants in 1871 purchased a piece of land from a predecessor in title of the respondent for the purpose of constructing works authorised by the Glasgow Corporation Waterworks Act 1886, for the sum of £11,000, and have constructed their works upon it. The disposition to the appellants contained a reservation in favour of the sellers of "the whole coal and other minerals in the said lands in terms of the Waterworks Clauses Act 1847."

The Act just named, which is incorporated with the appellants' private Act under which the land was purchased, provides (section 18) "that the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they have been expressly named therein and conveyed thereby."

I may observe here that I cannot accede to the view that the present case is to be dealt with as if the "coal and other minerals" had been reserved to the respondent by operation of the disposition alone without regard to the statutory provision I have quoted. It appears to me that whatever the statute excluded from the purchase was excluded in the present case, and that the issue between the parties depends entirely upon the construction to be put upon the statute in relation to the circumstances before us. Within and under the lands purchased, and the adjoining lands, there is a seam of clay which the respondent had been for some time working in the adjoining lands, and in March 1885 he intimated that he was desirous of working it under the ground acquired by the pursuers, and called upon them to state whether they would avail themselves of their right to prevent his working the seam by making him compensation therefor in terms of the Waterworks Clauses Act 1847. Hence the present action, the appellants insisting that the clay was included in their purchase, and that the respondent had no title to it.

In the 4th article of the condescendence it is alleged that the seam of clay lies at an average depth of only two feet below the surface, and that it can be worked only by open workings, which would destroy or endanger the appellants' works. This is not admitted by the answer, which alleges that the clay in the ground adjoin-

ing "has been wrought open-cast, but previous tirring of the surface is not necessary." I understand this to mean that the clay under the appellants' land could be worked otherwise than from the surface. The answer further states that the seam is of great value. No proof was led, the learned Lord Ordinary being of opinion that it was unnecessary to do so. Upon the allegations I have referred to the question arises —and I think it is the sole question in the case—whether this seam of clay was reserved within the terms "mines of coal, ironstone, slate, or other minerals," or whether the whole of it lying under the land conveyed passed by the conveyance.

The real question, then, to be determined is the meaning to be given to the words "mines or other minerals" in construing the Act of 1847. And I doubt whether we are very much assisted by the interpretation which has been put upon the same words appearing in a different collocation or in other instruments or enactments.

Your Lordships were referred to various English authorities for the purpose of showing that clay had been held in a case in the Court of Appeal to be within a reservation of minerals, and that in other cases a definition of minerals had been adopted sufficiently wide to include it. On the other hand, reliance was placed upon some Scotch authorities, and notably on *Menzies'* case in your Lordships' House, as establishing that in a contract between superior and vassal a reservation of mines and minerals did not comprise freestone which could only be obtained by quarrying. Lord Mure, whose judgment in the Court below was in favour of the appellants, based his opinion on the ground that though it might be settled by the English authorities that minerals had the extensive meaning contended for, yet it was settled by the Scotch law that in an ordinary contract of conveyance a more restricted interpretation must be adopted, and that there was no reason for construing differently the statutory reservation in question. It is to be observed, however, that the enactment with which we have to deal is intended to be incorporated with all Waterworks Acts, whether in England or Scotland, and that both the Scotch and English Railways Clauses Acts contain similar provisions. When the object and purview of these various statutes is regarded it is not to be supposed that the Legislature intended the same or similar enactments in these various statutes to have a different meaning.

What we have to do then is, I think, to look at the purview and intent of the Acts, and to consider what the Legislature meant by the language they have employed. It is impossible to peruse the various provisions of the Act we are considering without seeing that the words "mines" and "minerals" are somewhat loosely used. Before proceeding to the interpretation of them it may be well to inquire what was the object of the Legislature in reserving the minerals, and not vesting them in the undertakers of the works authorised by the Acts with which the general Act is incorporated.

This object is, I think, clearly stated by the learned Lords who delivered their opinions in the case of *Bennett* v. *The Great Western Railway Company*, 2 E. & I. App. 27. I think these provisions were inserted for the common advantage of the landowner and the undertakers. He was not to be compelled to sell minerals which were not needed for the purpose of the undertaking, and they were not to be compelled to purchase and pay for minerals which they did not want, which the owner of them might never desire to work, and as to which it would be often difficult to determine beforehand whether their working would be likely to affect the waterworks or railway constructed on the surface of the land. I think, then, that we should expect to find reserved all minerals under the land of such a nature as are commonly worked, and which possessed a value independent of the surface.

I propose first to inquire what meaning ought to be attached to the meaning of the word "minerals," supposing only the words "coal, ironstone, slate, or other minerals" had been employed without any mention of "mines." I think that the word "minerals" imports *prima facie*, and apart from any context, all substances other than the vegetable matters forming the ordinary surface of the ground. In this widest sense clay is unquestionably a mineral. But we have to look to the context to see whether the word is here used in a more limited sense, and if so, what is the limitation to be put upon it. I think the popular use of the word is often narrower, and that when people talk of minerals they frequently use the word in reference to metals or metalliferous ores. But it is impossible to give this restricted meaning to the word in the enactment we are seeking to construe. Coal and slate are specifically mentioned, and the words "other minerals" cannot be confined to metallic substances. Coal, slate, and ironstone are minerals most dissimilar in their character, and I have sought in vain for any mode of restricting the word "minerals" in this section, whether by confining it to things *ejusdem generis* with those specified or otherwise. There is no common *genus* within which coal, slate, or ironstone can be comprised except that they are mineral substances of sufficient value to be commonly worked.

But the words which I have hitherto discussed do not, as has been seen, stand alone. The things reserved are "any mines of coal, ironstone, slate, or other minerals" under the land purchased. It appears to me that this limits the reservation to mines of the substances named, and therefore to "mines" of the "other minerals" included in the general term. What then is the interpretation to be put upon the word "mines?" I think the primary idea suggested to the popular mind by the use of the word is an underground working in which minerals are being or have been wrought. It is certainly often used in contrast to quarry as indicating an underground working as opposed to one open to the surface. But to limit it in the enactment we are construing, to an underground cavity in which minerals are being or have been wrought, would be obviously inadmissible. The enactment was clearly intended to extend to minerals lying underground which had hitherto been undisturbed. Is the true interpretation to be found by limiting the provision to those minerals which are commonly worked by means of underground working? The word "mines" is, I think, in a secondary sense very frequently applied to a place where minerals commonly worked under-

ground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings they are spoken of as iron mines, and so too with coal which crops out at the surface. No one, I think, ever heard of a coal or iron quarry. On the other hand, the term "slate quarry" is undoubtedly sometimes made use of though the workings are underground. I think it is impossible to obtain any assistance from this use of the word "mines" in construing section 18. It is no doubt exceptional to obtain coal and iron except by underground workings, but this is not so with slate, and the word "mines" is used alike in reference to all these substances.

I thought for some time that the language used must be construed as applying only to those seams or strata of the specified and other minerals which were capable of being wrought by underground workings. It seems to me that there is much to be said for that view, but after reflection I do not feel that it affords a safe basis for decision, nor is it clear that it would assist the appellants. It must be remembered—and I think this has an important bearing on the view adopted by the learned Lord Ordinary—that it is part of the scheme of the statute that the undertakers do not purchase any right to the support of the underlying strata of minerals. No one has doubted that if they refuse to purchase the reserved minerals, whatever is really within the reservation may be got even though the result be to cause a serious subsidence and even dislocation of the surface. In this respect the case differs from an ordinary reservation in a deed unaffected by statutory provisions. In such a case the owner of the reserved minerals can only work such portions of them as can be removed without causing disturbance of the surface, or if he remove more he must provide some substituted means of support. Therefore when it is suggested that the reservation in question embraces only such mineral seams as are capable of being worked underground, that cannot mean such as are capable of being so worked without disturbing the surface.

Once this conclusion is arrived at it is difficult to see any firm basis for a distinction between seams which lie at a considerable depth below the surface, the removal of which would be likely to affect it little, and those which lying near it could not be got without very seriously affecting it. What valid distinction could be drawn between a seam of coal or ironstone a hundred yards beneath the surface and one which came within two feet of it? and if the latter would be within the reservation, how can a seam of clay similarly situated be excluded? I have said that it is not clear that the proposed interpretation of the section would be of any advantage to the appellants, for proof not having been led, I cannot assume that the clay might not be got otherwise than by surface operations by working on from the adjoining land, though of course its removal would cause subsidence and great disintegration of the surface. I own I have entertained very grave doubts as to the proper conclusion to be arrived at, but I do not see my way to differ from the judgment of the Court below. I think the reservation must be taken to extend to all such bodies of mineral substances lying together in seams, beds, or strata as are commonly worked for profit, and have a value independent of the surface of the land.

I desire to guard myself against being supposed to decide more than I do. The pursuers in their action seek to interdict the defender altogether from working the clay under their land in any manner whatsoever. All that in my opinion arises for decision is whether they are entitled to do so. I say this because it was contended before us that inasmuch as the statute authorises the use of such part of the minerals as may be necessary for the pursuers' works, and the bed of clay forms the bottom and sides of their reservoir, the defender cannot be entitled to take away this clay. But this point, which is well worthy of consideration, does not appear to me to be raised at the present time. I therefore forbear from expressing any opinion upon it, or (assuming it to be well founded) upon the further question, how much of the clay can be considered as having been used for the purpose of the waterworks, and therefore as having become the property of the appellants. I think the interlocutor appealed from ought to be affirmed.

Lord Macnaghten—Your Lordships are called upon to determine the meaning of the word "mines" in the 18th section of the Waterworks Clauses Consolidation Act 1847. That section is the first and most important section in a group of clauses collected under the heading "With respect to Mines." Corresponding provisions are to be found in the Railways Clauses Consolidation Act 1845, and the Railways Clauses Consolidation (Scotland) Act 1845.

The argument before your Lordships proceeded on the ground that so far as the present question is concerned the three Acts must be construed alike, and that in regard to mines under or near lands purchased for the purpose of the undertaking railways are in precisely the same position as waterworks. The case therefore is one of considerable importance. But the question lies in a narrow compass, and must, I think, depend for its solution on an examination of the sections in the Waterworks Act which bear upon the subject, with the aid of such light as may be derived from parallel passages in the Railway Acts.

Section 18 of the Waterworks Clauses Consolidation Act 1847 (corresponding with section 77 of the English Railways Act and section 70 of the Scotch Act) is in the following terms—"The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the waterworks, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

The exception in favour of the vendor comprehends, it will be observed, mines of all sorts, mines of coal, ironstone, and slate, and mines of other minerals, but nothing else. Taking the words in their ordinary signification and in their grammatical construction, the exception does not extend to minerals other than minerals of which mines are composed. This seems clear from the

latter part of the section, where the expression "such mines" refers to and sums up everything covered by the words of description previously used.

On this exception there is engrafted an exception in favour of the undertakers. It is one of very limited extent. But it throws, I think, considerable light on the meaning of the word "mines." It excepts only "such parts" of the mines under the lands purchased "as shall be necessary to be dug or carried away or used in the construction of the waterworks."

Now, the meaning of the word "mines" is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral, it means little more than veins or seams or strata of that mineral. But however the word may be used, when we speak of mines in this country there is always some reference more or less direct to underground working.

In *Darvill* v. *Roper*, May 26, 1855, 3 Drewry's Reps. 294, and again in *Bell* v. *Wilson*, March 9, 1865, 2 Drewry & Smale's Reps. 395, Vice-Chancellor Kindersley had to consider the meaning of the term "mines." In the latter case he asks the question, "What is a mine?" and he answers it thus—"I cannot entertain the smallest doubt that a mine and a quarry are not the same. It would perhaps require some labour to define precisely what each is, but we know this, that a mine, properly speaking, is that mode of working for minerals by diving under the earth and then working horizontally or laterally; whereas a quarry is where the working is *sub dio*. There is not the slightest doubt in my mind as to the difference between them." The case of *Bell* v. *Wilson* was taken to the Court of Appeal. In his judgment on the appeal (1 Ch. 303, 308) Lord Justice Turner asks the same question, and after referring to dictionaries answers it in much the same way. As regards that part of the case he expressed his entire concurrence with the Vice-Chancellor. It was admitted that there is no reported case which throws any doubt on the accuracy of the language used by the Vice-Chancellor in defining or describing a mine. If one wanted a recent authority to confirm the Vice-Chancellor, and to emphasise the ordinary meaning of the word "mines," one could not, I think, do better than turn to the judgment of Mr Justice Kay in the *Midland Railway Company* v. *Haunchwood*, March 22, 1882, 20 Ch. Div. p. 552. In describing the case the learned Judge says—"The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value, from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this except at one point where it crops out, but it is in no sense a mine, being got entirely by open workings."

Dealing therefore with section 18 alone, there seems to be no reason for giving the word "mines" a strained or unnatural meaning. It has indeed been suggested that the mention of slate tends to show that the word "mines" is used in a loose way without reference to any particular mode of working, because slate is usually got by open working. But, as everybody knows, there are places where slate is worked underground. The Act excepts mines of slate; it is silent as regards slate quarries. The more natural inference would be that slate mines are excepted, and that slate quarries are not, especially as the Railways Clauses Acts make mention of slate quarries in another group of sections. It has also been suggested that the exception in favour of the undertakers points to minerals near the surface, and therefore to minerals which may be got by quarrying. But it seems to me that there is little force in this suggestion. The exception rather tells the other way. In constructing railways and waterworks, in deep cuttings, in tunnelling, or in sinking wells, it is at least possible that minerals contained in mines may be met with. On such an event occurring, were it not for the exception, the operations of the undertakers or of the company might be brought to a standstill, and so the Act gives them as included in their purchase such parts of the mines, or, in other words, so much of the minerals contained therein as they are obliged to interfere with in the construction of their works. But it gives them nothing more. How strictly railway companies are tied down when their powers are limited by reference to what is necessary is shown by the decisions on sec. 16 of the English Act as to the diversion of roads and rivers—*The Queen* v. *The Wycombe Railway Company*, January, 26, 1867, L.R., 2 Q.B.D. 310; *Pugh* v. *The Golden Valley Railway Company*, May 31, 1880, 15 Ch. Div. 330. The rights of the undertakers or of the company are limited by the necessity of the case. They are not at liberty to interfere with mines or to use the minerals contained therein merely because it may be a convenience or a saving of expense to do so. If the intention of Parliament had been to reserve to the vendor under the exception of "mines" all minerals of every description however they might be worked, and therefore all such things as clay, stone, and gravel, which are ordinary materials for constructing or repairing the works, one would have expected to find the undertakers and the company authorised to use not merely such parts of the mines as might be necessary, but such parts as might be useful or proper for constructing their works, and, on the other hand, required to pay for what might be so used, and to work under the direction or inspection of the mine-owner or his surveyor.

So far there seems to be no difficulty. The difficulty, such as it is, is created by the sections which follow, and which regulate the rights of owners of mineral property (if I may be allowed to use that expression as a neutral term) lying under or near the lands of the undertakers or the company. In these sections we find the expressions "mines or minerals," "such mines," "such mines or minerals," "such minerals, parts of mines," and "mines, measures, or strata," all applied to the mineral property within the scope of the enactment.

Now, the word "minerals" undoubtedly may have a wider meaning than the word "mines." In its widest signification it probably means every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. In some of the

reported cases it seems to be laid down or assumed that to be a mineral a thing must be of commercial value or workable at a profit. But it is difficult to see why commercial value should be a test, or why that which is a mineral when commercially valuable should cease to be a mineral when it cannot be worked at a profit. Be that as it may, it has been laid down that the word "minerals," when used in a legal document or in an Act of Parliament, must be understood in its widest signification, unless there be something in the context or in the nature of the case to control its meaning. It has also been held that the use of the word "mines" in conjunction with "minerals" does not of itself limit the meaning of the latter word. At the same time it cannot be disputed that the term "minerals" is not unfrequently used in a narrower sense, and one perhaps etymologically more correct as denoting the contents or products of mines. Nor indeed are the authorities all one way in preferring the wider meaning of the word "minerals." For example, in *Church* v. *The Inclosure Commissioners*, January 31, 1862, 11 C.B., N.S. 664, Mr Justice Williams observed, and apparently the rest of the Court agreed, that minerals in the ordinary sense meant "minerals which could be worked in the ordinary way underground, leaving the surface or crust unaffected."

In dealing with the sections which follow section 18, it is to be observed that their scope is not, like the scope of section 18 and the corresponding sections of the railway Acts, limited to mineral property lying under the lands purchased and excepted or deemed to be excepted out of the conveyance. These sections have a much wider bearing. They extend to mineral property under the lands of the undertakers or the company, however it may have been severed in ownership from those lands. They also extend to mineral property within the prescribed distance, although the lands under which it lies do not belong to the undertakers or the company. It would therefore not be enough for the respondents to make out that these sections deal with minerals not contained in mines. They must show that on the fair reading of these sections the word "mines" includes minerals, whether got by mining or not. If that could be established it would go far towards proving that the word "mines" must have that meaning in section 18 and in the corresponding sections of the Railway Acts.

It may be conceded that in several places in these later sections the word "mines" is used as comprehending whatever is comprehended by the term "minerals" as therein used. But then comes the question—Is the word "minerals" to have its wider signification, and therefore to enlarge the meaning of the word "mines" or is the word "mines" to control the meaning of the word "minerals?" In the absence of an explanatory context or some indication to be gathered from the nature of the case, it has been held that the narrower meaning of the word "minerals" is not to be preferred. Still it is not a strained or unnatural meaning. You are giving a strained and unnatural meaning to the word "mines" if you make it include minerals not got by mining, and therefore if the question were which of the two words should yield to the other, there could, I think, be no doubt as to the answer. The more flexible word must give way. You must do as little violence as possible to the language you have to construe.

Apart, however, from this argument it seems to me that if you look at these enactments, carefully comparing one with the other, you will find enough to show that the minerals spoken of are minerals that are "parts of mines," or minerals that are "contained in mines." I will illustrate my meaning by one or two instances. The sentence in section 78 of the English Act "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway," becomes in the Scotch Act, section 71, "if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway." In the rest of the latter section the two expressions "parts of mines" and "minerals" are used indifferently as convertible terms. The section proceeds as follows—"And if the company be desirous that such mines or any parts thereof should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines . . . . which they shall desire to be left unworked, ... and in such case such owner, lessee, or occupier shall not work or get the mines and minerals comprised in such notice." In the following section (section 72 of the Scotch Act) there is a passage which refers to minerals as being contained in mines, and the context shows that the minerals so referred to are the only minerals in the contemplation of the framers of the Act. The section begins with the following sentence—"If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier"—(that is, the owner, lessee, or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the prescribed distance) "to work the said mines, or such parts thereof for which the company shall not have agreed to make compensation up to the limits of the mines and minerals for which they shall have agreed to make compensation in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein." Now, the expression "the minerals contained therein" must mean "the minerals contained in the mines." So the purpose to which the owner of the minerals, and the purpose to which the owner of the mines is limited are one and the same, and the purpose of the owner of minerals in working is not to get minerals, using the word in its widest signification, but to get minerals contained in the mines.

I ought perhaps to refer to the passage in which the word "minerals" originally occurs in the later sections of the Waterworks Act. It occurs first in section 22, where it is provided that "if the owner, lessee, or occupier of any mines or minerals lying under or near" the works should be desirous of using the same he is to give the prescribed notice, and then certain consequences follow. Every subsequent use of

the word may be traced to that passage. Now, if the word "minerals" there means minerals whether got by mining or not, the word "mines" is plainly superfluous whatever meaning be given to it. But if the word "minerals" be restricted to minerals contained in mines, I doubt whether either word is superfluous. The risk to be guarded against, as it seems to me, was the loss of support by the withdrawal of minerals from the mines. The minerals might be worked by the owner, lessee, or occupier of the mines. But they might be worked by persons who could not properly be described as owners, lessees, or even as occupiers of the mines. They might be worked by persons having merely a licence to enter and search for minerals, and a grant of the minerals when obtained. The word "minerals" may have been added out of abundant caution to meet such a case as that, and being a less awkward expression for the draftsman's immediate purpose than the expression "parts of mines" which occurs in section 18. At the same time if the word "minerals" in the sense of "parts of mines" or "minerals contained in mines regarded as separate from the chamber which contains them" be deemed superfluous, I would point out that less care seems to have been given to the framing of these sections than to the framing of section 18. The section and the corresponding sections of the Railway Acts, *mutatis mutandis*, are word for word the same. In the sections which follow in each of the three Acts there are changes from the language of the other two, and also variations of expression in the same Act in many cases where it is impossible to suggest any difference in meaning. These sections seem to have been taken at random from the different common forms without any attempt at precision or uniformity of language. In such a composition it is not surprising that a superfluous word should be found. It would be singular that in a short clause like section 18 of the Waterworks Act, which exhausts the particular subject dealt with, the leading word should be used in a strained and unfamiliar signification, and that the same peculiarity should be found in all three Acts.

There is no passage in any one of the Acts which requires the wider signification of the word "minerals." On the other hand, the provisions for inspecting mines, both before and during working, and the provisions for the ventilation of the minerals, for making air-ways and mining communications, all seem to point in the same direction, and to show that the Acts throughout these clauses are dealing with mines, using the word in its proper and usual signification.

Little or no assistance is to be derived from the rest of the Waterworks Clauses Act. But it may be observed that section 12 authorises the undertakers to dig and break up the soil of the lands which they enter under the powers of their special Act, and "to remove or use all earth, stone, mines, minerals, trees, or other things dug or gotten out of the same." The mention of earth and stone in conjunction with minerals seems to show that these substances were not considered by the framers of the Act to be necessarily comprehended by the term "minerals."

In considering the Railways Clauses Acts it is, I think, worth while to refer to the group of sections prefaced by the heading—"With respect to the temporary occupation of lands near the railway during the construction thereof." (Sections 30 to 43 of the English Act, sections 25 to 36 of the Scotch Act.) These sections empower the company for certain specified purposes to enter upon and use any lands within a distance from the centre of the line not measured by or necessarily corresponding with the limits of deviation, and to do so at any time before the expiration of the period limited for the completion of the railway, a period which generally, if not always, extends beyond the duration of the company's powers for the compulsory acquisition of land.

The purposes specified in the Acts include "the purposes of taking earth or soil by side cutting therefrom," and "the purpose of obtaining materials therefrom for the construction or repair of the railway." In exercise of these powers the company is authorised "to dig and take from out of any such lands any clay, stone, gravel, sand, or other thing that may be found therein useful or proper for constructing the railway." Then comes a *proviso*, "that no stone or slate quarry, brick-field, or other like place which at the time of the passing of the special Act shall be commonly worked or used for getting materials therefrom for the purpose of selling or disposing of the same shall be taken or used by the company."

It is clear therefore that in certain cases and for certain purposes a railway company may enter upon lands containing brick-earth, and use that brick-earth, although the lands may not be delineated in the deposited plans, and although the powers of the company to take lands compulsorily may have expired. But while working as temporary occupiers they are bound (section 41 of the English Act) to work in accordance with the directions of the surveyor or agent of the owner of such lands.

Now, section 42 provides that in all cases where the company enters upon lands for temporary purposes the owner may "serve a notice in writing on the company requiring them to purchase said lands." The company thereupon is "bound to purchase the said lands."

Nothing is said about mines or minerals in this section, or in this part of the Act, and, as I have already pointed out, there may be cases when the company is not in a position to serve a counter notice requiring the owner to sell his mines.

Section 43 provides that "where the company shall not be required to purchase such lands" compensation shall be made for their temporary occupation, and that such compensation shall include "the full value of all clay, stone, gravel, sand, and other things taken from such lands."

It seems to follow from the consideration of these sections that where lands taken by the company for temporary purposes are purchased in pursuance of a statutory notice given by the owner the purchase vests in the company as part of the property purchased, clay, stone, gravel, sand, and other things of that sort, useful or proper for constructing the railway, although not expressly purchased or expressly named in the conveyance and conveyed thereby, and also that after the purchase the company are free to work as they please, without being subject to the directions of the surveyor or agent of the vendor.

This result, however, seems somewhat incompatible with the view which the respondent takes of the meaning of the term "mines" in section 77. It must be borne in mind that that section is not confined to lands which the company require to purchase for the purpose of their undertaking. It applies to "any land purchased" by the company, and therefore to lands which the owner requires the company to purchase under section 42. If the respondent's view be correct, a railway company which has lawfully entered on lands for the purpose of taking clay or gravel therefrom might find its operations suspended by a notice to purchase those lands. If clay and gravel be comprehended in the term "mines," and if the time for compelling the landowner to sell mines has passed, the company is helpless. Purchase it must. But the purchase prevents it using the lands for the only purpose for which they were wanted, unless indeed you are prepared to do extreme violence to plain language, and to read the provision vesting in the company such parts only of the mines under the lands purchased by them as shall be necessary to be used in the construction of the railway as vesting in them to an unlimited extent whatever may be useful or proper for constructing the railway.

It was urged before your Lordships that the enactments dealing with mines were passed for the benefit of persons authorised to construct waterworks and railways, that, to use Mr Justice Kay's language, there was "no reason therefore for putting a narrow or restricted construction upon the word 'mines,'" and that consequently the word ought to be held to include minerals of every description. I am inclined to think that when you make the word "mines" include that "which is in no sense a mine," you do something more than avoid a narrow and restricted construction. And I am not convinced that it is a proper mode of construing an Act of Parliament to strain the language in favour of those for whose benefit the enactment may be supposed to have been passed.

However that may be, it appears to me that the enactments under consideration were not intended to benefit waterworks or railways at the expense of those whose lands might be required for the purpose of the undertaking. Indeed, if Lord Cranworth's suggestion in *The Great Western Railway Company* v. *Bennett*, L.R., 2 E. & I. App. 27, be right, the main object of these enactments in their ultimate shape was to prevent the hardships resulting to landowners from the application of common law rights to compulsory purchases. I doubt whether railway companies were special favourites with the Legislature in those days. I should rather have supposed that Parliament considered the division of property and the adjustment of rights effected by these enactments a fair arrangement, and one equally beneficial to both parties. And so it is if the language used has its ordinary and proper signification. Confine the enactment to mines, and nothing can be fairer. Where lands containing mines are taken by a railway company it would probably be a most serious injury to the vendor to compel him to include his mines in the sale. In most cases he would be selling a long narrow strip of minerals which might form an impassable barrier in the middle of his mines. If the sale were a voluntary sale to an ordinary purchaser it would be a matter of course to reserve the mines. On the other hand, neither railway companies nor persons who construct water-works require mines as such, or are capable of working mines for profit. Mines are only useful to them so far as they may contribute to the support of the lands under which they lie. In many cases they may be worked without interfering with the beneficial enjoyment of the surface.

These considerations, however, do not apply to the case of gravel and clay and things of that sort, which may be termed surface minerals. Remove surface minerals from under the track, and the railway becomes a heap of rubbish. For the very existence of the line it is necessary that they should be left undisturbed. And yet, according to the respondent's argument, a railway company is not to pay for the use they make of surface minerals which do not belong to them. Why? Because the person to whom they do belong does not actually want his property just yet. In the meantime it is more useful to the railway company than it is to the owner. In other words, to put it plainly, a railway company is to have a forced loan of their neighbour's property without consideration—without any corresponding advantage to him, so long as he may be unable to work it or get it worked at a profit. The doctrine involved seems to me somewhat advanced, and I should hesitate to attribute it to the Legislature unless I found it clearly expressed in an Act of Parliament.

Observe how unreasonable the proposition is. The surface minerals must either add to the value of the lands at the time of the purchase or not. If they do not add to the value, why is the railway company paying the full value of the lands not to have the surface minerals? They may be useful for the construction of the line; they are necessary for its existence. On the other hand, if they do add to the value of the lands, why is the landowner not to be paid for them at once, though he may not be able for some time to deal with them profitably when they are separated in ownership from the surface? In the case of surface minerals there is no peculiar hardship in taking a strip of the minerals. If the landowner were selling a strip of his lands to an ordinary purchaser, he would in ordinary course sell the surface minerals too, and so get a better price. When he is made to sell for the benefit of the public, why should he be made to sell his property in slices, and to wait for half the price (to take the figures from the present case) until he is in a position to intimidate the railway company? This seems very unreasonable and very unfair to the landowner, who gets nothing by way of compensation if the Act, as interpreted by the respondent, be honestly carried out. But I must say I much doubt whether the Act so interpreted could be carried out honestly. There is no difficulty in valuing lands on the assumption that they contain no mines. But there would, I think, be considerable difficulty in arriving fairly at the value of lands required for a railway, treating them merely as so much surface not entitled to any right of support, and as separated for the purpose of valuation from such ordinary constituents of the subsoil as gravel, clay, and stone. If the decision under appeal be upheld railway companies may no doubt protect themselves in

future purchases. But I suspect in many cases of past sales a railway company would be called upon to pay over again for what it has bought and paid for long ago.

It was said that unless the word "mines" be held to include surface minerals railway companies may be exposed to the risk of having the safety of their works endangered by the removal of clay and gravel and other surface minerals in the immediate proximity of their lands. The answer is that the railway company must judge for themselves what extent of land is required, and take sufficient to secure the stability of their works against accidents which can readily be foreseen when the nature of the sub-soil is known.

I desire to base my judgment on what seems to me to be the plain meaning of the words of the Acts, but at the same time it is satisfactory to find that the result is consistent with what may be presumed to have been the intention of Parliament, and not likely to lead to inconvenient consequences.

For these reasons I am of opinion that the interlocutor under appeal should be reversed.

Interlocutors appealed from reversed; interlocutor of the Lord Ordinary of the 16th December 1885 restored, the respondent to pay to the appellants their costs in the Court below and in this House.

Counsel for the Pursuers (Appellants)—Att.-Gen. Sir R. E. Webster — Balfour Brown, Q.C. Agents—Simson, Wakeford, & Co.—Campbell & Smith, S.S.C.

Counsel for the (Defender) Respondent—Sir H. Davey, Q.C. — E. W. Byrne. Agents — Grahames, Currey, & Spens—Hamilton, Kinnear, & Beatson, W.S.

COURT OF SESSION.

Thursday, January 24, 1889.

SECOND DIVISION.

[Sheriff of Aberdeen.

MOLLISON *v.* NOLTIE.

Contract—Stock Exchange—Joint Agreement to Sell Stock not in Seller's Hands—Speculation as to Rise and Fall of Stock.

On the joint employment of two persons a broker sold a certain amount of railway stock. Neither of the parties possessed the stock at the time. The stock was continued for some months, when it was closed at a loss, and the sum due to the broker for commission and differences was paid by one of the principals.

In an action at his instance against the other adventurer for repayment of one-half of this sum, the defender pleaded that the action should be dismissed in respect that the transaction was of a gambling nature. *Held* that as the stocks had been sold to a real purchaser, and the transaction between the principals was a joint-adventure in stocks, and not a joint-adventure in gaming, the pursuer was entitled to recover from the defender the amount sued for.

Upon 16th January 1888 Hugh Mollison, late farmer, Burnside, Ruthrieston, Aberdeen, and James Noltie, grocer and spirit merchant, Aberdeen, agreed to enter into a joint-adventure in the sale and purchase of Grand Trunk Railway Company of Canada First Preference Stock. They accordingly on said date instructed Mr Alexander S. Sutherland, stock and share broker, Aberdeen, to sell for them 500 said Grand Trunk Railway Company of Canada First Preference Stock at 54¼ per cent. Mr Sutherland made said sale. No such stock was in the hands of the parties at the time. The stock was continued till, on the 11th day of June 1886, the said quantity of stock was purchased through Mr Sutherland at 63⅜ per cent., in order to close the adventure. The sum which thus fell due to the broker for commission and differences amounted to £49, 15s. 11., which sum was paid by Mollison, who in October 1887 brought this action against Noltie for £24, 17s. 11d., being the half of the above-named sum.

The defender averred, *inter alia*—"In the beginning of March 1886 the defender called on Mr Sutherland and instructed him to close the 500 Trunks, and to let the pursuer know this. Mr Sutherland agreed to do so. From that time till 9th August 1886, two months after the stock had been purchased, the defender was not aware that said account had been closed. He believes and avers that if said stock was continued it was so continued in the name of the pursuer alone. The defender has no knowledge with whom the pursuer was dealing, and never received any sale notes, nor was he otherwise informed that a sale had been effected."

The pursuer pleaded—"(1) The defender having agreed to enter into said joint-adventure with the pursuer, and having done so, defender is bound to bear his share of the loss arising therefrom."

The defender pleaded—"(2) The defender having instructed his broker to close his account at a time when no loss would have been incurred, the defender is in the circumstances not liable to pursuer. (5) The transaction being of the nature of gambling transactions, the action should be dismissed."

After a proof, which was mainly directed to the question whether the defender had instructed Mr Sutherland to close the account in March 1886, the Sheriff-Substitute (Brown) upon 30th June 1888 sustained the defender's 5th plea-in-law, and dismissed the action.

On appeal the Sheriff (Guthrie Smith) on 25th September 1888 issued this interlocutor:—"Recals the interlocutor: Finds it proved that on their joint employment Mr A. S. Sutherland, stockbrocker, sold on their account certain railway stock, with the result that they became indebted to him in the sum of £49, 15s. 11d. for commission and differences: Finds in law that the pursuer having paid this sum to the said A. S. Sutherland, is entitled to recover from the defender his share thereof, being the sum sued for: Therefore repels the defences; decerns in terms of the conclusions of the summons; finds the defender liable in expenses, &c.

"*Note.*—On the 16th January 1886 the pursuer

and defender gave joint instructions to Mr Sutherland to sell on their account 500 Grand Trunks. Neither of them had the stock to deliver; it was in fact a 'bearing' transaction belonging to a class of dealings on the Stock Exchange which have frequently been denounced by eminent Judges as immoral and pernicious. There is no doubt also that, as between buyer and seller, a contract that the one shall receive and the other shall pay 'differences' is a wagering contract, which by Statute 8 and 9 Vict. c. 109, is null and void. But it is equally well settled that the statute only affects the contract which makes the bet or wager, and that the stockbroker employed by the seller to find for him a purchaser of the stock incurs obligations on his principal's behalf, which by the rules of the Stock Exchange are enforceable against him, and of which he has relief against his employers. In this case Mr Sutherland executed his commission by selling through a London broker, and the stock was continued till the month of June, when it was closed at a loss. In these circumstances if an action had been brought against the parties by Mr Sutherland it could not have been defended, and on general principles it is too clear for argument that if one of the two parties discharges a contract debt in which they are jointly interested, the other is liable in contribution. A more revelant defence to the action is that if the broker had closed the account when he was told to do so there would have been no loss. But this fails in fact. Mr Sutherland affirms that he acted on his instructions to close as soon as he received them; pursuer says the same, and the defender's statement to the contrary is unsupported."

The defender appealed, and argued — This was a gambling debt, and therefore the pursuer could not recover. In these circumstances the Court would not look at the agreement at all, and one of the wrongdoers could not recover from another any sum which he paid for purpose of gaming—*Risk* v. *Auld and Guild*, May 27, 1881, 8 R. 729; *O'Connell* v. *Russell*, November 25, 1864, 3 Macph. 89; *Calder* v. *Stevens*, July 20, 1871, 9 Macph. 1074; *Higginson* v. *Simpson*, January 12, 1877, L.R., 2 C.P.D. 76; *M'Kinnell* v. *Robinson*, Easter Term 1838, 3 M. & W. 434; Bell's Prin., secs. 36, 37, 550; *Don* v. *Richardson*, June 16, 1858, 20 D. 1138; *Ainslie* v. *Sutton*, December 14, 1851, 14 D. 184; *Gillies* v. *M'Lean*, October 16, 1885, 13 R. 12; *Newton* v. *Cribbes*, February 9, 1884, 11 R. 554. Secondly, the proof showed that the defender was not liable for any loss incurred after March 1886, when he had given orders to the broker to close the account.

The respondent argued—This was not a gambling transaction; the pursuer ordered the broker to sell so much stock. No doubt it was a speculation. The parties expected the stock to fall. But it was no gaming transaction. The parties simply agreed to await the result of an expected fall. Moreover, the stock was sold to a real purchaser. It was a *bona fide* transaction. There was no element of *sponsio ludicra* here—*Foulds* v. *Thomson*, June 10, 1857, 19 D. 803; Addison on Contracts, 1157. The defender was resting-owing to the pursuer in the amount sued for. The pursuer simply paid the whole loss for the sake of convenience, and that mainly on the defender's part, who by repaying the half of the loss, would only repay a loan. There was no proof that the defender had instructed the broker to close the account in March.

At advising—

Lord Justice-Clerk—There are two points in this case—one as to the evidence, the other as to the law. With regard to the former of these points, the Sheriff has found that the defender failed to make out the allegation that he gave the holder instructions to close the account in March, and that he was not aware that the account had been continued, as it afterwards turned out to have been. On this point I agree with the Sheriff.

The other question is the important one as to the law. It is the question whether the defender is justified in resisting payment of his share of the sum paid to the broker by the pursuer, on the ground that the transaction was a gambling transaction, and that the Court will not listen to a party who comes forward asking powers to enforce an alleged right arising out of such a gaming transaction. Now, having given the subject the best consideration I can, I think that the Sheriff is right on this point also. The broker Sutherland was instructed to sell a certain number of shares for both Mollison and Noltie. It is not disputed that at that time neither Mollison nor Noltie possessed the scrip, and that the transaction was a speculation. They both hoped that the market would fall, and that they would therefore make money by purchasing the stock at a lower price before it required to be delivered. In this they were unfortunate, for the market rose. Now, I think this transaction was an ordinary and *bona fide* one on the Stock Exchange, whereby a broker was instructed to sell, and did sell, the shares to a third party. Mollison and Noltie were bound to deliver the stock, and did, after the transaction had been continued over, procure and deliver it. I cannot hold that that is a transaction struck at as a gaming contract. These were not two parties wagering, and a wager requires two parties. It cannot be said that the two speculators Mollison and Noltie were wagering with the purchaser, for he was an ordinary purchaser offering to buy stock, and intending to obtain it, and not in any way engaged in a wager. Was the broker, then, engaged in wagering about the stock? He was not, for his whole interest in the matter was to obtain his commission, and to be kept by his employers free from personal liability to the purchaser.

We have, then, only Mollison and Noltie left, and they could not be wagering with each other, because under no circumstances could the one be better or worse off by the event than the other. I think the transaction comes within the rule of the case of *Foulds*, and a passage in the opinion of Lord Wood in that case is entirely applicable to this one. Lord Wood says—"To wagering or gaming there must be two parties" (and of course he means two opposing parties). "The provisions of the statute are all framed on that footing. The parties must come together directly or through their brokers. In contracts within the statute there must be opposite parties,

and there can be no innocent ignorant third parties. If a party or his broker go to another party or his broker and arrange or make a contract for the sale and purchase of shares, but where they are merely to pay the differences according to the rise and fall of the market, that would be gaming within the statute. But in the present case there is no evidence that any one of the contracts forming the transaction in the account libelled was a contract for payment of differences, and to be implemented by such payment. On the contrary, it appears that the transactions were with a great variety of brokers acting for an equal variety of constituents, and as far as seen every transaction was a real *bona fide* onerous purchase or sale from or to a party to whom a personal obligation was undertaken to fulfil the contract which he was entitled to enforce, and in which the responsibility of the pursuer as broker for the defenders did not terminate until the stocks bought or sold were either delivered or paid for." I think that with the single difference that in that case there was a variety of different transactions, which is not the case here, that paragraph of Lord Wood's opinion exactly applies. I have no hesitation in agreeing with the Sheriff.

Lord Young—I am of the same opinion. I think that the Sheriff-Substitute has somewhat misapprehended the case, not the facts so much as the law, for I see that he says—"It is not suggested that as between the seller and purchaser of the stock in question the transaction was not perfectly genuine, for that was not made fictitious by the person to whom the stock originally fell to be transferred again selling for delivery at next settling-day." No doubt the parties to this action were both speculating on a fall of the stock. That was because they were both selling it. But unfortunately for them the stock rose and they could not buy in the stock save at a loss which, as to them both, is only £49, for to that extent, taking into account the commission of the broker, the stock rose before they bought it. I think it was a genuine transaction. The purchaser of the stock demanded it, and was entitled to get it. Well, he obtained the stock, and one of the adventurers had to pay the whole £49 which they lost. Why should not the other pay part of it also? It was a genuine transaction. The buyer would, if the broker had not bought in the stock, have been entitled to sue for the difference of the price between that at which it had been sold to him and the price he would have had to pay for it, and the broker had involved himself in liability. Now, the pursuer has paid to the broker both his own share and the defender's. The speculation might have been one about any other property—a house, for example—as much as about stock. The buyer if it was not delivered to him would have been entitled to acquire it at the expense of those who undertook to sell it to him. Now, I think that if one of the sellers paid that loss it is clear that the other must pay him his share. I think the matter is well expressed in the opinion of Justice Lindley in the case of *Thacker* v. *Hardie*, 4 Q.B.D. 685, which was a case of pure speculation—"Firstly, the defendant was a speculator, and the plaintiff knew him to be so. Secondly, that the defendant employed the plaintiff to speculate for him on the Stock Exchange. Thirdly, that the defendant knew, or must be taken to have known, that in order to carry out the transactions the plaintiff would have to enter into contracts to buy or sell as the case might be." Now, I think there was here no wagering. It was reprehensible speculation no doubt, but it was carried on (and there was no other way of carrying it on) by real contracts which the buyer could and did enforce against the joint speculators to their loss. I think the pursuer is entitled, having paid the whole of that loss, to recover the half of it from the defender.

On the question of fact as to the broker's instructions to carry over, I agree that the Sheriff's judgment should not be altered.

Lord Rutherfurd Clark concurred.

Lord Lee—The question is whether the ground of the pursuer's action is *sponsio ludicra?* I do not think it clear that that question is answered by the mere consideration that the purchaser from the pursuer and defender was a real purchaser. I go upon this consideration that according to the statements of both parties upon record the transaction in which they were engaged was a real and lawful joint-adventure in stocks, and not a joint-adventure in gaming or in staking money upon a chance.

The Court pronounced this interlocutor:—

"Find in fact (1) that on the joint employment of the pursuer and defender Mr A. J. Sutherland, stock-broker, on 16th January 1886 sold on their account 500 shares of the Grand Trunk Railway Company of Canada First Preference Stock, and that the said stock was subsequently purchased in order to implement said contract of sale, and was delivered and paid for by the purchaser; (2) that in respect of said transaction the pursuer and defender became indebted to the said A. J. Sutherland in the sum of £49, 15s. 11d. for commission and differences in said contract of sale: Find in law that the pursuer having paid the said sum to the said A. J. Sutherland is entitled to recover from the defender his share thereof, being the sum sued for: Therefore dismiss the appeal and affirm the interlocutor of the Sheriff appealed against; of new repel the defences, and decern in terms of the conclusions of the petition," &c.

Counsel for the Appellant—Guthrie. Agent—Robt. C. Gray, S.S.C.

Counsel for the Respondent—Comrie Thomson—Orr. Agents—Stuart & Stuart, W.S.

Friday, January 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

M'MEEKIN *v.* EASTON AND OTHERS.

Bill of Exchange—Promissory - Note—Personal Obligation of Granter—Bill Signed in Representative Capacity—Delegation.

A member of a church advanced a sum of £300 to meet a debt due by the church, and received therefor a promissory-note signed by the minister and two of the office-bearers, "in the name and on the behalf of" the said church. The congregation agreed to recognise the note as an obligation resting upon them, but subsequently abandoned this position. The lender raised an action upon his note. *Held* that it was the personal obligation of the granters, and that as the congregation was not a *persona*, and could not take upon it the personal obligation of a debtor, there was no room for the plea of delegation.

This was an action in which Robert M'Meekin, farmer, Culgrange, Inch, Wigtownshire, sued David Easton, Kilmarnock, executor-dative of the deceased Rev. Thomas Easton, minister of the Gospel, Stranraer; Peter Lusk, farmer, Craigcaffie, Inch; and Mrs Maria Hudson or Easton, widow and executrix of the deceased David Easton, doctor of medicine, Stranraer, for payment of the sum of £290 sterling, being balance remaining due of the principal sum of £300 contained in a promissory-note dated 17th March 1882. The note was in these terms—"One day after date, we, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay to Robert M'Meekin, or Miss Agnes M'Meekin, Culgrange, or order, within the British Linen Bank, Stranraer, with interest at a rate not exceeding four per cent. per annum, the sum of £300 sterling, value received. (Signed) T. EASTON; PETER LUSK; DAVID EASTON."

The advance was made in the following circumstances—To meet the cost of repairs upon the Reformed Presbyterian Church, Stranraer, an account was opened in March 1876 with the Clydesdale Bank there, in name of the treasurer of the congregation as authorised by a minute of managers dated 4th March 1876, from which account at sundry times between March 1876 and March 1882 sums were drawn. The balance against the congregation on said account amounted in March 1882 to about £300, and to reduce the burden on the congregation of interest on said sum, which the treasurer represented was accumulating, as he had no funds out of which to meet it, the loan of £300 at 4 per cent. interest was obtained from the pursuer.

The pursuer averred that the note was granted on the representation that Mr Easton was the debtor and the other two his cautioners. They did not ask or receive sanction from the congregation for the transaction. Further, Mr Easton on 18th April 1885 received from Mr Alexander Whitelaw a donation of £300 towards the extinction of the debt upon the church, and collected besides other sums to meet the cost of repairs still outstanding. These various subscriptions, however, he failed to intimate to the managers of the congregation.

The defenders averred that the loan was obtained by the managers of the congregation from the pursuer, who was then an elder and presently president of the managers. The managers authorised the Rev. Mr Easton, Peter Lusk, and the late David Easton, the minister and two of their number, to grant to M'Meekin the promissory-note sued on in the name and on the behalf of the congregation. It was not the case that the Rev. Thomas Easton was principal, and the defender Peter Lusk and the late David Easton truly cautioners, in said obligation, and no representation to that effect was made to the pursuer. The obligation to the Clydesdale Bank was the obligation of the congregation, and not of any individual members, and it was the intention of parties that the obligation to Mr M'Meekin, which was to replace it, should likewise be the obligation of the congregation, and not the personal obligation of the individual members who were authorised to sign in the name and on the behalf of the congregation. The elders and managers of the congregation at a meeting on 21st March 1887 "agreed to recognise Mr M'Meekin's bill for £290 as a debt due to him by the church," and Mr M'Meekin, who was himself present and presided at the meeting, "at the same time agreed to allow the same to remain as formerly at 4 per cent. interest." Further meetings of the managers were held on 20th June and 8th July 1887. At the former meeting it was resolved "that the managers agree to abide by and confirm their minute of March 21st last, recognising and accepting the bill in the said minute described as an obligation resting on the congregation; . . . that Mr M'Meekin be asked to allow the bill meantime to remain in its present form; that a subscription list be opened, . . . and that the following committee be, and now are, appointed to carry out this arrangement, and adopt whatever measures they may deem necessary, so that the whole sum required may be obtained and conveyed to Mr M'Meekin without any undue delay." . . . This resolution was read and approved of, Mr M'Master dissenting, at the meeting of 8th July 1887. At both these meetings the pursuer was present. At a meeting of the congregation on 8th August 1887 the views of the managers as to the adoption of the debt were submitted, and subscriptions to meet it were there intimated. In these circumstances the defenders declined to pay the bills sued on, averring no liability thereunder, in respect that it was the obligation of the congregation merely, and not of the parties signing it. In any view, the managers of the church had undertaken liability for the said promissory-note, and collected subscriptions to defray the liability thereunder, and the said Robert M'Meekin had taken them as his debtor.

The pursuer explained that the managers and congregation now declined to pay him any portion of the debt, on the ground that the donation which the late Mr Easton received from Mr Whitelaw for payment of the debt deprived the defenders of all claim to relief at their hands. They averred that the resolutions embodying the proposed arrangement for payment of the sum in question were all passed under essential error

as to the facts connected with the defenders' obligation for the same, which error was induced by their representations, and in entire ignorance of the fact that the defenders had long since been provided with the means of paying off the debt, and they accordingly maintained that they are in no way bound by said resolutions.

The pursuer pleaded—"(1) The late Reverend Mr Easton, the defender Peter Lusk, and the late Dr David Easton having granted, and being personally liable for the sums due under, the said promissory-note, and the sums sued for with interest being due, the pursuer is entitled to decree as concluded for, with expenses."

The defenders pleaded—"(2) The promissory-note sued on is not the personal obligation of the defender Peter Lusk and of the now deceased Reverend Thomas Easton and David Easton, and the defenders are therefore entitled to be assoilzied. (4) *Separatim*—Delegation."

On 26th July 1888 the Lord Ordinary (KINNEAR) decerned against the defenders in terms of the conclusions of the summons.

"*Note.*—The promissory-note must be held as the obligation of the granters, creating a personal liability against them. If this be its effect there appears to me to be no sufficient averment to support the plea of delegation. There is nothing in what took place at the meetings mentioned on record, according to the defenders' account of them, from which it ought to be inferred that the pursuer has discharged his original debtors and accepted the managers in their place. The defenders may have a claim of relief against the managers of the congregation, but they have not been relieved of their direct liability under the promissory-note."

The defenders reclaimed, and argued—1. They were not personally liable. They only acted for the congregation of the church in granting the promissory-note, and this appeared from the wording of the document itself. The only persons who could be sued were the managers or other persons liable for the debts of the congregation. It appeared on the face of the note that it was granted on behalf of some one other than the person signing, and a proof should be allowed of the circumstances to ascertain the true obligant—Bills of Exchange Act (45 and 46 Vict. cap. 61), secs. 89 and 26; *Gadd* v. *Houghton and Another*, June 20, 1876, L.R., 1 Ex. Div. 357; *Alexander and Others* v. *Lizer*, January 26, 1869, L.R., 4 Ex. Div. 103; *Brown, &c.* v. *Sutherland*, March 17, 1875, 2 R. 615; *Gordon* v. *Campbell*, June 13, 1842, 1 Bell's App. 428; *Woodside* v. *Cuthbertson*, February 4, 1848, 10 D. 604; *Webster* v. *M'Culman*, June 3, 1848, 10 D. 1133; *Chiene* v. *Western Bank of Scotland*, July 20, 1848, 10 D. 1523; *Union London Commercial Bank* v. *Kitson and Others*, May 19, 1884, L.R., 13 Q.B.D. 360. 2. This was a case of delegation, and the pursuer accepted the congregation as his debtor.

Counsel for the respondent were not called upon.

At advising—

LORD YOUNG—I am sorry for the defenders. They signed this promissory-note along with a gentleman who is now dead. There is apparently a question whether it is not his personal debt wholly or in part, or at least a debt incurred by him as minister of a congregation in Stranraer. He seems according to the contention of some of the parties to have expended more money than he was entitled to do upon the repair or alteration of buildings belonging to the congregation. The other persons who signed the note are connected with the congregation.

The money was borrowed from a bank. The bank, I presume, desired to have it paid up. If the bank fell it had no proper debtor at all that would account for the anxiety to get the money paid up, and the pursuer Mr M'Meekin stepped in and paid £300. He got when he did so this promissory-note signed by three gentlemen, the Rev. Mr Easton, David Easton, and Lusk. Is this a worthless document, and did he receive it as such? The idea that this Reformed Presbyterian congregation were the proper debtors in a personal obligation is of course absurd. A congregation could not be debtors on a promissory-note, and there is therefore no personal obligation on them. Well, did not these three gentlemen become the debtors? They were legally capable of being so, and they signed it. They refer on the face of it to its being signed in the name and on behalf of the congregation. That is, it was a debt which the congregation would feel it to be their duty to provide for. They can do that, though they are not capable of being the debtors or creditors on the note, out of good feeling and the conviction that they are morally bound to relieve those who became debtors for their behoof. On the face of the note then, that is the position of the debtors. It is the only thing that could be meant, unless we supposed they meant to give, and Mr M'Meekin meant to take, a worthless document. The only legal view of M'Meekin's position is that he must be taken as saying to those who signed the note that he could not take the congregation as his debtors, but would look to them, and they on their part would look to the congregation for their relief. That is the view of the Lord Ordinary, and it is unanswerably right. We are told that the congregation or many of them refuse to subscribe the money to relieve the defenders, because rightly or wrongly a notion is entertained that the late Rev. Mr Easton got £300 from Mr Whitelaw to relieve them of the obligation, and it was otherwise applied or has somehow not been applied to that purpose. But for that impression the congregation would have collected the money. But the only legal view is that which I have explained.

The defenders plead delegation. To raise that plea they ought to have made a separate distinct statement of the facts on which they wish us to sustain it. But instead of that they give us only a long and irregular answer to the pursuer's statements. But that answer, apart from its mode of statement, is no good answer to the pursuer's case. It is said that the pursuer accepted the congregation as his debtor in place of the defenders. But the congregation is not a person, and could not take over the personal obligation of a debtor. I think that there is no relevant statement of a case of delegation, and that the judgment of the Lord Ordinary should be affirmed.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I come to the same conclusion, but not without some difficulty. That difficulty arises from the allegations, not of the defenders, but of the pursuer. His action is not brought simply on the promissory-note as a document of debt. His condescendence shows that he is not in his own view in a position to lay his action upon it alone. He makes allegations that the Rev. Mr Easton was the principal debtor and that the other obligants were truly cautioners for him, and explaining the history of the transaction in his view of it. Now, on the document all the obligants are in the same position.

But on the whole, while I am clear that there could have been no summary diligence on this document, and have doubts whether it is sufficient to instruct the pursuer's allegations, I concur in thinking that *prima facie* it instructs an undertaking by the defenders personally to pay the sum contained in it. As to the alleged delegation also, I concur in holding the defenders' arguments not relevant to support their plea. My doubt is whether the case as presented is ripe for judgment.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Young, and have nothing to add.

The Court refused the reclaiming-note and adhered to the Lord Ordinary's interlocutor.

Counsel for the Appellants—H. Johnston. Agent—P. Adair, S.S.C.

Counsel for the Respondent—Dickson—Salvesen. Agents—Gill & Pringle, W.S.

Friday, January 25.

FIRST DIVISION.

[Lord Fraser, Ordinary.

CURRORS *v.* WALKERS.

Trust — Investment — Law-Agent — Liability of Law-Agent.

The law-agent of a trust is not bound to volunteer advice to the trustees.

Adam Curror and John Curror, trustees acting under a trust-disposition and settlement, continued to hold as an investment of the trust-estate a loan made by the testator before his death to Adam Curror secured only on his personal obligation. In consequence of Adam Curror's bankruptcy the money was lost, and John Curror's representatives were obliged to make good this loss to the trust-estate.

In an action by the latter parties against the representatives of the law-agent of the trust to recover the amount for which they had been found liable, the pursuers founded on averments to the effect that the law-agent had, in gross neglect and breach of his duty, failed to advise the trustees that it was their duty as trustees to obtain payment of the loan, and that the security upon which the money stood was not such as trustees were entitled to hold as a trust investment. *Held* that the pursuers' averments were irrelevant, and the action *dismissed*.

William Kennedy, W.S., Edinburgh, died on 23rd April 1877 leaving a trust-disposition and settlement dated 10th June 1876, and codicil thereto dated 20th April 1877, by which he conveyed his whole estate, heritable and moveable, to Adam Curror of the Lee, and his brother John Curror in trust for behoof of William Kennedy Moffat, his grandnephew and his heirs, payable or assignable to him on his attaining the age of twenty-one years, or as much sooner as the trustees might think proper. In his codicil he expressed a wish that John Walker, W.S., should be factor and agent for the trustees.

Messrs Adam and John Curror accepted the trust, and nominated Mr Walker to act as factor and law-agent to them.

During the fifteen or twenty years previous to his death, Mr Kennedy had advanced considerable sums of money to Adam Curror, and in December 1876 the latter was indebted to him in the sum of £4000, for which on the 13th of that month he granted to Mr Kennedy a bond and assignation in security, whereby he bound himself to re-pay the said sum, and in security thereof assigned £2400 City of Glasgow Bank stock and £1000 Union Bank of Scotland stock.

It was, however, arranged that Mr Kennedy should not intimate the assignation of the bank stock, and by letter dated 11th December 1876 he undertook not to do so.

After Mr Kennedy's death the loan to Adam Curror was allowed to remain on the security of his personal obligation.

Adam Curror in October 1878 was ruined by the failure of the City of Glasgow Bank of which he was a shareholder. In accordance with the advice of counsel no claim on behalf of Mr Kennedy's trust was lodged in his sequestration in case it should give rise to a claim by the liquidators of the bank against the trust-estate, and the sum of £4000 was thus totally lost to the trust-estate.

Adam Curror died on 11th February 1879, John Walker died on 27th October 1879, and John Curror died on 8th July 1885. The clerk who acted under Mr Walker in the management of the estate had also died before the date of this action.

After John Curror's death the trustee acting under Mr Kennedy's settlement made a claim against John Curror's representatives for payment of the sum of £4000 with interest, and the latter being advised that they could not resist the claim, paid to Mr Kennedy's trust the sum of £5479, 18s. 10d. on 10th December 1885.

With the view of recovering this sum the representatives of John Curror raised the present action against representatives of John Walker.

In their averments the pursuers set forth the facts above narrated, and in particular averred—"Mr Adam Curror and Mr John Curror accepted the trust (*i.e.*, under Mr Kennedy's settlement), and a meeting of trustees (the first meeting) was held on 1st May 1877, when Mr Walker was formerly authorised to act as factor and law-agent to the trust to make up the trustees' title to the trust-estate, and to do whatever might be necessary for the confirmation of the executors, and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor. An inventory of the estate (amounting to £91,918, 15s. 1d. was then

given up, and confirmation of the executors was obtained on 12th June 1877. Thereafter the affairs of the trust were entirely conducted by Mr Walker, who only called a meeting of trustees when it was necessary for him to obtain their signatures. The Messrs Curror having full confidence in Mr Walker, and especially looking to the fact that he had been specially nominated law-agent of the trust by Mr Kennedy, trusted to him, as they were entitled to do, to advise them and keep them right in all questions of law connected with the administration of the trust." "At the date of Mr Kennedy's death the said loan of £4000 to Mr Adam Curror was secured only by his personal obligation contained in the said bond, and by the unintimated assignation of the said bank stock. Mr Adam Curror was then possessed of very considerable means, and if Mr Walker had advised the trustees that it was their duty as trustees to obtain payment of the debt of £4000 Mr Adam Curror would have made payment thereof, and he was then in a position to do so without difficulty. Mr Walker, however, through gross and culpable recklessness, or in gross neglect and breach of his duty, failed to advise Mr Adam Curror or Mr John Curror that it was their duty as trustees to obtain payment of the said loan, or that the security upon which the money stood was not such as trustees were entitled to hold as a trust investment. The Messrs Curror believed that the security for the said loan was ample (and in fact it was ample until the failure of the City of Glasgow Bank in October 1878, when Mr Adam Curror was ruined, as after mentioned), and as Mr Adam Curror was paying 5 per cent. upon the money, it is believed and averred that it did not occur either to him or to Mr John Curror that there was any necessity for calling up the loan, especially as Mr Kennedy had himself been satisfied with the security. The Messrs Curror were not lawyers, and they trusted, as they were entitled to trust, to Mr Walker to keep them right in matters of law. Mr Adam Curror paid the interest upon the said loan up to and including Whitsunday 1878 to Mr Walker as factor for the trust. Mr Walker gave receipts to Mr Adam Curror for the said interest, but never advised that the loan should be paid up. Mr Walker also in 1877 paid Mr Adam Curror a legacy of £500 left to him by Mr Kennedy in his said trust-disposition and settlement."

They further averred that during the proceedings in an action brought against them in January 1877 to enforce another claim on the part of Mr Kennedy's trust, they had had access to the accounts and papers and minutes of the trust, and were satisfied that the claim for payment of £4000 could not have been successfully resisted. It was only in course of defending the same action that they had ascertained for the first time that Mr Walker had been nominated the law-agent for the trust, and that "in gross neglect and violation of his duty he had failed to inform Messrs Adam and John Curror what their duty as trustees was in regard to the realisation of the estate, and in particular in regard to calling up the said loan."

The pursuers pleaded—"(1) The said John Walker, having in gross violation and neglect of his duty as law-agent and factor for said trust, failed to advise the said Adam Curror and John Curror that it was their duty as trustees to obtain payment of said loan, the defenders, as representing the said John Walker, are bound to make good to the pursuers, and relieve them of the loss sustained by them as representatives of the said John Curror through payment of the said loan not having been obtained."

The defenders pleaded—"(1) The pursuers' statements are not relevant or sufficient to support the conclusions of the summons. (2) The said John Walker not having been guilty of any violation or neglect of duty as law-agent and factor for the said trust, the defenders should be assoilzied."

The Lord Ordinary (Fraser) on 9th June 1888 found the averments of the pursuers irrelevant, and dismissed the action.

"*Opinion.*—This is an action of a kind which the Lord Ordinary has had occasion to deal with several times during the last two years. The law-agent is here once again sought to be made liable in damages for failure in duty. The ordinary case is where the law-agent bungles a title; omits to intimate an assignation; neglects to make proper inquiries in reference to investments which he recommends. But the present case is one which goes far beyond any precedent in this branch of the law. The liability for damages in the present case is sought to be enforced, not on account of any blunder which the law-agent committed, but on account of not having ultroneously given advice as to the risky character of an investment which had been made by the testator himself. The facts are simple enough. William Kennedy, W.S., Edinburgh, who died in 1877, had lent to his friend Adam Curror, Esq. of The Lee, £4000 upon Mr Curror's personal bond. Mr Curror was a shareholder in the City of Glasgow Bank, and by the failure of that bank he was ruined, while the £4000 remained unpaid. Mr Kennedy, by a codicil to his will, said, 'I wish John Walker, W.S., to be factor and agent for my trustees and executors.' And the trustees and executors at the first meeting after Kennedy's death nominated Mr Walker as factor and law-agent to the trust, 'to make up the trustees' title to the trust-estate, and to do whatever might be necessary for the confirmation of the executors, and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor.' Mr Walker accepted this employment, and performed the various pieces of business thus confided to him. He died on the 27th of October 1879, and now, nine years after his death, an action is raised against his executors, claiming damages against them by reason of the fact that he did not advise the two trustees Adam and John Curror to compel payment from Adam Curror, one of the trustees, of the debt he owed to Kennedy's trust. The pursuers say that they have been 'advised that Mr Walker, in respect of his said failure of duty, became liable to relieve Mr John Curror, or his representatives, of any loss sustained by them in consequence of non-realisation of Mr Kennedy's estate, and that the same liability rests upon the defenders as Mr Walker's representatives.' The representatives of John Curror, the co-trustee of Adam Curror, were called upon to pay up the debt owing by Adam Curror, and did pay it with principal and interest, amounting altogether to £5479, 18s. 10d. John Curror's representatives were thus made

liable because he, John Curror, had not compelled his brother Adam Curror to make payment of the debt he owed to the trust, and now these representatives seek to make Mr Walker's executors liable for the sum of money that they have so paid, because he did not advise the trustees to proceed against one of their number for recovery of the money. There are no means of ascertaining now whether he gave such advice or not, nor are there any means of ascertaining whether, if he had given it, it would have been followed. But these points are of no importance, because there is no such duty laid upon an agent for trustees to watch over their investments, and to give them good counsel when the investments become dangerous. That is the duty of the trustees themselves, which they are not entitled to delegate to their agent, and for the due performance of which he is not responsible, unless indeed he agrees to perform work which is properly that of the trustees. If an agent for trustees is bound to be for ever looking around in order to ascertain whether any of the debts owing to the trust, or the investments upon which the trust moneys are laid out are in an unsecure condition, then in like manner an agent for any client would lie under the same responsibility. There is nothing special in the position of trustees in regard to this matter.

"It was admitted that there was no precedent for such an action as this, nor any *dictum* from the bench or by a writer of authority, and consequently the only course with this action is to dismiss it."

The pursuers reclaimed, and argued—The loan to Adam Curror was clearly an improper investment for the trustees to hold, for two reasons—(1) personal security was not a proper security for a trust investment, and (2) the loan was to one of the trustees. It was not merely an imprudent investment, it was an illegal one for trustees to hold. A person who was selected as the law adviser of trustees was bound to acquaint them with the ordinary rules which must govern their action, and to warn them that certain investments held by them were not proper investments for a trust-estate, and that they held them at the risk of becoming personally responsible for loss arising therefrom. One of the duties of the law-agent was to ingather the estate. In doing so it was clearly his duty to realise such securities as it was illegal to hold. If, in the presence of the law-agent, the trustees had proposed to make an improper investment, would it not have been his duty to advise them as to the law on the subject? No sound distinction could be drawn between the giving of bad advice and the failure to give sound advice where the law-agent saw the trustees to be in error. The law-agent accordingly had in this case been guilty of a neglect of duty, and the defenders were liable to make good the loss caused to the pursuers thereby—*Rae* v. *Meek*, July 20, 1888, 15 R. 1033, *per* Lord Mure and Lord Shand, 1049-1051; *Guild* v. *Glasgow Educational Endowments Board*, July 16, 1887, 14 R. 944; *Mackinnon* v. *Miller's Trustees*, August 7, 1888, 15 R. (H. of L.) 83; *Stewart* v. *M'Clure, Naismith, Brodie, & Macfarlane*, July 22, 1887, 15 R. (H. of L.) 1; *Brownlie* v. *Brownlie's Trustees*, July 11, 1879, 6 R. 1233; M'Laren on Wills, ii. 320; Lewin on Trusts (5th ed.) 250, *et seq.*

The respondents argued—The loss had not arisen from an illegal investment. The question before the trustees was the sufficiency of Adam Curror's security. Of that they were the judges. There was here no averment that the trustee were ever asked for his advice, and it was not the duty of a law-agent to trustees to volunteer advice unasked. The averments of the pursuers were incapable of proof. No one could tell what would have been the result of the law-agent's advice had he given it.

At advising—

Lord President—In this case I agree with the Lord Ordinary. The trustees of the late Mr Kennedy were the late Mr Adam Curror of The Lee and his brother the late Mr John Curror. In compliance with a wish expressed by Mr Kennedy's settlement, they appointed the late Mr John Walker, W.S., Edinburgh, to be their factor and law-agent As the averment in article 4 of the condescendence states it, "he was formally authorised to act as factor and law-agent to the trust." The explanation of his duties is familiar, and means no more than this, that he was factor and law-agent for the trustees—that he was employed as lawyer by them. Now, the duties of a factor and law-agent on a trust-estate are perfectly well defined and known in law, and they are accurately expressed in the 4th article of the condescendence. He was "to make up the trustees' title to the trust-estate, and to do whatever might be necessary for the confirmation of the executors, and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor." That is just an enumeration of the ordinary duties of factor and law-agent. The estate consisted of a very large sum of money invested in a number of different securities, and it was to be held by the trustees for a considerable period—until the beneficiary, the truster's grand-nephew, who was in infancy, attained the age of twenty-one years. One of the assets of the trust-estate was a sum of £4000 owing to Mr Kennedy by Mr Adam Curror, one of the trustees. It was explained by the pursuers that Mr Kennedy had frequently during the fifteen or twenty years prior to his death advanced considerable sums of money to Mr Adam Curror, and in December 1876 Curror was indebted to Mr Kennedy in £4000. He granted to Mr Kennedy a bond for that amount dated 13th December 1876, and he gave him also an assignation in security of certain shares in the City of Glasgow Bank, and of certain shares in the Union Bank of Scotland. It is added in condescendence 5 that it was "arranged that Mr Kennedy should not intimate the assignation of the said bank stock, and he wrote a letter to Mr Adam Curror dated the 11th December 1876, undertaking not to do so." That therefore was an unsecured debt, standing upon the personal credit of the debtor Mr Adam Curror, and there can be no doubt that it was not a proper investment for the trust-estate. In the first place, it was dependent entirely upon the personal credit of the debtor; and in the second place, it was a debt due by one of the trustees to a trust-estate. In both of these particulars it was not an investment which should have been kept up. Notwithstanding, the two trustees, Mr Adam Curror being himself the

debtor and the other trustee being his brother, thought fit to keep up that debt as a proper investment for the estates, or, at all events, they did not call it up or interfere with it. The money was lost in consequence of Mr Adam Curror being a partner in the City of Glasgow Bank, and being ruined by the failure of that bank. At the time the trustees entered upon the management of the estate it is not disputed that Mr Adam Curror was a perfectly solvent man, in good circumstances, and quite able to meet all his liabilities. In consequence of the loss of his money Mr John Curror's representatives were found liable to replace the sum lost, which, with interest, amounted to £5479, 18s. 10d., and that is the sum now sued for; and they bring this action for the purpose of making the representatives of Mr John Walker, the factor and agent, liable to the trustees for failure of duty on his part towards them.

The pursuers of course represent the last solvent trustee who made that investment, or, rather, who kept up that investment, and therefore if there was any ground of liability on the part of Mr Walker to his clients, the trustees, it is not disputed that the pursuers are quite entitled to avail themselves of that, and to enforce liability against Mr Walker. But the question comes to be, what was the nature of the liability, or whether such liability existed at all in the circumstances? The trustees, according to the statement of the pursuers in the 6th article of the condescendence, applied their minds to the question whether that money should be called up or not, because they say that "the Messrs Curror believed that the security for the said loan was ample (and in fact it was ample until the failure of the City of Glasgow Bank in October 1878, when Mr Adam Curror was ruined as after mentioned), and as Mr Adam Curror was paying 5 per cent. upon the money, it is believed and averred that it did not occur either to him or to Mr John Curror that there was any necessity for calling up the loan, especially as Mr Kennedy had himself been satisfied with the security." One cannot read that averment without seeing that it was not a matter in which the two trustees did absolutely nothing, or failed to take the matter into consideration. On the contrary, that averment shows that the trustees did consider the matter, and believed the security to be ample, which indeed it was at the time, and therefore they came to the conclusion that there was no necessity for calling up the loan. There cannot be any doubt, I suppose, that the trustees in so acting, acted quite wrongfully and in breach of their trust. But then, how does Mr Walker come in as a party liable for that proceeding? The averment is this—"The Messrs Curror were not lawyers, and they trusted, as they were entitled to trust, to Mr Walker to keep them right in matters of law. Mr Adam Curror paid the interest upon the loan up to and including Whitsunday 1878 to Mr Walker as factor for the trust. Mr Walker gave receipts to Mr Adam Curror for the said interest, but never advised that the loan should be paid up. Mr Walker also in 1877 paid Mr Adam Curror a legacy of £500 left to him by Mr Kennedy in his said trust-disposition and settlement." Of course it naturally fell to Mr Walker as factor to ingather the annual payment of interest, and therefore he necessarily received from Mr Adam Curror the interest upon that debt of £4000. As to Mr Walker's paying the legacy of £500 to Mr Adam Curror, that comes to no more than this, that that was a legacy which the trustees had to pay to Mr Adam Curror as a legatee of Mr Kennedy. The payment therefore was a payment by the trustees, although as a matter of fact the cheque may have gone through the hands of Mr Walker. There is another passage in the earlier part of the same article which perhaps I ought to read—"Mr Walker, however, through gross and culpable recklessness, or in gross neglect and breach of his duty, failed to advise Mr Adam Curror or Mr John Curror that it was their duty as trustees to obtain payment of the said loan." Now, was Mr Walker in such a position that he was bound without being asked to volunteer the statement to the trustees that they were bound to call up the loan? I think Mr Walker was under no obligation to volunteer such advice. The law-agent of a trust is the law-agent of the trustees no doubt. They employ him to advise them, but if upon any point they do not want advice, they are not bound to take it, and if they do not ask advice the law-agent is not bound to volunteer it. These gentlemen may have been quite conscious that they ran considerable risk in allowing that loan to lie, but still they probably thought the risk a small one and resolved to run it. They were men of understanding and men of business, and quite capable of judging on a matter of that kind. The fact is obvious that they did not ask Mr Walker's advice. If they did that would have been stated as a matter of course. The complaint is that he did not volunteer it, and that I think he was not bound to do.

But one cannot help, in a case of this kind, looking at the record to see what would be the nature of the case in the proof if one were allowed. All the parties who had to do with the transaction in question are dead. Both the Currors are dead, Mr Walker is dead, and the clerk who acted under Mr Walker in the management of the estate is dead also. The averment of the pursuer is that Mr Walker failed to give the trustees advice. How is it to be established that no verbal communications passed between the trustees and Mr Walker which may have been quite sufficient to discharge any such duty on his part? At the same time, I may say there seems to be no reason to complain of the pursuers' delay, but if they were allowed to have a proof, it would be a proof in the absence of every human being who could speak to the facts. It would therefore be a proof by writings only, and as is stated by them on record they had access in a former action "to the accounts, papers, and minutes of Mr Kennedy's trust." If that be so, they are in a position to aver any fact appearing on the face of the minutes and other papers relevant to support their claim, but none is averred. I cannot therefore help feeling some confidence in the safety of the judgment we are going to pronounce, from the circumstance that the pursuers have failed to find anything in the papers of the trust relevant to support their claim.

Lord Mure—I am of the same opinion as your Lordship, and think that this record contains no relevant ground of liability. It is not the duty of an agent of trustees to set about examining the securities held by them, unless specially em-

ployed for that purpose, or to advise them as to part of the securities whether they should be retained or not, unless he is asked for his advice.

Lord Shand—I also am of the same opinion. I think even if an inquiry were to be allowed, it is quite evident that the pursuers would labour under very great difficulty in the course of that inquiry. Ten or eleven years have elapsed since the occurrences with regard to which the action arises. All the parties — the two Currors, Walker himself, and the clerk, who acted under Walker in the management of this estate—are dead. If the parties got to the stage of an inquiry there would be a great deal of groping in the dark as to the facts. There would be a question as to what may have passed between the Currors and Walker in conversation, and it appears to me if there was conversation between them, and Walker explained the law on this matter to the Currors, they may very well have said that they were satisfied of the soundness of the security, and that they would run the risk of holding it.

Undoubtedly the amount of difficulty attending the inquiry might be very great, but I would rather take the case on the assumption that the pursuers can prove the averments they make on record, and they aver that Mr Walker "through gross and culpable recklessness, or in gross neglect and breach of his duty failed to advise Mr Adam Curror or Mr John Curror that it was their duty as trustees to obtain payment of the said loan, or that the security upon which the money stood was not such as trustees were entitled to hold as a trust investment."

Now, the question is whether that is a statement relevant to support a claim for damages, and I do not think it is a relevant statement, even if it were proved in the circumstances as they are stated on record. I assume, and with no difficulty, that the investment was of a class not allowed in the case of trust-estates. I assume that not only was it of that class, but that it was peculiarly objectionable as being a loan to one of the trustees themselves. I assume that the trustees were bound within a reasonable time to realise the debt due by Adam Curror, and that if they continued to hold it as an investment they could only do so by a breach of trust for which they became personally responsible—that is to say, I assume rather more than the Lord Ordinary has done in favour of the pursuers, for the Lord Ordinary has taken it only to have been an imprudent investment, whereas I agree on the criticism which has been made on the Lord Ordinary's note, that it was more than an imprudent investment, that it was an investment not sanctioned but condemned by our law; and I assume further, that if advice or information had been asked of him it was the agent's duty to tell the trustees of the character of the investment, and that they might incur personal responsibility by holding it. But assuming all that, I see nothing in the case which raised on his part the duty of giving advice. If he had been asked for advice of course he was bound to know the law, and he would no doubt have advised the trustees that this investment was not a proper one for them to hold. But there is no suggestion on record that his advice was ever asked, and the question comes to be whether from the mere relation of agent and client a duty of this kind arises to give advice when advice has never been asked, and when we may perhaps assume it was not wanted.

All that is alleged here is a general appointment as factor and law-agent "to make up the trustees' title to the trust-estate, and to do whatever might be necessary for the confirmation of the executors, and in regard to the general management of the estate, and to make all necessary payments and disbursements therefor." There is nothing more than an averment that Mr Walker was employed as agent for the trustees, and the case is that his general appointment as agent imposed on him a duty to go over the investments, and say which are to be realised under a penalty of personal responsibility for failure.

I do not think that the duty of a law-agent goes that length. Some circumstances must occur to create such a duty. Either the subject of the propriety of the investments must have come up for discussion or his advice must have been asked, or some circumstance must have occurred to impose the duty.

An illustration was given in the argument from what was said to be an analogous case, namely, the proposal of an investment. I do not think that any argument can be founded on the analogy between the two cases for this reason—When we are dealing with the question of the liability of an agent for not having given advice as to an investment we must have the whole circumstances; we must know whether the trustees looked to the agent for advice, or whether the subject was ever talked between them. In this case nothing of the kind is averred, but it is said that although the Currors never spoke to Walker on the subject, he was bound as agent to volunteer his advice. I cannot carry the obligation of an agent that length. I do not think such an obligation arises necessarily out of the relation of agent and client, and there is no further averment here than an averment of that relation. I therefore agree with the conclusion to which the Lord Ordinary has come.

Lord Adam concurred.

The Court adhered.

Counsel for Pursuers—D.-F. Mackintosh, Q.C. —Low. Agents—A. P. Purves & Aitken, W.S.

Counsel for Defenders — Muirhead — Blair. Agents—Blair & Finlay, W.S.

Friday, December 21, 1888.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

CUNNINGHAM *v.* COLVILS, LOWDEN, & COMPANY.

Ship—Seaworthiness—Charter-Party—Exception —"Errors or Negligence of Navigation."

A charter-party exempted the owners of a steamship from liability for loss arising from "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and error or negligence of navigation, of whatsoever nature and kind

during the said voyage." Before starting on a return voyage from a foreign port the boilers were filled with muddy water. When she was at sea some of the mud clogged the valves of the water-gauge, and the engineer, led by "false water" in the gauge-glass into the erroneous belief that there was an over supply of water, shut off the boiler feeds. In consequence the water was reduced so low in the boiler that the crowns of the wing furnaces collapsed, with the result that the vessel was lost through the failure of steam power.

In an action by the charterers against the shipowners for damages on account of the loss of the cargo, the Court *assoilzied* the defenders, in respect that the ship was lost through "error or negligence of navigation" on the part of the engineer (1) in not "blowing out" the muddy water after the ship got to sea, which it was proved could have been done, and (2) in shutting off the boiler feeds, and keeping them shut off till the water was reduced dangerously low in the boiler.

Ship — Charter-Party — Exceptions — Out and Home Voyage—Error of Navigation during the Voyage.

By a charter-party it was agreed that a steamship should proceed to a port in Spain and there take in a cargo, and the shipowner was exempted from liability, *inter alia*, for loss of the ship through "error or negligence of navigation . . . during the said voyage."

Opinion (*per* Lord Shand) that if the vessel was rendered unseaworthy through "error or negligence" on the part of her master or crew in the port of lading the shipowners would not be freed from liability on account of her loss by the exceptions in the charter-party, it being an implied term of that contract that the ship should be seaworthy at the time she left with her cargo.

Vide The Seville Sulphur and Copper Company (Limited) v. *Covils, Lowden, & Company, ante*, vol. xxv. 437, and 15 R. 616.

By charter-party dated Glasgow, 2nd September 1886, it was agreed between Colvils, Lowden, & Company, owners of the steamship "Ethelwolf," and J. R. Cunningham junior, merchant, Glasgow, *inter alia*—"That the said ship, classed 100 A1, and being tight, staunch, strong, well manned, victualled, equipped, and in every way seaworthy, and well fitted for the voyage, shall, with all possible speed, sail and proceed to Seville, Spain, and after being well and sufficiently ballasted with ore or lead if required, and not sand or mud, or anything which may be prejudicial to the cargo, the said master shall take and receive on board the said ship, from the agent of the said charterer, a cargo of fruit, say not less than 3000 H/chests oranges, or other lawful merchandise which the said charterer agrees to ship, not exceeding what she can safely stow and carry, over and above her tackle, apparel, provisions, and furniture. . . . The cargo being thus loaded, the said owner engages that the said ship shall proceed therewith with all possible speed direct to one of the undernoted ports (as ordered on signing bills of lading), and there deliver the said cargo at the place and in the manner directed by the consignees, to whom the ship is to be addressed. . . . The master to sign bills of lading at any freight required by charterers, but without prejudice to this charter-party. . . . Penalty for non-performance of this agreement—Estimated amount of freight (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and error or negligence of navigation, of whatsoever nature and kind, during the said voyage, always excepted)."

The "Ethelwolf" left Swansea on 20th November, and arrived at Seville on 27th November 1886. The agent of the charterer there shipped on board her 3200 boxes of oranges, for which the master signed a bill of lading in the following terms:—"Shipped in good order and well conditioned by J. S. Macdougall, in and upon the good ship or vessel called the 'Ethelwolf,' whereof Cargill is master for the present voyage, and now lying in the harbour of Seville, and bound for Antwerp, 3200 boxes best Seville China oranges, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the foresaid port of Antwerp, act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted, unto order or to assignees, freight for the said goods, as *per* charter-party, with primage and average accustomed. In witness whereof the master or purser of said ship hath affirmed to two bills of lading of this tenor and date, the one of which being accomplished, the other one to stand void."

The "Ethelwolf" sailed from Seville for Antwerp on the 5th December. Shortly after leaving Seville she grounded on a bank on her way down the river Guadalquiver, where she remained about an hour. On getting off she proceeded to sea. The weather was fine on the 6th and 7th, but on the 8th it began to blow hard, with a high sea. About half-past four on that afternoon the crowns of the wing furnaces of the boiler came down, and the engineer, to avoid an explosion, drew the fires. About two hours afterwards the captain, finding the vessel was being driven on shore, ordered the fires to be re-lighted, which was done. The boiler, however, leaked to such an extent that sufficient steam pressure could not be got up to keep the vessel off shore, and after an ineffectual attempt had been made to navigate her under sail, she and her cargo were lost on the coast of Spain, near Vigo, on the afternoon of 10th December.

In October 1887 the charterer J. R. Cunningham junior raised an action in the Sheriff Court of Lanarkshire against Colvils, Lowden, & Company for payment of £1536 in respect of their failure to deliver the cargo of oranges.

The pursuer averred, *inter alia*—"She was further unseaworthy, in respect that prior to leaving Seville the boiler was filled with excessively muddy water. Such water is very injurious to boilers, and apt to derange the boiler connections, and to lead to injury to the furnace crowns. The sails were old and defective, and insufficient in number, and no spare sails were provided, and her bridge-steering-gear was out of order and useless."

The defenders in answer 4 denied these state-

ments, and explained that the vessel was in all respects seaworthy when she left Seville. Her loss was due to perils of the sea, or to error and negligence in navigation, or to both of these causes combined.

The pursuer pleaded—"(2) Said goods having been lost in consequence of the unseaworthiness of the 'Ethelwolf' when she sailed on the voyage in question, decree should be granted as craved."

The defenders pleaded—"(2) The loss of the 'Ethelwolf' having been due to causes falling under the exceptions specified in said charter-party, the defenders ought to be assoilzied."

The defenders appealed to the First Division of the Court of Session, and their Lordships of consent appointed the cause to be tried without a jury, and remitted to Lord Kinnear to proceed therewith.

The evidence consisted partly of evidence taken in the action at the instance of the Seville Sulphur & Copper Company (Limited) against Colvils, Lowden, & Company, and partly of additional evidence taken in the present case. It is examined in detail in the opinions of Lord Adam and Lord Shand. The material facts held to be established were as follows—The boiler of the 'Ethelwolf' was filled with muddy water from the river Guadalquiver about thirty-six hours before she started from Seville. It was the regular practice of steamers like the 'Ethelwolf' to fill their boilers with river water not only in the Guadalquiver but in other rivers of the same character, such as the Seine and the Garonne. While proceeding down the river from Seville the vessel took the ground on a mud bank. In the course of an hour she was got off, and a small quantity of water was taken in to re-place the loss occasioned in the effort to float the steamer. The tide was running up the river at the time. At sea on the morning of the 8th December the valves of the water-gauge got clogged with mud, and the glass consequently showed 'false water.' The engineer, misled by the appearance of the glass into the belief that there was an over-supply of water, shut off the feeds, and kept them shut off till the water got so low in the boiler that the crowns of the wing furnaces were bared, and were consequently so over-heated that they collapsed. Taking it as proved that the mud which led to the loss of the vessel was taken in when the boiler was filled with muddy water at Seville (and the majority of the Court inclined to that view), it was also proved that that muddy water could have been blown out by a method well known to engineers when the vessel got to sea.

The Lord Ordinary (KINNEAR) on 17th February 1888 pronounced the following interlocutor—"Decerns against the defenders and appellants for the sum of £1536, with interest at the rate of 5 per cent per annum from the tenth day of December 1886 until payment: Finds the defenders liable in expenses, &c.

"*Opinion.*—This is an action against a shipowner for damages for failure to deliver a cargo shipped at Seville on board the defenders' steamship 'Ethelwolf.' The contract is contained in a charter-party, by which it is stipulated that the penalty for non-performance shall be 'the estimated amount of freight, the act of God, the Queen's enemies, and fire, and all and every other dangers and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever nature and kind during the voyage always excepted,' and the only question is whether the defenders have proved that the loss of their vessel and their cargo was due to one or other of these excepted causes.

"The 'Ethelwolf' sailed from Seville on the 3rd of December 1886. On the afternoon of the 8th, while she was off the coast of Spain, and in very rough weather the crowns of the furnaces were found to be sinking, and the engineer considered it necessary to draw the fires in order to prevent an explosion of the boiler. But the ship could not make headway under sail, and as the only means of keeping her off shore the master ordered steam to be got up, while the boiler was not yet cool enough to allow of its being filled with cold water without injury. The boiler was filled accordingly by pumping water from the sea, and the natural effect of that operation was to cause serious leakage, so that it was found impossible to get up steam enough to work the engines. The ship drifted towards the shore, and ultimately went on the rocks, and was abandoned by the master and crew, and became a total loss.

"In these circumstances there can be no question that the loss was caused by a peril of the sea in the ordinary sense of these words, and it has been decided by the House of Lords in the case of the '*Xantho*,' L.R., 12 App. Cas. 503, that the words must have the same meaning in a contract of affreightment as in any other maritime instrument. But that decision does not affect the general rule that a stipulation for exemption from the enumerated risks will not relieve the shipowner of his obligation to provide a ship that shall be seaworthy, and in every way well fitted for the voyage which he engages that he shall perform. Nor does it alter the rule that if he fails to deliver the cargo the burden lies upon him to prove that his failure is attributable to a cause for which he is not responsible under his contract. The defenders therefore must prove that the failure of the boiler which occasioned the loss of the ship was attributable to causes arising subsequently to the departure of the ship from Seville. If it was attributable to the negligence during the voyage of persons in their employment, they will not be responsible, because they have expressly stipulated that they incur no liability for the consequences of such negligence. But if it is to be ascribed to anything in the condition of the boiler before the sailing of the ship, the ship was not seaworthy, because owing to the state of her boiler she was not, to use the language of Lord Cairns in the case of *Steel* v. *The State Line Steamship Company*, 'in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, might be fairly expected to encounter' upon the voyage she was required to perform.

"The evidence as to the condition of the boiler before the departure from Seville is not altogether satisfactory. There is evidence that the tubes were leaking, and also that a dangerous crust or scale might have been deposited, which, if it existed when the ship came into harbour at Seville, was not removed before she sailed on the voyage in question. On the other hand, there is evidence that the leakage was not greater than might reasonably be expected, and

not sufficient to affect the soundness of the boiler, and that the ship had not been long enough at sea since the last occasion when the boiler was scaled to allow of a fresh accumulation of salt water crust. But there was another source of danger on which the pursuer lays greater stress. The boiler was filled with muddy water from the Guadalquiver, and this is said to have been done so long before the departure of the ship that the mud had time to settle in the bottom of the boiler, so that it could not be got rid of by blowing off the muddy water at sea, as might have been done if the mud had still been held in suspension, and re-filling the boiler with water from the sea. The evidence at the time when the boiler was filled is not satisfactory, but, according to the only witness who speaks to the time, it was done on Friday evening, and the ship did not sail till Sunday morning. If this evidence is correct the mud was in the boiler for thirty-six hours before the ship sailed, and the defenders, upon whom the burden lies, are not in a position to dispute the accuracy of a statement which they might have disproved, if it is erroneous, by the evidence of their engineer. The theory is that the mud having settled, so that it could not be cleared out at sea, was afterwards set in motion by the rolling of the ship; that it would naturally settle on the heated surface of the furnace crowns, and by preventing the transmission of heat would ultimately cause the crowns to collapse. The defenders make three separate points in answer to this hypothesis —First, that if there was mud in the boiler it must have been taken in during the voyage, because the ship took the ground in going down the river, a certain quantity of steam was lost in getting her off, and fresh water was taken in to supply the deficiency, while the propeller was working and necessarily stirring up the mud; secondly, that the boiler should have been cleared of the muddy water when the ship got to sea, and if this were not done, any mischief arising from the presence of mud must be ascribed to negligence during the voyage; and thirdly, that if the mud were set in motion, as the pursuer suggests, it would have settled on the crown of the centre furnace, which is lower than the other, and not upon the side furnaces which alone collapsed. It does not appear to me that these answers are satisfactory. The opinion of the experts examined for the defenders as to the probability of mud being taken in while the ship was aground is not given with sufficient reference to the facts in evidence. The contrary opinion is that the mud stirred by the propeller must have been carried away from the pumps by the tide which was running up the river, and this does not appear to me to be effectually displaced by the evidence for the defenders. But further, the quantity of water taken in on this occasion was very small in proportion to the contents of the boiler, and if it had contained any considerable proportion of mud this must probably have been detected at once by the presence of mud in the gauge-glass, whereas the gauge-glass was clear for the first two days, and only showed mud on the morning of the 8th of December. The objection that the boiler might have been cleared at sea does not meet the pursuer's case, if it is otherwise well founded, because this operation could not have been performed if the mud had already had time to settle before the ship sailed. The third objection does not appear to me to be established, because while there is a conflict of skilled opinion on the subject the evidence of the defenders' witnesses comes to no more than this, that, other things being equal, the mud would have a tendency to settle upon the centre furnace crown rather than upon the others. But whether in the particular case it would adhere to one rather than another, or bring down one sooner than another of the crowns to which it did adhere, might depend to a material extent upon the antecedent condition of the various furnace crowns, as to which there is no satisfactory evidence.

"But it is a more material consideration that the pursuer is not required to establish the cause to which the accident must be ascribed. They have suggested a probable cause. But it is not enough for the defenders to show that the cause so suggested has not been sufficiently proved. The fact is that their boiler failed, and the inference is that when the ship sailed it was not in a fit condition for the voyage, unless they can prove by affirmative evidence that the failure is to be ascribed to some specific cause arising during the voyage. I think there is no evidence sufficient to displace the inference arising from the fact of the failure. The only cause suggested by the defenders is that the engineer by an error of judgment shut off the feed, and so allowed the water to evaporate without supplying the place of what was lost. The opinion of the experts examined for the defenders upon this point proceeds upon the assumption that the feed was entirely shut off for a period of four hours. But there is no evidence for this. The only evidence tending to prove it is that of the engineer William Thomson. His evidence is not in my opinion satisfactory. But he does not say, and there is nothing else in the evidence to prove, that the feed was shut off for the time that it is indispensable to support the defender's theory.

"On the whole, therefore, I am of opinion that they have not explained by any satisfactory evidence the failure of the boiler, which undoubtedly was the direct cause of the loss of the ship, and therefore that they have failed to prove that their ship was seaworthy when she sailed from Seville.

"I do not think it proved that she was unseaworthy in any other respect except from the condition of her boiler. But in the view I have taken it is unnecessary to examine the evidence upon other points in detail."

The defenders reclaimed, and argued — The contract here was contained in the charter-party and the bill of lading taken together, and not in the bill of lading only—Scrutton on Charter-Parties, 33. "Errors or negligence of navigation" were therefore within the exceptions. The *onus* of proving that the vessel left Seville in an unseaworthy condition was in the pursuer. Assuming that the owners were, in the first place, bound to account for non-delivery of the cargo, the *onus* was shifted by the fact that the vessel had admittedly been wrecked, and therefore *prima facie* lost by a peril of the sea. It now lay with the charterers to prove that the loss was due to a cause for which the shipowner was responsible. In *Steel & Craig's* case the *onus* was assumed all through to be on the charterer—

Moes Moliere & Tromp v. *Leith & Amsterdam Shipping Company*, July 5, 1867, 5 Macph. 988; *Boyson* v. *Wilson*, March 6, 1816, 1 Starkie, 236; *Pockup* v. *Thames Insurance Company*, May 16, 1878. L.R., 3 Q.B. Div. 594; *Czech* v. *General Steam Navigation Company*, November 9, 1867, L.R., 3 C.P. 14; Bell's Com. i. (7th ed.) 597-663-664. On the evidence, the defender's theory of the cause of the accident, namely, that the water had been allowed to get too low in the boiler, was far more probable than the pursuer's. If it were held that the defender's theory was the true one, then the loss of the ship was due to an "error of navigation," because the lowness of the water in the boiler had been caused by the engineer's shutting off the feeds. Further, it was not proved that the mud which led to the accident by clogging the valves of the water-gauge, and so misleading the engineer as to the amount of water in the boiler, was taken in at Seville. On the contrary, it was much more likely to have been taken in when the vessel grounded on the bank on its way to the sea. If this were held to be so, the loss was due to a "peril of the sea." "Perils of the sea" were to be construed in the same way in charter-parties as in contracts of marine insurance. The "*Inchmaree*," July 14, 1887, 12 App. Cas. 484; the "*Xantho*," July 14, 1887, 12 App. Cas. 503; the "*Inchrhona*," July 14, 1887, 12 App. Cas. 518. Assuming that the pursuer's view of the accident was proved, namely, that the mud taken in at Seville subsequently caked on the crowns of the wing furnaces, and so caused them to get overheated and to collapse, the owners were still not liable, as the taking in of dangerously muddy water was "an error of navigation." These terms were the same as "improper navigation," and included any error on the part of master or crew, which resulted in the ship not completing her journey in safety. The words "during the voyage" in the charter-party could not prevent the exceptions applying to a period when the preparations for starting had commenced — *Carmichael* v. *Liverpool Indemnity Association*, May 19, 1887, L.R., 19 Q.B. Div. 242; *Good* v. *London Protecting Association*, June 23, 1871, L.R., 6 C.P. 563; the "*Warkworth*," June 28, 1884, L.R., 9 Prob. Div. 145; the "*Glenfruin*," March 31, 1885, L.R., 10 Prob. Div. 103. What was the "voyage" here, and where did it begin? The vessel was chartered to make an out-and-home voyage, and the voyage began at Swansea. It was clear that the shipowner was bound to furnish a seaworthy ship there, and it could scarcely be doubted that if the vessel had been wrecked in a storm on the way to Seville the owners would have been protected by the exception in the charter-party—Scrutton on Charter-Parties, 67; *Hudson* v. *Hill*, May 27, 1874, 43 L.J., C.P. 273; *Bruce* v. *Nicolopulo*, May 30, 1855, Hur. & Gord. Rep., 11 Exch. 129; *Nelson* v. *Dahl*, August 8, 1879, 12 Ch. Div. 568. But supposing the words "during the voyage" had the restrictive effect contended for by the pursuer, the danger from the presence of muddy water in the boiler could have been obviated by that water being blown out when the vessel got to sea. The method of doing so was familiar to engineers, and the failure to take this precaution was an "error of navigation." The facts relied on as constituting unseaworthiness in *Steel & Craig's* case were of quite a different character from those here. There the source of danger could not have been easily removed, whereas in this case it could have been. This and the difference of the two contracts distinguished the two cases from one another. As to the alleged defect in the sails, the pursuer's averment was not proved, and the best of sails could not have saved the vessel in the actual circumstances of the case.

The pursuer and respondent argued—The defenders had failed to deliver the cargo, and so the *onus* lay primarily on them to account for their failure. Admitting that they had discharged that *onus* by showing that the vessel had been wrecked, and had thus *prima facie* been lost by "peril of the sea," the *onus* was again shifted when it was proved that the official cause of the loss was a breakdown of the steam power, and it remained with the defenders to prove that the breakdown was due to "an error or negligence of navigation." This they had failed to do—*Williams* v. *Dobbie*, June 29, 1884, 11 R. 982. The weight of the evidence supported the pursuer's theory of the cause of the accident, that it was due to the formation of a muddy cake on the furnace crowns. But whether the pursuer's or the defenders' theory was the true one, the loss of the vessel was due to the presence of mud in her boiler, and it was much more likely that that mud had been taken in at Seville, when the boiler was filled, than during the short time while the vessel was on the bank. It was further argued by the defenders that even if the mud which did the damage was taken on board at Seville, still that was an "error of navigation." But it was not an error "during the voyage." That had been already decided in the case of *The Seville Sulphur and Copper Company's* case, *ante*, vol. xxv., 437, 15 R. 616. As the charter-party was imported into the contract by reference in the bill of lading, these words were part of the contract, and the voyage must be that for which they were then preparing. In the case of *Bruce* v. *Nicolopulo* the vessel at the time she was seized was under the charterers' orders. And though several of the other cases on this point amounted to this, that where a shipowner had undertaken to go to a port for goods, and was prevented by an excepted cause, he would be excused, that did not solve the question whether the shipowner when he came to the port of lading, and granted bill of lading, was absolved from his obligation to provide a sea-worthy ship. None of the cases quoted by the pursuer at all touched the question whether the shipowner would be liable for accidents in the port of loading—*Worms* v. *Storey*, November 23, 1855, 11 Exch. H. & G.'s Rep. 427; *Cohn* v. *Davidson*, February 9, 1877, 2 Q.B. Div. 455; *Smith* v. *Darl & Son*, November 28, 1884, 14 Q.B. Div. 105. If the pursuer was right the vessel started on her voyage with a dangerous amount of mud in her boiler. That mud could not have been blown out when the vessel got to sea, as it had had time to harden before steam was got up, and when the rolling of the vessel showed mud the weather was too rough for the operation of "blowing out" the boiler. The vessel therefore left Seville in an unseaworthy condition. This case was *a fortiori* of *Steel & Craig*. Any difference in the two contracts was to the advantage of the pursuer's argument—

Steel & Craig v. *State Line Steamship Company*, July 20, 1877, 4 R. 657 (H. of L.) 103; *Kopitoff* v. *Wilson*, February 23, 1876, L.R. 1 Q.B. Div. 377; *Tattersall* v. *National Steamship Company*, March 11, 1884, L.R. 12 Q. B. Div. 297; Arnold on Marine Insurance, 660, *et seq.* Taking the defenders' theory of the cause of the breakdown to be the true one, the loss of the ship could not fairly be said to be due to an "error or negligence of navigation." All that could be required of the engineer was ordinary skill and care. If he was naturally deceived by the choking of the gauge-glass, and so led to cut off the feeds, with the result that the furnace crowns collapsed, that was not "error or negligence of navigation" in the sense of the contract. Further, if the vessel had been furnished with a supply of good sails she would have been able to keep off shore. The freighters were entitled to the chance that if the steam power failed the ship might be got off by sail—Arnold on Marine Insurance (6th ed.) 673.

At advising—

Lord Adam—This is an action brought by the charterer of the steamship "Ethelwolf" against the owners for payment of the sum of £1536 in respect of their failure to deliver a cargo of oranges shipped by the charterer on board the steamship at Seville.

By charter-party entered into between them, of date 2nd September 1886, it was agreed that the said ship being tight, staunch, strong, well-manned, victualled, equipped, and in every way seaworthy and well fitted for the voyage, should, with all possible speed, sail and proceed to Seville, Spain, and that the master should take and receive on board the said ship from the agent of the charterer a cargo of fruit, say not less than 3000 H/chests oranges.

It was, further, thereby agreed that the master should sign bills of lading at any freight required by charterer, but without prejudice to the charter-party.

The charter-party further contained a clause in these terms—"Penalty for non-performance of this agreement, estimated amount of freight, the Act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and error or negligence of navigation of whatsoever nature and kind during the said voyage always excepted."

The vessel left Swansea on the 20th November, and arrived at Seville on the 27th November 1886. She then shipped 3200 boxes of oranges, for which on 4th December the master signed a bill of lading, which bore that the said oranges were to be delivered at the port of Antwerp—"Act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted."

It will be observed that the bill of lading does not except "error or negligence of navigation of whatever nature or kind during the voyage" as the charter-party does, but it was not disputed by the charterer that he was bound by the clause of exception as contained in the charter-party.

The vessel sailed from Seville on her voyage to Antwerp on the morning of the 5th December. Seville is on the river Guadalquiver, about sixty miles from the sea. About an hour after leaving Seville the vessel grounded on a bank in the river, where she remained about an hour, more or less. On getting off she proceeded on her voyage, and got to sea on the same evening. The weather was fine during the 6th and 7th, and all went well, but on the 8th it began to blow hard with a very high sea. About 4·30 on the afternoon of that day the crowns of the wing furnaces of the boiler came down. When this occurred the engineer, to prevent an explosion, drew the fires. The captain, finding the ship was being blown on a lee shore, ordered the fires to be re-lighted. The engineer, accordingly, about 6·30 re-filled the boiler with water from the sea and re-lighted the fires. The boiler, however, leaked to such an extent that sufficient steam pressure could not be maintained to prevent the vessel from being driven on shore, and she and her cargo were lost on the coast of Spain, near Vigo, on the afternoon of 10th December. There is no question that the vessel was wrecked in consequence of the failure of steam power, and that this failure is to be attributed to the coming down of the crowns of the furnaces, which necessitated the drawing of the fires.

The loss of the ship was undoubtedly caused "by the perils of the sea," and falls within the risks excepted in the charter-party. But the charterer maintained that the ship was unseaworthy when she left Seville, and that this unseaworthiness caused the loss of the ship. No doubt, if this be so, the owners will be liable. The owners, on the other hand, maintain that the ship was in every respect seaworthy, and that the injury to her boiler was caused by the error or negligence of the engineer, and that they are not liable in respect of the exception of error or negligence of navigation" contained in the charter-party. These therefore are the questions for decision in this case, and the first is the question of fact, whether the vessel was seaworthy when she sailed from Seville and commenced her voyage.

The charterer sets forth, in the 4th article of his condescendence, several particulars in respect of which he alleges that the ship was unseaworthy, but the only one about which there is, I think, any room for serious controversy is thus expressed—"She was further unseaworthy in respect that prior to leaving Seville the boiler was filled with excessively muddy water. Such water is very injurious to boilers, and apt to derange the boiler connections, and to lead to injury to the furnace crowns."

The facts as to filling the boiler with water at Seville appear to be as follows—The boiler had been blown down (that is, emptied of water) after the ship arrived at Seville for the purpose of making some repairs. These having been finished, the crowns of the furnace were cleaned and the boiler washed out. Then about 10 o'clock on the night of Friday the 3rd December, or about thirty-six hours before the vessel sailed, the boiler was filled with water from the river. This time was chosen because it was then high tide, when the water of the river would probably be freeest of mud.

The question is, whether the taking in of this water rendered the ship unseaworthy? There is no doubt, I think, that the presence of mud in the boiler of a steamer in large quantity may be

an element of danger. But I think it is proved that when water is taken in from a muddy river such as the Guadalquiver, it may be objectionable as tending to produce priming, and to clog the valves and their connections, but that it is not a source of danger to the boiler by forming a deposit on the furnace crowns or otherwise.

It is proved that there are no hydrants or other facilities at Seville by which steamers which have blown down their boilers can re-fill them except with water from the river. It is proved that it is the regular practice of such steamers to do so, and that no injury has resulted to them from doing so. There is no contradictory evidence as to this. It is also proved that it is the practice of steamers to do so in rivers of a like character to the Guadalquiver, such as the Seine and Garonne. If this be so, it would be difficult to hold that all such steamers are thereby rendered unseaworthy.

But it is said that in this case the muddy water was taken in so long before the vessel sailed, about thirty-six hours, that the earthy matter in suspension would be precipitated and so cause danger to the boiler. There is, however, no evidence that it was anything out of the usual course to fill the boiler so long before sailing, or that the earthy matter would not have been as completely precipitated in six as in thirty-six hours. There are no questions asked on the subject. It does not appear to have occurred to the pursuer, when the witnesses were being examined, that there was anything objectionable in the matter. I do not myself see that the mud constituted a greater element of danger, lying at the bottom of the boiler, than when in suspension in the water, and in fact the pursuer's case is, that the mud was stirred up from the bottom by the rolling of the ship, and in this way, and not till then, became a source of danger.

But the defenders have another answer on this part of the case. They say that if the presence of the mud in the boiler constituted such an element of danger as to produce unseaworthiness if not removed, yet it could and ought to have been removed as soon as the vessel got to sea by blowing it out of the boiler and taking in sea water. This, they say, is a method quite simple, and known to every engineer, and that if the vessel was lost by reason of the presence of the mud she was not lost because of unseaworthiness, but because of the error or negligence of the engineer in not blowing it out of the boiler. In my opinion the defenders are right in this contention, and that it is supported by the principles laid down in the House of Lords in the case of *Steel & Craig*, 4 R. 103. In that case, where a ship sailed with an open or insufficiently secured porthole, by which the water entered and damaged the cargo, it was suggested that whether the ship was or was not seaworthy depended on the position of the porthole; if it was easily accessible, and could be easily closed, the ship would be seaworthy; but if it was not so accessible, but would cost much time and trouble to get access to it in order to put it right, the ship might be unseaworthy. So here, if the steamer was in no danger from the mud in the boiler so long as she was in the Guadalquiver river—and it is not suggested that she was—and if the mud could have been easily removed on reaching the sea, then I think she was in a seaworthy condition, and perfectly fit for her voyage when she left Seville, and that the danger, if any, from the state of the water arose from the engineer not having removed it.

Now, I think it is proved that the muddy water in the boiler could have been easily removed. One of the witnesses, Mackenzie, thus describes the operation—"It could easily," he says, "have been cleared out afterwards, when the vessel got out to sea—that could have been done by blowing or scumming the boiler. The bottom blow-off cock could have been turned on, and the water taken in from the sea alternately until the water in the boiler was found to be perfectly clear. That is the proper method, and is well known to engineers." Six or seven of the defenders' witnesses speak of this as being a common and simple method of getting rid of mud in boilers.

But the pursuer has examined three witnesses—Messrs Neish, Donaldson, and Darling—who say that it would not have been practicable in this case, because the mud had had time to settle in the bottom of the boiler. Neish says "that if the mud in the water had thirty-six hours to settle before steam had been got up, I don't think you could blow it off after steam had been got up. The mud would settle down in the bottom of the boiler, and get comparatively hard with the cold water, and get quite quiescent. There would be no inducement for it to be blown off, except just round about the orifice of the blow-off cock;" and Messrs Donaldson and Darling agree with him.

Mr Neish, however, says at another part of his evidence that the particles forming the mud would be in the condition of loose soft sludge, and if this was its condition, I do not see why it should not be easily blown off. I do not think it is proved that the mud would get into any such hardened condition as here described. The evidence shows that the mud was in such a condition that when the ship began to roll it mixed with the water, which had theretofore been clear. Roger, the assistant engineer, is asked—"Did anything unusual occur during your watch?—(A) Yes, the water in the gauge-glass got very muddy about three in the morning" (that was of the 8th). "(Q) What was wrong?—(A) The wind had got abeam, and the rolling had turned up the mud. When I saw the mud I blew the gauge-glass down." He then says he did this several times, and reported it to the engineer at six o'clock, when he was relieved from his watch. He came back at eight, when he noticed that the water in the gauge-glass was very muddy, and he says that he kept blowing it down.

The pursuer's witness Donaldson is asked—"If an engineer could not get better water than muddy water, and had then to take it out, his duty would be to blow down the boiler, and thereby blow out the muddy water when he got to sea?—(A) Yes, I should think it would be his duty to do so. I think he could not get the whole out in that way which had settled as a deposit. (Q) But if the vessel began to roll, so as to mix the mud with the water, he could blow it off then?—(A) Yes, he could get rid of it then, when mixed with the water. I think that if mud was moving about in the boiler in such a way that it could reach the furnace-crowns, or show itself in the gauge-glass, it could have been blown off. (Q) Is it not a perfectly familiar operation to

engineers of ordinary skill to blow muddy water out?—(A) Yes."

It appears to me therefore to be proved that there could have been no difficulty in this case in blowing out the mud, either when the ship first reached the sea, or, at any rate, later, when it was moving about in the boiler.

The two engineers of the ship, who ought to have known best, are of that opinion. Roger says so, and Thomson, the engineer, says—"I could have got the supplementary feed to work and put in sea water, and blown out the river water and the mud along with it. That, however, did not occur to me at the time;" and he says—"We could have blown off the mud after we started if we had tried. I did not do so because I did not know there was any mud in the boiler to the extent of being a source of danger."

On this part of the case therefore I am of opinion that the ship was seaworthy when she sailed on her voyage from Seville.

The defenders maintained further, that if the ship was unseaworthy because of mud in the boiler, it was not the muddy water taken at Seville that rendered her so, but mud taken in when she was aground on the bank in the river, in which case they say the vessel was lost from dangers of navigation during the voyage.

It is not necessary in the view I have taken of the case to consider that matter at length, but my opinion is that the quantity then taken in can have made no appreciable difference on the amount of mud already in the boiler due to the water taken in at Seville, and can have made no difference in the result.

It is also right to state that it was maintained by the owners that on a sound construction of the charter-party and bill of lading the voyage must be held to have commenced at Swansea and not at Seville; that consequently, if the taking in of the muddy water at Seville rendered the vessel unseaworthy, that was caused by error or negligence of navigation during the voyage, for which under the charter-party they are not liable. In the view, however, which I take of the facts it is not necessary to determine that question either.

The next question to be considered is the cause of the collapse or falling down of the furnace crowns. The falling down of the furnace crowns is undoubtedly caused by the over-heating of the metal, and this again is attributable to one or other of two causes, either to the deposit thereon of a non-conducting crust, which prevents the transmission of heat from the metal to the water in the boiler, or to the water in the boiler having been allowed to fall below level of the crowns.

The facts bearing on this part of the case appear to be as follows—Nothing went wrong with the engines or boilers until about 11·30 on the morning of the 8th, when the gauge-glass instantly filled with water. This, no doubt, was caused by the gauge-valves, or its connections becoming clogged with mud. About 4·30 the crown of the port-furnace collapsed, and a few minutes afterwards that of the starboard furnace. Thereupon the engineer drew the fires and reported the fact to the captain. The captain, however, finding that he was drifting on a lee shore, shortly afterwards ordered steam to be got up again. The boiler was re-filled from the sea and the fires re-lighted about 6·30. The consequence, however, of the cold water coming in contact with the still heated metal of the boiler, such an amount of leakage took place that steam of a sufficient pressure in the boiler could not be got up to enable the vessel to make headway enough to keep her off the land, and hence the catastrophe.

I think the collapse of the crowns of the furnaces was caused by the water in the boiler having been allowed to fall below the level of their crowns. The engineer is of that opinion now, and he was of that opinion at the time. This is clear from Captain Cargill's evidence. He says—"I remember about 4·30 in the afternoon of the 8th having a conversation with the engineer. He told me that he would have to withdraw the fires. (Q) What reason did he give?—That the water had got so low in the boiler that he could not keep up the steam." And further down he is asked—"Did you remonstrate or say anything to him?—(A) Yes, I said the ship is in a very dangerous position to do that. Could he not keep steam on till I got the ship perhaps 8 or 10 miles from the land? Did he draw the fires?—(A) He came back and said that he must draw them, there was nothing else for it: The ship might be blown up. He did draw them." In cross-examination he is asked—"You have told us that the engineer reported to you that he had to draw the fires because the water was so short. That is so. I am sure that that is the report he made to me."

Then the fact that the crowns of the two wing furnaces, which were higher than that of the centre furnace, and consequently would be first denuded of water, came down while the centre one remained intact, indicates that the reason was want of water. Again the boiler was refilled with water from the sea before the fires were re-lighted. But this would not have been necessary and would not have been done had the boiler been fed with water in the usual way, as in that case the boiler would have been full. Then, again, the result which followed from filling with cold water the still heated boiler was exactly what was to be anticipated. The cold water coming in contact with the heated metal of the plates and tubes of the boiler, which were of different thicknesses was certain to cause unequal contraction of the metal and consequent leakage. The result was, that whereas the normal working pressure before the fires were drawn was from sixty to seventy pounds, a greater pressure than from twenty-five to thirty could not be afterwards obtained.

Nor is there any difficulty in accounting for the water having been allowed to fall so low in the boiler. The engineer is asked—"Did you ever shut off the main feed?" The answer is—"Sometimes I have done it. (Q) Did you do it on 8th December?—(A) I believe I did, but I do not remember. I thought there was too much water in the boiler from the indication of the steam packing and the engine priming. I cut off the main feed in that way, believing that that was the right thing to do." It will be observed that by shutting off the main feed he shut off all water from the boiler, as it had also the effect of shutting off the supplementary feed. He is not asked if he

turned the main feed on again. But I do not doubt that he would have said so if he could, because he could not fail to know that if he did not do so the whole blame of the loss of the ship must rest on his shoulders. That he should have neglected to turn the feed on again is perhaps to be explained by his attention having been taken up by his endeavours to rectify the gauge-glass. But however that may be, if he turned off the main feed at the time that he says that he did, and did not turn it on again, then it is proved that the crowns of the furnace collapsed about the time they might have been expected to do so.

There is one circumstance which is said to be proved, and is strongly insisted on by the pursuer, as showing that the collapse of the furnace crowns could not have been caused by want of water. It is, that as the tubes of the boiler became successively denuded of water by its evaporation, the heat would cause them to leak, and permit the escape of steam, eventually producing so large a leakage of steam, and a corresponding diminution of pressure of steam in the boiler, that the engineer could not have failed to notice it.

It is said to be proved that there was no such leakage or decrease of pressure of steam noticed, and therefore that the tubes could not have been denuded of water. As it was steam leakage that would result, the steam would escape by the smoke-jack, and it would appear that its escape might not have been noticed by the engineer.

But I do not think that it is proved that no diminution of pressure was noticed before the fires were drawn. The evidence on the point is certainly not satisfactory, because apparently the parties had not realised the importance of it when the witnesses were being examined. Rogers, the assistant-engineer, no doubt says that they were able to keep up the normal pressure till the fires were drawn. But the engineer, who was the proper person to speak as to this, is not specially examined on the subject. It may be gathered, however, from his evidence that he had noticed a diminution of pressure of steam—"Thus," he says, "I formed the idea that the boiler was getting short of steam, and that there was too much water in it;" and a little lower down he says—"At four o'clock in the afternoon" (that is, about half-an-hour before the crowns collapsed) "I gave orders to have the fires cleaned so as to try to get more steam."

We have also the evidence of Captain Cargill, who says that when the engineer informed him it would be necessary to draw the fires he told him that the water had got too low in the boiler "that he could not keep up the steam;" and again, that he said "the water had got so low in the boiler that he would be obliged to draw the fires; he could not get steam." I think therefore that it is sufficiently proved that there was a deficiency of steam in the boiler before the fires were drawn. The proof is not so satisfactory as it might have been, but the fault lies with the pursuer, who ought to have cleared up the matter if he meant to make a point of it.

I do not think it necessary to say much as to the rival theory of the pursuer, that the falling of the crowns was caused by the deposit of mud thereon. It appears to me to be based on assumptions of fact which are not proved, and do not exist in this case.

As to the deposit of mud from muddy water in the boiler, I think the evidence shows that mud *per se* will not form a dangerous deposit on the furnace-crowns of a boiler. Mr Neish, the pursuer's leading witness, says "that mud by its nature will not form a deposit or crust on the furnace-crowns so as to injure them when the boiler is under steam."

It appears, however, that mud may possibly do so when it is mixed with oil or grease, and accordingly the pursuer assumes, for the purposes of his theory, an admixture of oil and mud in this case. But there is no proof, and nothing to lead to the inference that there was any such admixture in the boiler. I think therefore that there is no foundation for the pursuer's theory. But even assuming that there might have been such a dangerous admixture of oil and mud in the boiler as the pursuer assumes, I think the facts show that it had formed no dangerous deposit on the crowns of the furnaces. If such a deposit had been formed, one would have expected it to have been first formed on the crown of the centre or lowest furnace, and that it would have come down first. In the next place, the boiler would have been in its usual condition as to water, and would not have required to be filled with water from the sea, as the engineers say they filled it. Neither would there be anything to account for the great leakage which took place after the fires were re-lit, as there would have been no cold water to come in contact with the heated metal, and nothing to cause increased leakage; and finally, if a deposit on the crowns of the furnaces had been the cause of their collapse, it is difficult to see why, after the fires were re-lit, the crown of the centre furnace should not have collapsed, and the crowns of the wing furnaces come still further down, seeing that the *origo mali*, the deposit, was presumably still upon them.

On the whole matter, I am of opinion that the collapse of the crowns of the furnaces, and consequent deficiency of steam pressure and loss of the vessel, is clearly traceable to want of water in the boiler, and that this deficiency of water was caused by the negligence of the engineer in failing to turn on the main feed after he had turned it off; that consequently the loss of the vessel was caused by error or negligence of navigation during the voyage; that therefore the failure to deliver the cargo is covered by the exception to that effect in the charter-party, and that the defenders are entitled to absolvitor.

We were referred to the case of *The Seville Sulphur and Copper Company* against the present defenders, 15 R. 616, which was an action brought against them for the delivery of 350 tons of sulphur ore, which formed part of the cargo of the "Ethelwolf," and was lost with the vessel, and in which the Second Division arrived at a different conclusion to that at which I have arrived, but it is enough to say that the evidence we have had to consider is materially different from the evidence in that case.

Lord Mure—I have come to the same conclusion as Lord Adam on all the important points raised in this case, and I concur in the views that he has expressed as to the import of the

evidence. I find it therefore unnecessary to go into any detail on any of these points. The way it has presented itself to my mind is shortly this—The cause of the wreck was plainly the failure of the boiler to answer the purposes of the boiler of a steam vessel, and that boiler, I think, failed according to the evidence from one or other of two causes—either from the effects of the mud in the water, which was said to have been improperly taken in, mixing with certain substances, and settling down on the crowns of the furnace, and thereby producing a state of matters which led to the collapse of the furnace crowns; or secondly, if that was not the cause of the accident the boiler failed through the engineer shutting of the feed, and so causing so great a decrease of water in the boiler as to produce a state of matters which would also lead in the ordinary course to the collapse of the furnace crowns. From one or other of these causes the ship was wrecked, from a want of power to enable the engine to do what was required of it in the weather which prevailed at the time. Now, it appears to me upon the evidence that to whichever of these causes we attribute the accident, there was negligence in the navigation of the vessel which led to this collapse. It was the duty of the commander of the vessel, knowing that there had been muddy water taken in at Seville to get quit of that muddy water as they went down the river, and it is clear on the evidence that a well managed vessel leaving Seville in these circumstances would take that course. The other cause of the accident—the shutting off of the feed—as has been explained by Lord Adam, was done by the engineer through a mistake in regard to the working of the boiler at the time when he examined it. He took the wrong course, and therefore there was negligence in that respect. Now, to whichever of these causes we are to attribute the accident, there was negligence on the part of the crew leading to the loss of the vessel, and that negligence is covered by the words of the charter-party. On the question of the seaworthiness of the vessel on leaving Seville, I am quite unable to see that the fact of her taking in muddy water at Seville was of itself sufficient to render the vessel unseaworthy, because even assuming it to be proved that the water taken in from the river was extra muddy, I am not quite sure that that is proved, but even assuming it to be proved, I think it is plain on the evidence that any master who chooses to attend to the ship can take means to get that muddy water cleared out of the boiler before he gets to sea on the way down the river. No doubt there is contradictory evidence on that point, but the evidence led by the defender on that part of the case is to my mind conclusive that that muddy water would not have operated injuriously if there had been a proper exercise of discretion on the part of the commander on his way down the river. Therefore I think the vessel was not unseaworthy.

Lord Shand—I had an opportunity of considering the opinion which my brother Lord Adam has delivered, and I entirely concur in that opinion, both in the substance of it and in the careful and detailed examination of the evidence which Lord Adam has made, subject to one observation, and only one, namely, that I attach more importance than his Lordship has done to the stranding of the steamer on the bank in the river shortly after she left Seville. I do not mean to go into the evidence, but taking it as a whole I think there was on that occasion a considerable amount of mud drawn in from the river during the struggle that was made to get off the bank. The evidence shows, I think, that the steamer was on the bank for a material time, and there was a good deal of stirring up of the mud in the attempt to get off the bank, and accordingly I think there was then a considerable addition made to any mud there was previously in the boiler. If so, and if the loss of the vessel can be attributed to the presence of mud in the boiler, of course the defence of perils of the sea would cover the loss if caused by the presence of mud taken in after the vessel had left Seville, and in this view it is important to observe there is a mass of evidence that vessels did frequently take in the ordinary muddy water of the Guadalquiver at Seville without supervening mischief of any kind.

Then, generally, in regard to the case the pursuer's claim is made upon the footing that the cargo was lost and the ship lost because the taking in of the muddy water, producing unseaworthiness, really caused the accident, by having been the direct cause of the falling down of the crowns of the boiler, and consequent failure of the motive power. Now the Court must be satisfied upon this point, not only that the vessel was unseaworthy, but that the unseaworthiness caused the loss of the cargo. The case is not one like that of insurance where it is quite sufficient, in order to void a policy to prove that there was unseaworthiness, even though the unseaworthiness was not proved to be the cause of the loss. In the case of insurance, it is a condition-precedent that the vessel shall be seaworthy, and if that condition be not fulfilled the contract of insurance cannot be enforced. In this case, however, there must not only be unseaworthiness, but it must appear on the evidence that the unseaworthiness caused the loss. Now, we had a good deal of discussion upon the question of *onus* in the case, and I desire to say a few words upon that point. It appears to me in the first place, that the shipowners having been entrusted with the carriage of the goods, and being unable to deliver them, have an *onus* upon them to show that they are to be relieved of the obligation to deliver, and I think that *onus* is discharged primarily by showing that the vessel was driven on a lee shore and wrecked. While that was being done, however, it came out in the evidence that the cause of the vessel being so wrecked and driven on shore was the failure of motive power. The pursuer maintains that it is clear that the *onus* is thereby thrown upon the defenders in the action to account for this, that it is to be presumed that the failure of the motive power arose from the unseaworthiness in respect of the boiler being defective, or in a condition dangerous to the ship when she left Seville. The defenders say no; that there is a clause in the charter-party saving them from the effects of the negligence of those who were working the ship, and that this was just as likely to happen from the negligence of those working the machinery as from the alleged defective state of the machinery itself three or four days before, when

she left Seville, and before she encountered the severe weather that she did. Upon that matter it appears to me that there is no presumption of law arising in the circumstances one way or the other which can be referred to as determining the question of *onus*. It is purely a question of presumption of fact one way or the other, and that is for the judge or jury dealing with the circumstances of each case. The case of *Cohen* v. *Davidson*, referred to in the course of the discussion, was one in which, I think, the presumption of fact was absolutely clear. A vessel or lighter drawn into the harbour, in all respects apparently seaworthy, took in her cargo, and everything appeared right when she left the pier, but within two hours of her getting to sea a very heavy leakage occurred, and that leakage went on and became so bad that the vessel ultimately sank. The only inference that could be drawn from the circumstances there was, that the vessel had received damage while the cargo was being put on board, and that a hole had been there driven in the bottom, and consequently it was there held that she was unseaworthy at the time of sailing. That was simply, however, because of the special circumstances that occurred. In this case it is perhaps difficult to determine exactly how the presumption stands after this vessel had been three or four days out, and her machinery had gone wrong. If one could conceive a case in which there was no evidence to be got on the subject, and no light to be had on the matter at all, I rather think the pursuer would be right, that one would rather infer unseaworthiness at starting than negligence causing the accident. But we have no case presenting these features, for in this case we have a body of evidence with two conflicting theories, and I am quite clear that the Court must on that evidence simply come to the conclusion on these theories, and say which of them is right. We have a great deal of evidence on both sides, and I do not consider the question of *onus* to be of the slightest consequence. We have simply the two theories, and the evidence in support of these is not so nicely balanced that you cannot say which of the two alleged causes of the failure of the vessel's motive power is the more probable. On the contrary, there is evidence which, I think, enables the Court to come to a conclusion as to the true cause.

Now, so taking the case on this question of *onus*, which I think is simply a question as to the presumption arising from fact, I entirely agree in the view which Lord Adam has expressed as to the true cause of this accident. And even supposing it had been proved that the vessel had taken in so much mud from the muddy water, taken in at Seville, as might possibly cause danger to the boiler (which, however, is not proved in my opinion), yet I am of opinion with his Lordship that the pursuer has failed to make out that this was really the cause of the accident. It appears to me that the theory on which the pursuer proceeds is ingenious, but much too speculative, and having fully considered the proof on the subject, the theory which seems to me to proceed on too many assumptions of fact, does not recommend itself to my mind. I do not think that there are facts proved in the evidence on which that theory can be satisfactorily established, and I think there are facts proved which conflict with it. When the vessel left Seville, according to Neish and other witnesses, who took the view that mud had ultimately settled down on the crowns of the boiler and caused them to collapse, everyone seems to be agreed that the muddy water having been thirty-six hours in the boiler, the mud must have fallen as a deposit—I shall not call it a cake, because it was a loose deposit—on the bottom of the boiler. There is no suggestion that there was anything on the furnace crowns then. Now, what is necessary in order to make out Mr Neish's theory? In the first place, the mud which was at the bottom has to be stirred up, and I agree with the witnesses in thinking that it necessarily must have been stirred up. The putting on of fires and the heating of the boiler would immediately cause a certain amount of boiling and stirring up of the mud, and as she went to sea the motion of the vessel would increase that, and after the third day, when the wind and the sea began to rise it would be increased more and more. In that state of matters it appears to me that the mud which was at the bottom must have got all through the boiler. But to make out the pursuer's theory it is required to bring that mud down and deposit it on the two upper furnace-crowns which first gave way, and to deposit it there so that it became a cake adhering to the metal in such a way that the fire was no longer able to act on the water around the two upper furnace-crowns. That is the theory I think. It appears to me that if there would be a settling of mud there—I doubt whether there was opportunity from the motion of the vessel for the settling of the mud at all—it would go to the bottom of the boiler again, and that at least the lowest furnace crown would be the one most readily covered, and would be the first to show symptoms of weakness and to come down, whereas it was the two upper ones that came down. And besides, to carry out the theory you require (1) a certain admixture of oil so as to make the mud adhesive, while the presence of the oil requisite is not proved, and (2) the existence of a current or currents in the boiler of this peculiar nature that they would carry the mud over the low under crown and land it on the top of the two higher side crowns. Looking at all the evidence on the subject, I can only say that this theory does not commend itself to my mind. I think the accident was much more likely to have occurred, and I believe it did occur, according to the evidence, because Thomson, the engineer, to some extent lost his head in the difficulty in which he was placed. When he went to the glass which indicated the presence of mud in the boiler, and the water very high up, and at a time when he says he thought there was priming also, the first thing he would naturally do was to shut off the feeds. The result of this would of course be to let the water get gradually low, and I think the real evidence in the case tends to show that this was what happened. And the first account accordingly which Thomson gave to the captain, when the occurrence was looking serious, was that the boiler was short of water. If the true view of the evidence be that the engineer cut off the water and omitted in proper time to turn it on again, as I think he is brought to confess, that accounts entirely for what happened. The water fell in the boiler, the two upper furnace-

crowns became exposed to great heat, there was no water to cover them, the action of the fire at once told, and the necessary result was that the two furnace-crowns came down. Then there are the other matters which Lord Adam so fully went into on the evidence. I could not give a better *résumé* of the evidence on that point than he has done. And so I am of opinion that at the outset of the case there is a failure on the pursuer's part to prove that the cause of the accident was unseaworthiness of the vessel.

But even if that were the cause I am still of opinion that the pursuer cannot succeed, because I do not think it has been proved that the vessel was unseaworthy. The case of *Steel & Craig* v. *The State Line Shipping Company* shows that if a vessel goes to sea with some defect which, though it would be a cause of danger if left unremedied, may yet be readily cured, as by shutting a porthole, or by any operation that will obviate the danger before it arises, even when the vessel is at sea, that cannot be regarded as unseaworthiness. The owners of the vessel stipulated that any error of navigation during the voyage should relieve them from responsibility. Now, I think the evidence in this case brings out a point which was not before the other Division of the Court in the former case, namely, that if there is such a quantity of mud in the water in the boiler as to lead to any apprehension of danger the engineer has it in his power at once to cure that by blowing off the muddy water, and taking in a supply of sea water. I am not prepared to say that when the vessel left Seville there was sufficient mud to cause danger, but if there was a dangerous quantity of mud so taken in everyone is agreed that the engineer had nothing to do but blow it off. The mud must be shaken up before it could produce the accident—that is part of the pursuer's case—and as soon as it was shaken up in the water, then was the time to blow it off. It is said by the pursuer's witnesses that the mud was all lying at the bottom, and that blowing it off would only take off the part of the mud at and around the orifice by which the water was driven out, but the theory of the pursuer's case is that it would be all shaken up before being deposited again on the crowns. There were two days of fine weather, and only by the third day there was a heavy sea, so there was ample opportunity to have the muddy water blown off, and to take in sea water, and Thomson says if it had occurred to him he would have taken that course. Therefore I am of opinion that in this view it was not from unseaworthiness, but from an omission on the part of the engineer, that the loss occurred. Taking it in either way, my opinion is that the loss was caused either by Thomson having cut off the water and omitted to turn on the feed again, or that it was caused by his failure to blow off the muddy water. In either case the loss was caused by the negligence of one of the servants of the defenders, and on these grounds I concur in the opinion of Lord Adam.

The pursuers maintained another point in argument, viz., that they were not bound under the special terms of the charter-party to have a seaworthy ship starting from Seville, but the best consideration I have been able to give to that question leads me to the opinion that this argument is unsound. It is quite true that the vessel began her voyage at Swansea, and the provision of the charter-party undoubtedly is, that the vessel being then staunch and strong and seaworthy, and fitted for the voyage, should sail for Seville and there take on board her cargo, and then the exceptions of perils of the sea and errors in navigation occur relating to the voyage as a whole. I do not doubt in the least that if the vessel, being seaworthy when she left Swansea, had been lost or delayed on her way to Seville by a cause within the clause of exceptions no claim of damage could have been made against the owners of the vessel for non-arrival or non-arrival in time. The exceptions would apply to any part of the voyage contemplated. But, on the other hand, I am of opinion that though we have here a voyage in one sense out and home, we have also a cargo voyage. The charterers required to have a vessel out into which they could load their cargo, and it appears to me—and there is pretty clear authority for saying—that in every case where there is a provision for taking cargo on board, even on such a charter-party as we have here, it is an implied term of that contract that the ship at the time she leaves with her cargo shall be seaworthy. There are two leading cases on that point which were referred to, one of them in 1876 and the other in 1877, in the Queen's Bench Division of the High Court of England. The first of these was the case of *Kopitoff*, where a bill of lading having been granted for goods, although there was no stipulation on the subject, the Court held that if a person undertakes carriage of goods on board his ship there is implied in the contract that he shall present a seaworthy ship to carry the cargo. That was the case of *Kopitoff* in 1 Q.B. Div. Rep. The other was the case of *Cohen* in 2 Q.B. Div. Rep., and there the case of *Kopitoff* came up again for consideration, but with this difference, that in the case of *Cohen* which I have already referred to on another point, there was a charter-party which provided that the vessel should leave a certain place where she was, go into harbour, take on board her cargo, and then sail with it. It seemed to be proved that the vessel was perfectly sound when she left the place at which she had been lying when the charter-party was entered into, that she was perfectly seaworthy when she presented herself to take on board the cargo, but an accident occurred by grazing on the harbour bottom before she left the harbour, and it was maintained that if the vessel was seaworthy when the charter was signed, and when she started to sail for the harbour, the owner was not bound to have her seaworthy when she started with her cargo on board, but the Court in that case laid down the same principle as in the case of the bill of lading, viz., that when the charterer came to put the cargo on board the vessel, then is the time when it is important for him that the ship shall be seaworthy, and unless that undertaking is positively excluded it must be held to be implied in the contract. I do not propose to read the opinions, but the judgment came very clearly to this, that as in a bill of lading, so in every charter-party, there is an implied undertaking that the vessel at the time of sailing with her cargo shall be seaworthy. And that is very well explained in the unanimous opinion of the Court, that to hold otherwise might defeat the power that a shipper of goods has to make his

insurance effectual. He cannot insure his goods except on the footing of giving an implied warranty of seaworthiness, and so the law holds in the contract of carriage that seaworthiness is plainly implied as an obligation on the shipowner. I am therefore of opinion that that plea maintained on the part of the defenders would not have availed them. But on the facts of the case otherwise, as I have stated, I am of opinion that the defenders ought to succeed, and that the judgment of the Lord Ordinary should be recalled.

Lord President—I concur entirely in the opinion of Lord Adam, and have nothing to add.

The Court recalled the interlocutor of the Lord Ordinary, sustained the defences, and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuer—Asher, Q.C.—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders—Balfour, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, December 21.

FIRST DIVISION.

KLENCK *v.* EAST INDIA COMPANY FOR MINING AND EXPLORATION, LIMITED.

Limited Company—Memorandum and Articles of Association—Issue of Shares at a Discount—Companies Act 1862, *secs.* 7, 8, 12, 25, *Table A* (27)—*Companies Act* 1867, *sec.* 25.

It is *ultra vires* of a company incorporated with limited liability under the Companies Acts 1862 to 1880 to issue its shares at a discount (whether the memorandum of association bears to confer such a power or not), because such a company has no power to reduce the capital specified in the memorandum of association.

The articles and memorandum of association of a limited company, incorporated under the Companies Acts 1862 to 1883, bore to confer power on the company to issue shares at a discount. The company issued such shares in conformity with certain special resolutions and a contract registered with the registrar. A shareholder, who was a party to these special resolutions and contract, presented a petition to the Court to have the register of the company rectified by deletion of his name as holder of 300 shares issued at a discount, on the ground that the issue of these shares was *ultra vires* of the company, and that consequently their allotment to him and the entry of his name on the register were also *ultra vires* and illegal. The Court *granted* the petition.

Opinion (*per* Lord Shand) that in certain cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount.

The East India Company for Exploration and Mining, Limited, was incorporated under the Companies Acts 1862 to 1880 in 1881. The capital of the company was £100,000 in 100,000 shares of £1 each, of which 99,000 were taken up.

The memorandum of association contained the following clause:—"The objects for which the company is established are—From time to time to make the shares of capital original, increased, or reduced, or any part thereof ordinary or preferred, or guaranteed or deferred shares, and to convert the same into shares of different nominal amount, . . . and to issue all or any of such shares at par, or at a discount, or at a premium, or as paid up or partly paid up."

By the articles it was provided, *inter alia*—"(8) The company may from time to time by special resolution increase the capital by the creation of new shares." . . .

"(9) Such increased capital may be issued as ordinary shares, or preferred or guaranteed or deferred shares, or partly by one of these modes and partly by another or others, and may be issued at par, or at a discount, or at a premium." . . .

By special resolution passed on 6th January 1886, confirmed on February 5, 1886, and registered on 16th May 1886, it was resolved that the capital of the company should be increased from £100,000, divided into 100,000 shares, to £300,000, divided into 300,000 shares of £1 each.

By special resolution, passed on 13th June, confirmed on 30th June, and registered 8th July 1887, it was resolved, *inter alia*—"(1) That the directors be, and they are hereby authorised to issue 150,000 shares of £1 each, *quoad* 123,270 shares at a discount of not more than 12s. 6d. per share."

In pursuance of this resolution the company offered 123,270 shares at a discount of 12s. 6d. per share, and John Matthew Klenck applied to the directors for 300 shares, and at the same time remitted £15, being 1s. per share thereon. On 26th August 1887 he received notice that these shares had been allotted to him, and that he was entered in the company's books as holder of these shares.

On 31st May 1888 Mr Klenck presented a petition craving the Court "to ordain that the register of said company be rectified by deleting therefrom the entry of the petitioner's name as holder of the 300 shares of the capital stock of the said company (part of the shares issued in July 1887) standing in his name in the said register; and to direct that due notice of such rectification be given to the Registrar of Joint-Stock Companies in Scotland; and further, to interdict and prohibit the said company from making or enforcing any call or calls upon the petitioner in respect of the said shares, or from charging him for any alleged price in respect thereof, or from in any way holding or treating him as a shareholder of the said company in respect of the said 300 shares; and further, to decern and ordain the said company to make payment to the petitioner of the sum of £15, paid by him in respect of said shares, with interest thereon at the rate of 5 per centum per annum, from the 25th day of July 1887; and to find the said company liable in the expenses incurred in this application."

The petitioner averred that his application for the shares had been made on his part and accepted by the company on the condition that on

each share 12s. 6d. was to be credited as paid up, and that each share was to be subject only to a liability of 7s. 6d. thereon. This issue of shares at 12s. 6d. discount per share was *ultra vires* of the company, and consequently the allotment of the shares to the petitioner and the entry of his name on the register were also *ultra vires* and illegal. The company had refused to comply with his request to have his name removed from the register.

In their answers the company denied that the issue of shares at a discount, and their allotment to the petitioner and the entry of his name on the register were illegal, and averred that the said shares were issued in terms of the memorandum and articles of association, and of an agreement between the company and Mr James Napier and the Goldfields Prospecting Company, Limited, dated 24th and 27th May 1887, and of the resolutions of the company. The petitioner and the other shareholders further agreed with the company that the said shares should be so issued; and the agreement to this effect, dated 25th October 1887, was duly registered in terms of the Companies Act 1867, section 25, before the shares were issued. Numerous obligations had been incurred by the company on the faith of the petitioner and the other persons in the same position being shareholders. Both the company and the creditors relied on the petitioner and the said other persons being shareholders. The petitioner applied for and accepted the shares in question in full knowledge of the terms of the memorandum and articles of association. The respondents submitted that the petitoner was barred from insisting in the petition; that his allegations were irrelevant, and, so far as material, unfounded in fact; and that the petition should be refused, with expenses.

By section 7 of the Companies Acts 1862 it is enacted:—"The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound-up."

Section 8 of the same Act provides, *inter alia*:—"Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things—that is to say, . . . (5) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount."

Section 12 provides:—"Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association."

By section 25 it is enacted:—"Every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars—(1) The names and addresses, and the occupations if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and the amount paid or agreed to be considered as paid on the shares of each member." . . .

Table A, section 27, provides that "subject to any direction to the contrary that may be given by the meeting that sanctions an increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company."

Section 25 of the Companies Act 1867 provides as follows:—"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares."

Reference was also made in the course of the discussion to certain sections of the Companies Clauses Acts, which are quoted in the opinion of Lord Shand.

Argued for the petitioner—It was illegal and *ultra vires* of the company to issue shares at a discount. At common law there was no such thing as limitation of the liability of partners. Such limitation was entirely the creation of the Companies Acts, and could only be pleaded in the terms of these statutes, which did not authorise the issuing of shares at a discount. The memorandum and articles of association could not confer a power on the company to limit the liability of its shareholders in this way. The limitation of liability in the Act of 1862 was to the "amount, if any, unpaid on the shares"—secs. 7 and 38 (4). The amount of the capital and the shares was fixed by the memorandum under sec. 8, and with the exceptions enumerated in sec. 12, no alterations were to be made on the conditions contained in the memorandum of association. A company could neither buy its own shares nor issue them at a discount, for this reason, that every creditor was entitled to assume that the subscribed capital was in the coffers of the company, either in money or money's worth, or available to it in the pockets of its shareholders, except in so far as it had been diminished by the legal operations of the company. Section 25 did not authorise the issuing of shares at a discount. What it did was to recognise payment in kind, and that was regulated by sec. 25 of the

Act of 1867. The bargain between the company and the petitioner was therefore void as involving impossible conditions—*In re Almada and Tinto Company*, May 19, 1888, W.N.; *Trevor* v. *Whitworth*, L.R., 12 App. Cas. 409, *per* Lord Macnaghten; *In re Financial Corporation*, L.R., 2 Chan. App. 714, *per* Lord Cairns, 732-3; *Ashbury Railway Carriage and Iron Company* v. *Riche*, 7 Eng. and Irish App. 653, *per* Lord Cairns, 672. The argument from the provisions of the Companies Clauses Acts did not throw much light upon this case, where difficult statutes had to be construed. With regard to the question of prejudice to creditors, it was settled that if a man was induced by misrepresentation to become a shareholder, he might cease to be a shareholder if he sought redress before liquidation—*Smith's* case, 2 Ch. App. 604; *Oakes* v. *Peck*, 3 Eq. 576.

Argued for the respondents—The petitioner founded mainly on section 7 of the Act of 1862. That section, however, did not fix the liability of shareholders to the company. To ascertain that it was necessary to go to the conditions and regulations of the company, and in this case these allowed the issue of shares at a discount. The liability of shareholders to creditors was their liability to the company and nothing more—*Waterhouse* v. *Jamieson*, March 13, 1868, 6 Macph. 591—*aff.* May 24, 1870, 8 Macph. (H. of L.) 88, L.R. 2 Scotch App. 29. In the memorandum of the company there was a provision that shares might be issued at a discount, and there was nothing illegal in shareholders agreeing to this effect—*Oakbank Oil Company* v. *Crum*, December 2, 1881, 9 R. 198. The issue of shares at a discount was recognised in section 25 of the Act of 1862, which should be read along with sections 26, 27, and 28 of Table A. The company could issue shares at a discount if allowed by the articles—*Ramwell's* case, July 22, 1881, 29 W.R. 882; *Nice Hall Rolling Mill Company*, 23 Ch. Div. 545. It was argued for the petitioner that section 25 merely recognised payment in kind or money's worth, but that surely could not mean money's worth of the nominal value of shares. If goods were given for new shares when other shares were in the market at a discount, no one would give in goods more than the real value of the shares, and cash payments must be on the same footing—Palmer's Company Precedents, 39. Whatever payment in cash might mean in section 25 of the Companies Act of 1867, the operation of that section was avoided by registering a contract in terms of its provisions—*Birkenshaw* v. *Nicolls*, L.R. 8 App. Cas. 1004, *per* Lord Blackburn, 1025. If a contract were registered, the Court was not to ask whether the consideration given was equal to the nominal value of the shares or not. To take the case of the sale of a going business where the seller agreed to take payment in shares, the consideration on one side must be held equal to that given on the other, unless the agreement were impeached as fraudulent—*Pell's* case, L.R., 8 Eq. 222—*rev.* 5 Ch. App. 11; *Anderson's* case, L.R., 7 Ch. Div. 75; Buckley on the Companies Acts. The Companies Clauses Act 1845 (8 and 9 Vict. cap. 17) was a very kindred statute to the Companies Act 1862. It contained very similar provisions as to the amount of shares, and the liability of shareholders. The shares were to be of "prescribed amount" in the one case, of "fixed amount" in the other. By section 63 of the 1845 Act power was given to issue shares at a discount by the words "in such manner and on such terms,"—*cf.* 26 and 27 Vict. sec. 21, and 32 and 33 Vict. cap. 48. Why should not a similar power be conferred by the words "in such manner" in sec. 27 of Table A of the 1862 Act? There being no express prohibition of issuing shares at a discount in that Act it must be assumed to be legal. The benefit of the Act was that it created a general way to enable limited companies to incorporate themselves without special Acts of Parliament, but none the less the limitation of liability depended on the incorporation. In the *Almada* case founded on by the petitioner there appeared to have been no reference to the terms of section 25 of the 1862 Act, or to Table A. Two of the most cogent arguments on the point in question had therefore been overlooked. The power here contained in the memorandum of association was a further distinction between the two cases, and to a great extent the Judges in the *Almada* case proceeded on a mistaken analogy between that case and *Trevor* v. *Whitworth*. The issue of shares at a discount was not the same as the buying by a company of its own shares. The petitioner could allege no hardship in being kept on the register, as he had been present at the meetings at which the special resolutions were passed.

At advising—

Lord President—This is a summary petition presented under the authority of the 35th section of the Companies Act of 1862 against a company called the East India Company for Exploration and Mining, Limited, which has its registered office in Glasgow, and the registered capital of which was 100,000 shares of £1 each. The company resolved in the year 1886 to increase its capital from £100,000 divided into 100,000 shares of £1 each, to £300,000 divided into 300,000 shares of £1 each. That was simply an increase of capital exactly upon the same terms and footing as the original capital of the company, and is quite unobjectionable. But there followed upon that in the next year 1887 a special resolution of the company, by which it was resolved "that the directors be and they are hereby authorised to issue 150,000 shares of £1 each *quoad* 123,270 shares at a discount of not more than 12/6 per share;" and that was followed by certain other resolutions as to the proportions in which these new shares were to be offered to the existing partners of the company. Now, in pursuance of that resolution the company caused a prospectus to be issued offering these shares, 123,000 odds, at a discount of 12/6; and the petitioner applied for 300 of these shares and had them allotted to him, and he was entered in the company's books as the holder of 300 shares accordingly, upon the footing and condition, although that was not expressed in the register, that he was to be credited with 12/6 per share as paid up, and consequently that each share held by him was to be subject only to a liability of 7/6. The petitioner maintains that the issue of the shares at a discount is *ultra vires* of the company and void, and consequently that the allotment of shares to him was also *ultra vires* of the company, and that he is entitled to have his name removed from the register, and to have the

money which he paid for these shares, which amounted only to £15, repaid to him. The answer that is made on the part of the company is, in the first place, that the issue of these shares was perfectly legal and within the competency of the company, and secondly, that the petitioner having applied for and accepted the shares in the full knowledge of the terms on which they were issued, is barred from insisting in this petition and from having his name removed from the register. Now, the question whether this resolution of the company was illegal, and whether the issuing of the shares at a discount by this company was *ultra vires* and therefore void, is a question of very great importance, and depends, I think, truly upon the clauses of the Companies Acts, particularly upon the clauses of the Act of 1862. The seventh section of that statute prescribes the mode in which the liability of members of a company may be limited, and it must be observed that the limitation of liability is a statutory privilege purely. There is no such thing as limited liability at common law, and therefore no company can have limited liability that does not comply with the conditions upon which that privilege is granted. The 7th section is in these terms—"The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up." The latter is what is called limitation by guarantee, with which we have nothing to do in the present case. The limitation that we are dealing with here is a limitation which is "to the amount, if any, unpaid on the shares respectively held" by the members. The 8th section provides that "where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things—the name of the proposed company, with the addition of the word 'Limited' as the last word in such name;" the place where the registered office of the company is to be situated; "the object for which the proposed company is to be established; a declaration that the liability of the members is limited;" and lastly, "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." Now, I do not think there can be any ambiguity in these two clauses. The limitation is to the amount unpaid on the shares. Nobody can have a greater amount of limitation of liability than is prescribed here; and the limitation is this, that he shall not be called upon to pay more than remains unpaid upon the amount of his shares. Supposing the share to be £1, he never can be called upon for more than £1 for each share, and if any portion of that £1 has been paid, then his liability is limited to what remains unpaid. But that his liability extends to every shilling that remains unpaid is perfectly clear. In connection with this it is also necessary to consider the 12th section of the same statute, which provides that "any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association." Now, keeping in view that the leading condition of the memorandum of association is to be in all cases that the liability of members is limited to the unpaid portion of the shares which they have taken, and is not and cannot be extended farther, it appears to me that this clause, sec. 12, affords an additional confirmation of the importance attached to the rule established by sections 7 and 8, because, with the exceptions enumerated in section 12, no alteration shall be made by the company on the conditions contained in the memorandum of association. Now, the conditions contained in the memorandum of association are that the capital shall be divided into shares of a certain fixed amount, and that the liability of members extends to the whole amount of these unpaid shares, and extends no farther. The 25th section of the subsequent Act of 1867 was also referred to in argument, and quite properly, because it must be construed also in connection with the sections of the Act of 1862 that I have read. That 25th section provides that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint-Stock Companies at or before the issue of such shares." The evil which this enactment was intended to remedy was very well-known. There were a number of transactions of rather a doubtful kind entered into between persons contracting with the company for works and the like, by providing that they should be paid by giving them shares—fully paid-up shares, or shares held to be fully paid-up—and the like, and to check these irregular transactions this section provided for payment of the shares in cash only, unless it shall have been otherwise determined by a contract made in writing before the issue of the shares—that is to say, that the contract made in writing must specify and publish the consideration which the company took in place of cash for the shares. So that that I think does not advance the argument at all in support of the issue of shares at a discount, because the issue of shares at a discount involves this, that whereas the share capital of the company is all divided in £1 shares, that being the certain fixed amount prescribed in section 8 of the Act of 1862, in point of fact they have given a discharge to those people who took the shares at a discount of a considerable portion of that which *ex facie* of the share they are bound to pay. That seems to me to be exactly the same thing in principle as the company buying its own shares. It is just a diminution of the apparent

capital of the company. In the one case—the case of purchasing its own shares, and holding them without re-issue—the company just return to the shareholders the whole or a portion of the capital which he has paid; and in this case, instead of returning a portion of the capital which he has paid, they fail to lay him under an obligation to pay up the unpaid portion of the shares, or rather they grant him a discharge of that, without consideration, to a certain amount. In short, the two violate the principle of the statute exactly in the same way. The memorandum sets out—and is bound to set out—the precise amount of the capital of the company divided into shares of a certain fixed amount, and the effect of that is to show to the public and to the creditors dealing with the company, what is the amount of the fixed capital upon which they are entitled to rely in so dealing with the company. But if by either of the means that I have suggested—either the purchase by the company of its own shares, or by such a transaction as this, issuing shares at a discount—the public and the creditors are misled entirely, then the memorandum is set at naught, and the provision of the memorandum is for all the purposes for which it was intended practically useless. These are the grounds upon which it appears to me that the issue of shares at a discount cannot possibly be maintained to be legal.

This is the first time that the question has occurred for decision in this Court, but there have been some cases in the English Courts upon the subject, and there has been apparently a good deal of variance of opinion among the English Judges. However, there was a case cited to us in which the Court of Appeal in England seems to have come to a unanimous decision, precisely to the effect that I have now indicated, and it is very satisfactory, especially after the apparent differences of opinion that existed among the English Judges, to find at least something like an authoritative judgment upon this question. I shall only say that the case of the *Almada Company* appears to me to be upon all fours with the present. It is very difficult to conceive two cases so nearly the same. I forbear from quoting the judgments of the learned Judges in that case, because your Lordships have had them before you, but I am happy to be able to say that I concur not only in the judgment at which the Court of Appeal arrived, but in the reasons which are given by the learned Judges for their opinions. But there is another and perhaps still more authoritative guide which we have in the present case, and that is the judgment of the House of Lords, in the case of *Trevor* v. *Whitworth*. That was a case where the company had purchased up its own shares and held them without re-issue, and the House of Lords held that that was an entirely illegal and void transaction, and must be set aside upon the ground which I have already indicated as being the ground of jugment in the present case, that this was just a defeating of the object of the memoandum of association in that part of it where it is required to set out the precise amount in money of the capital of the company divided into a certain number of shares of a certain fixed amount. The two cases—the case of the purchase of shares by the company, and the case of issuing shares at a discount—I think depend entirely upon the same principle.

There is just one other point to which it is necessary to advert in disposing of this petition. It is maintained upon the part of the respondents that they are entitled to issue shares at a discount, because they have a power to do so within the memorandum of association itself, whereas in the cases that have been decided, both in the *Almada* case and in the case of *Trevor* v. *Whitworth*, the power was not in the memorandum of association but in the articles of association. I do not think that makes any difference in the case at all, because if the power to issue shares at a discount be inconsistent with setting forth the precise amount of the capital of the company, divided into a certain number of shares of fixed amount, then that is superadding to the memorandum of association something that takes away its value, or rather something that utterly contradicts its most important provision. The point was dealt with, and very ably dealt with, by Lord Macnaghten in the case of *Trevor* v. *Whitworth*, and as expressing my own views of the question, although it did not actually arise for decision in *Trevor* v. *Whitworth*, I am prepared to adopt Lord Macnaghten's views upon that question. He says—"It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company it would necessarily be void;" and further on he says—"It seems to me that one way of trying whether it is permissible or not would be to read it"—that is, the decree—"into the memorandum in connection with the condition which states what the capital is to be;" and then he puts it in this form—"The condition would then run thus—'The capital of the company is £150,000 in 15,000 shares of £10 each, but the board may buy back shares whenever they think it desirable for the purposes of the company to do so.' It seems to me that a condition so qualified would be repugnant and contradictory to itself. At anyrate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form." I cannot better express my own opinion than it is there expressed by that noble and learned Lord. I think if you add to the memorandum of association anything that derogates from or annuls one of the statutory requisites of the memorandum of association that must necessarily be an illegal condition. Upon these grounds I am for granting the prayer of this petition, removing the petitioner's name from the register of shareholders, and ordering the company, as I think we may by the 35th section, to repay the £15.

Lord Mure—I entirely agree in the grounds on which your Lordship has so very clearly based your judgment in this most important case, and I have nothing to add.

Lord Shand—I am entirely of the same opinion, and I adopt your Lordship's judgment upon all the points with which it has dealt.

I consider that this case is really decided by the case of *Trevor* v. *Whitworth*. Looking at the question which was there settled, and the grounds of the decision, I think we have practically the same question raised in this case. In *Trevor* v. *Whitworth* the company had bought back a number of its own shares, and in that

way the capital was diminished. The Court held that this was illegal and *ultra vires*, because the company had no power to diminish the capital which was specified in the memorandum. It appears to me that what was done here, although not done in the same way, has precisely the same effect. The Court in *Trevor* v. *Whitworth* expressed a strong view that the creditors were entitled to look to the capital as it was defined in the memorandum, and that the shareholders and directors of the company could not, unless under special conditions, and with the sanction of the Court under the Statute of 1867, reduce that capital by any process, and of course buying back their shares was practically reducing their capital. Now, can it possibly be said that if £1 shares are issued at a discount of 18s. that is not reducing the capital? In the one case the capital is paid back; in the other the obligation of the shareholder to pay his share of capital is discharged. The operation in the one case has precisely the same effect as in the other although it is done in a different form, and therefore I hold the case of *Trevor* v. *Whitworth* to be decisive of this case, except on the point to which your Lordship last alluded, that here the power to issue shares at a discount is contained in the memorandum, but on that matter also I agree with your Lordship. A power to issue shares contrary to the express provisions of the statute cannot be given by a provision in the memorandum.

Counsel for the respondents maintained an argument upon the Companies Clauses Acts, and as to what could be done with reference to the issue of a railway company's stock at a discount, and it is right to notice the argument that was so presented. It was maintained with reference to the provisions of these statutes, in the first place, that it was obvious that the Legislature did not consider that it was in all cases an illegal proceeding to issue shares at a discount; and, in the second place, that if we applied the analogy of these statutes to the present case, it would be found with reference to issuing shares at a discount that a company under the Companies Acts really had the power. It was said that power will be found to exist in the case of railways and other companies which come under the Companies Clauses Acts, and the statutes with which we have to deal are substantially the same.

Now, it appears to me that the argument succeeded so far. I think Mr Murray was able to show us—at least he satisfied me—that in the case of companies which come into operation under the Companies Clauses Acts of 1845 and subsequent statutes, there is power to issue shares at a discount, subject to certain conditions and restrictions. But I think the argument entirely fails to show that the clauses which allow of that power in the case of railway companies, and other companies adopting the Companies Clauses Acts, are at all the same either in terms or in effect as the clauses which we have to deal with in the Companies Acts of 1862 and 1867. In the Companies Clauses Act of 1845, section 6 provides that "the capital of the company shall be divided into shares of a prescribed number and amount, and such shares shall be numbered in arithmetical progression," and section 38 contains this provision as to the liability of shareholders, that "if any legal diligence or execution shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy under such diligence or execution, then such diligence or execution may be used against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid-up, and for the purpose of ascertaining the names of the shareholders" access shall be given to the register. Now, if these had been the only provisions in that statute affecting a question of this kind, it appears to me that the result would have been precisely the same as under the Acts we are dealing with. There would have been limited liability, but I think there would have been no power to the company to purchase its own shares or to issue shares at a discount. But we are referred to the special provision touching this matter contained in section 63 of the Companies Clauses Act of 1845, which deals with unissued capital authorised to be issued by the conversion of the power to borrow money into a power to issue capital stock. Section 61 provides—"If at the time of any such augmentation of capital taking place by the creation of new shares, the then existing shares be at a premium or of greater actual value than the nominal value thereof, then, unless it be otherwise provided by the special Act, the sum so to be raised shall be divided into shares of such amount as will conveniently allow the same to be apportioned among the then shareholders in proportion to the existing shares held by them respectively," and they are to be offered to existing shareholders accordingly. But section 63 provides that "if at the time of such augmentation of capital taking place, the existing shares be not at a premium, then such new shares may be of such amount, and may be issued in such manner and on such terms as the company shall think fit." Now, I am disposed to hold, and I think the subsequent course of legislation shows that by that clause with its wide powers having reference to augmentation of capital, where the existing shares are not at a premium, the new shares may be issued at a discount. But that is, I think, because of the very special terms of this particular clause, which provides that the shares may be issued "on such terms as the company shall think fit." The power of issuing the shares on such terms does, I think, include the power to issue shares at a discount. And subsequent legislation on the subject shows that the Legislature had taken that view of the section, because the Act of 26 and 27 Vict. c. 118, sec. 21, which follows on a number of sections providing for the issuing of new shares, and new stock in the case of a railway company, provides that "subject to the foregoing provisions the company may from time to time dispose of new shares and new stock at such times to such persons on such terms and conditions, and in such manner as the directors think advantageous to the company," but it goes on to enact—"but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof." This clause, it may be observed, directly prohibits the issuing of shares at a discount, and accordingly if the enactments had stood there, in the case of railway companies that could not have been done.

But by two subsequent statutes, the latter being the Act 32 and 33 Vict. c. 48, sec. 5, it was provided, with reference to the section which I have now read—"Section 21 of the Companies Clauses Act of 1863 shall, with respect to any company to which it is applicable under the provisions of this or any other Act, be read to have effect as if the following words, that is to say, 'but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof,' had not been inserted in that section." So that the prohibition to issue shares at a discount was removed by the Legislature, and apparently in certain limited cases the shares of railway and other companies which have adopted the Companies Clauses Acts may be issued at a discount.

But while the argument goes this length, I do not think it goes a step further. The mode in which that authority is given in certain limited cases is by the provision of the statute that the directors may issue the shares on such terms as they think fit. There is nothing of that kind in the Companies Acts of 1862 and 1867. The only reference to which counsel for the respondents could make upon this matter is contained in Table A containing the articles of association which might be adopted by any company. Table A, sec. 27, provides that "subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offers shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company." Now, the distinction between the two classes of cases is two-fold. In the first place, the Companies Clauses Act of 1845 itself in one of its enactments gives the power. We have no such power given in the Companies Act of 1862, and even if there were inserted in the articles of association a power of that kind, or indeed even in the memorandum of association, it would not be effectual as against the direct provisions of the statute, which in effect directly prohibit any such proceeding. But further, when you turn to the articles of association you find there is no such wide power given as to authorise directors to issue shares "on such terms" as they think fit, and the absence of these words, I think, makes all the difference between the two cases. On these grounds it appears to me that the argument founded upon the Companies Clauses Acts has no material bearing on the question which we are to decide, and that under the Companies Acts of 1862 and 1867 the issue of shares at a discount is *ultra vires*.

Lord Adam—I concur for the reasons now stated by your Lordship, and for the reasons stated by the English Judges in the *Almada* case. The only difference between this and the *Almada* case that I can see is that in this case the company has taken power by its memorandum of association to issue shares at a discount, as they have attempted to do. Nobody disputes that there must be certain conditions inserted in the memorandum of association, and that these are essential conditions under the Act. If that be so, it has always appeared to me to be a very clear proposition that in the same memorandum of association you cannot insert valid conditions which will give power to the company, if exercised, to destroy all or any of the essential conditions required by the Act to be in the memorandum of association. Take, for example, the first condition which must be inserted, viz., that the name of the company shall be followed by the word "limited," would it be possible to insert a valid condition in the same memorandum of association giving the power to the company to alter the name of the company by the omission of the word "limited?" The thing would be absurd. And so you might go through every one of the essential conditions, and take power in the memorandum which would enable the company to destroy every one of the statutory essential conditions, and so reduce the memorandum to a nullity. This would be out of the question, and I quite agree with the reasoning of Lord Macnaghten on that point.

The Court pronounced the following interlocutor:—

"Grant the prayer of the petition, ordain the said respondents to rectify the register of the company, and to delete therefrom the entry of the petitioner's name as holder of 300 shares of the capital stock of said company (part of the shares issued in July 1887) standing in his name in the said register, and direct that the respondents give due notice of such rectification to the Registrar of Joint-Stock Companies in Scotland: Further, interdict and prohibit the said company from making or enforcing any call or calls on the petitioner in respect of said shares, or from charging him for any alleged price in respect thereof, or from holding or treating him in any way as a shareholder of said company in respect of the said 300 shares, and decern: Further, decern and ordain the said company to make payment to the petitioner of the sum of £15 paid by him in respect of said shares, with interest thereon at the rate of five per centum per annum from the 25th day of July 1887: Find the petitioner entitled to the expenses incurred subsequent to the lodging of the answers by the respondent," &c.

Counsel for Petitioner—D.-F. Mackintosh, Q.C.—Lorimer. Agents—John C. Brodie & Sons, W.S.

Counsel for Respondents—Graham Murray—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, January 26, 1889.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

BALFOUR, PETITIONER.

Judicial Factor — Special Powers — Insanity — Aliment to Next-of-Kin out of Ward's Surplus Income—Nobile Officium.

An application by the *curator bonis* of a person *incapax* for authority to make alimentary allowances out of the surplus income of the ward's estate to first cousins of the wards who were in destitute circumstances, *refused.*

Upon 17th December 1872 James Balfour, W.S., Edinburgh, was appointed *curator bonis* of James Robert Lloyd, who was of unsound mind, upon the petition of his uncle Mr Joseph Lloyd.

He now presented a note for special powers under the Pupils Protection Act (12 and 13 Vict. cap. 51), sec. 7, to pay a certain portion of the surplus income of the ward to certain of his relations. The circumstances under which the application was made were as follows:—

At the time of the curator's appointment the estate of the ward amounted to £46,977, 2s. 5d. Upon 31st March 1887 the amount of the estate was £77,017, 17s. 2d. The annual revenue was £2,565, 5s. 11d., and the expenses of the wards' maintenance, management, &c., amounted to £609, 13s. 6d., leaving a surplus revenue of £1956, 12s. 5d. The ward had thus been under curatory since 1872. He had always been of weak intellect, having inherited this from the families of both his father and mother. He was forty-eight years of age, unmarried, and in good health. A request was made to the curator by the ward's next-of-kin, who were in poor circumstances, for an annual allowance out of the free surplus. These next-of-kin were stated to be the ward's cousins, children of his uncles, William Evans Lloyd and Joseph Lloyd, both deceased. The children of William Evans Lloyd were—1. Alfred Lloyd, cabinetmaker, 16 Copley Street, London, wages £1, 15s. per week; 2. Mrs Lucretia Sarah Lloyd or Saunders, a widow, residing in Globe Road, Mile End, Old Town, London, income £30 per annum, derived from leasehold property, the leases of which expired in five years; 3. Mrs Eliza Lloyd or Merman, residing at Leatherdale Street, Mile End, Old Town, London, income £26 per annum. She had a son aged seventeen, then earning 8s. per week.

There were two children of Joseph Lloyd, a boy aged fourteen and a girl aged eleven, who were supported by their mother, whose income amounted to £36, 8s. per annum, derived from leasehold property, the leases of which expired in three years.

The Accountant of Court reported—"The accountant is not aware of any case where allowances have been granted to next-of-kin so distantly removed as cousins.

"The son of William Evans Lloyd is in receipt of good wages as a tradesman, and both the daughters have for the present an income on which they have been able to live; but it is stated in a letter by the said Alfred Lloyd, dated October 1888, and addressed to the agents for the curator, that both Mrs Saunders and Mrs J. Lloyd have received notices from the freeholder to repair their respective houses, and that neither of them have the means of meeting the cost of such repairs; and further, that if they are obliged to give up the houses they will be left nearly destitute.

"The curator has not stated any amount he would suggest as an annual allowance, and until judgment has been given on the principle involved, it may be premature to consider that."

The Junior Lord Ordinary (WELLWOOD) reported the matter to the Second Division of the Court. In his note he stated—. . . "I have not been referred to, and I do not know of any case in which the Court has in similar circumstances authorised payment of an allowance to collaterals out of a ward's estate. The only cases in which, so far as I know, such payments to persons, other than those whom the ward was legally bound to support, have been sanctioned, have been where the ward himself, when sane, was in use to make alimentary payments to the persons in question, or had clearly expressed his intention to do so. In the present case these elements are wanting—see *Dunbar*, March 7, 1876, 3 R. 554, and authorities there quoted in the accountant's opinion."

The petitioner argued—This was a case in which the Court could exercise its discretion. In former cases the Court had exercised a similar discretion, as they had given payments out of the ward's estate which were not authorised by the terms of the Act under which such petitions were presented—*Allan*, November 13, 1869, 8 Macph. 139. Here there was a large surplus revenue, the persons to be benefited were in poor circumstances, were the near relatives of the ward, and were the persons entitled to succeed to the estate upon his death. It was not probable that the ward would ever recover his mental health. In the case of *Dunbar* there were other persons whose interests had to be considered besides the brother of the ward, whom it was proposed to benefit.

The Court remitted the cause back to the Lord Ordinary with instructions to refuse the note.

Counsel for the Petitioner—Kermack. Agents—Mylne & Campbell, W.S.

Saturday, January 26.

SECOND DIVISION.

GRANT AND OTHERS, PETITIONERS.

Nobile Officium—Guardian and Pupil—Authority to Grant Bonds and Dispositions in Security over Ward's Estate.

A pupil proprietor of a fee-simple estate succeeded thereto under burden of certain provisions for the younger children of the disponer, payable one year after the death of the latter, and bearing interest at 5 per cent. The interest amounted to £689, 10s. 11d. per annum.

The tutors and curators of the pupil presented a petition to the Court for authority to raise by bonds and dispositions in security over his estate a sum sufficient to pay off these provisions. It appeared that the interest payable on such a loan would amount to £482, 13s. 8d. per annum, and the annual saving to the ward would therefore be £206, 17s. 3d. for the period of eight years.

The Qourt *granted* the prayer of the petition.

This was a petition at the instance of Mrs Mary Jane Jackson or Grant, widow of the late Henry Alexander Grant, of Western Elchies, and others, tutors and curators of James William Hamilton Grant, now of Wester Elchies, for authority to grant bonds and dispositions in security for younger children's provision.

The late Mr Grant of Wester Elchies, formerly heir of entail in possession, and thereafter heritable proprietor of these lands, executed a disposition thereof in favour of himself in liferent, and to James W. H. Grant and his heirs in fee, of date 14th June 1884. Mr Grant reserved power to grant a bond or bonds of provision in favour of his child or children who should not succeed to the lands and estates, under such terms as he should think proper—if one child one year's free rent or value, if two such children two years' free rent or value, and if three or more children three years' free rent or value of the said entailed estates, to be ascertained in the manner prescribed by the Statute 5 George IV., chap. 87, entitled "An Act to authorise the proprietors of entailed estates in Scotland to grant provisions to the wives or husbands and children of such proprietors," and payable therein mentioned, and to charge the same upon the estate by bond or bonds and dispositions in security in ordinary form when the amount had been ascertained and fixed; it being declared by the foresaid disposition that any such bond or bonds of provision already granted by the disponer should be as valid and effectual as if granted after the execution of the disposition.

Mr Grant by bond of provision executed on 26th day of January 1878, and recorded in the Books of Council and Session the 25th January 1888, bound and obliged himself and the heirs of entail succeeding to him, to make payment to the child or children procreated or to be procreated of his body who should be alive at his death, and should not succeed to the said entailed estates, the following provisions bearing interest at the rate of 5 per centum per annum, and payable one year after his death, viz., if one such child one year's free rent, if two such children two years' free rent or value, if three or more such children three years' free rent or value of the said entailed estates.

By declaration dated 19th November 1884, annexed to the said bond of provision, and recorded along with it, Mr Grant declared that the bond of provision should remain in full force and effect against him and the heirs succeeding to him in the said estates of Wester Elchies and others.

Mr Grant died on 7th July 1886, survived by his widow, the petitioner, and seven children, including James W. H. Grant, and leaving a settlement by which he appointed the petitioners tutors and curators to his children.

The petitioners, *inter alia*, averred—"James William Hamilton Grant was born on the 3rd day of April 1876, and now is 12 years of age. Henry Alexander Grant having been survived by six younger children, the provision to which they were entitled was three years' free rent of the said estate of Wester Elchies, which has been found to be £13,790, 18s. 3d. Said provision was payable one year after the death of the said Henry Alexander Grant, viz., on 7th July 1887, and under the said bond of provision, interest is payable at the rate of 5 per centum per annum until the said provision is paid. As money could now be borrowed at a less rate of interest if the tutors and curators of the said James William Hamilton Grant could grant bonds and dispositions in security over his estates for the amount of said provisions, a large saving of interest would in this manner be effected. The present application is therefore made for authority to grant bonds and dispositions in security for £13,790, 18s. 3d.—the amount of his brothers' and sisters' provisions."

The Court remitted to Mr George M'Intosh, W.S., to report on the circumstances set forth in the petition.

The reporter, after narrating the circumstances as already set forth, proceeded:—"As Master James William Hamilton Grant, who is now proprietor of the lands and estate of Wester Elchies, is a pupil, he is not in a position to implement the obligation upon him in the said bond of provision by making payment to his brothers and sisters of the amount of their provision, and the petitioners as his tutors-nominate have no power, without obtaining the authority of the Court, to borrow money on their ward's estate for the purpose of making payment of the provision. . . . . Master James William Hamilton Grant is not possessed of any moveable estate from which he can pay the amount of his brothers' and sisters' provisions. . . . . The petitioners do not set forth in the petition that there is any urgent necessity for their obtaining such authority in order to save their ward's estate, but they state that the amount of the younger children's provisions can now be borrowed at a less rate of interest than 5 per centum per annum if they are empowered to grant a bond and disposition in security over the estate for the amount, and a large saving of interest will in this manner be effected to the ward. . . . . Interest at the rate of 5 per cent. on the sum of £13,790, 18s. 3d. is

£689, 10s. 11d. per annum. . . . . Assuming that the petitioners, on obtaining authority to grant bonds and dispositions in security over their ward's estate, could borrow the amount of the younger children's provision at 3½ per cent., which is the current rate of interest on first-class landed securities in Scotland, the interest on £13,790, 18s. 3d. would amount to £482, 13s. 8d. per annum, and the annual saving to the ward would therefore be £206, 17s. 3d. So far as your reporter is aware, the Court has not hitherto granted authority to tutors-nominate of a pupil proprietor in fee-simple to borrow upon the security of their ward's estate, except on being satisfied that there was necessity or high expediency: Your reporter respectively refers your Lordships to the case of *Bellamy and Others*, November 30, 1854, 17 D. 115, where the Court authorised tutors-nominate to borrow money on the security of the heritable property, to pay off debts of the testator. In that case it was stated that it was of great importance that the debts and provisions should be paid off, in order that the creditors might not proceed to do diligence to attach the estate and accumulate expenses, with accumulated interest at the highest legal rate. The reporter in that case stated that there was no reason to doubt that the raising the sum required on the security of the heritable property of the ward would be a proper and necessary act of administration on the part of the petitioners. Your reporter further respectfully refers your Lordships to the case of *Sinclair Wemyss*, July 18, 1882, 9 R. 1131, where an application by a tutor-nominate for power to build a mansion-house on the estate of the pupil was refused, as being neither a matter of necessity nor of high expediency. In that case the Lord President stated—'That to justify an application by a tutor to borrow in order to execute operations on the estate of a pupil, he must make out a case either of necessity or of such obviously high expediency as in the eye of the law amounts to necessity. That is substantially what has been laid down over and over again, both in this and in the other Division of the Court.' His Lordship further stated—'There are certainly no facts before us which instruct a necessity, or a high expediency, and I am therefore for refusing the prayer of the petition.' In the present petition it is not set forth, and your reporter understands that there is no ground for supposing, that the younger children require immediate payment of their provisions. Your reporter therefore begs respectfully to report that the circumstances set forth in the petition do not indicate any such urgency as to render it a necessary act of administration on the part of the petitioners to borrow on the security of the ward's heritable estate. If this view is correct, the question for your Lordships' determination comes to be—Whether, in the circumstances above set forth, the saving, or probable saving, of £206, 17s. 3d. per annum for about eight years to the ward is sufficient to make it highly expedient, in the interests of the ward, that the petitioners should be authorised to grant heritable securities over his estate?"

The petitioners argued—It was highly expedient in the interests of the pupil that the prayer of the petition should be granted. The saving of interest would amount to more than £2000 before the ward came of age. A positive advantage was thus secured to the pupil, and there was practically no risk to the estate. Provisions to younger children were in the same position as the debts of an ordinary creditor. The younger children here might at any time proceed to do diligence to recover the principal sums due to them, as these were payable the year after their father's death. The present case was more favourable than those in which powers had been granted to tutors previously—*Mackenzie*, January 27, 1855, 17 D. 314; *Lord Clinton*, October 30, 1875, 3 R. 62; *Campbell*, February 26, 1881, 8 R. 543; *Morrison*, July 19, 1861, 28 D. 1313; *Crawford*, July 6, 1839, 1 D. 1183; *Threipland*, July 7, 1848, 10 D. 1234; *Bellamy and Others*, November 30, 1854, 17 D. 115; *Somerville's Factor*, February 6, 1836, 14 S. 451. Further, the tutors of a pupil heir of entail in possession could now obtain power to borrow upon the security of their ward's estate—Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), sec. 11. A pupil proprietor of a fee-simple estate should not be put in a worse position than a pupil heir of entail.

The Court granted the prayer of the petition.

Counsel for the Petitioners — Macfarlane. Agents—Tait & Crichton, W.S.

HIGH COURT OF JUSTICIARY.

Monday, January 28.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner.)

MAXWELL *v.* MARSLAND.

Justiciary Cases—Act 2 *and* 3 *Will. IV. c.* 68—*Day Trespass Act—Poaching by Person having Permission to Kill Rabbits—General Conviction.*

Held that a person who had permission from his father, the tenant of a farm, to shoot rabbits, and who while upon the farm shot two grouse, was guilty of a trespass under the Day Trespass Act.

Held that a charge under the Day Trespass Act of entering upon lands in "pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies," is not an alternative charge, and that a general conviction following upon it is good, even though the person convicted has a right to kill conies.

James Maxwell, residing at Hunthills, in the parish of Tinwald and county of Dumfries, was charged before the Sheriff Court of Dumfries and Galloway at Dumfries on a complaint which set forth that he had "contravened the first section of the Act Second and Third William the Fourth, chap. 68, entituled 'An Act for the more effectual prevention of trespass upon property by persons in pursuit of game in that part of Great Britain called Scotland (17th July 1832),' in so far as on the twenty-first day of November 1888 years, or about that date, the said James Maxwell did commit a trespass by entering or

being in the daytime—that is to say, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, upon the lands of Hunthills, in said parish and county, belonging to Robert Stewart Dalzell, Esquire of Glenae, without leave of the complainer or of the said Robert Stewart Dalzell, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies."

He was convicted of the contravention charged. He took a case. The facts proved in evidence were set forth in the case as follow—"That on the date libelled in the complaint the gamekeeper Adam Lauder found the accused in a field adjoining the farm-steading of Hunthills with a gun; that the accused was seen to fire the gun at some object in the field, and that on the keeper (who deponed that he himself had no gun, but only a walking stick) going to the spot in the direction in which the gun was fired, he found two dead grouse, but quite warm, and he thereupon challenged the accused with poaching. The keeper immediately returned to Glenae with the birds, which he showed to the coachman, stating that he had 'caught Maxwell at last.' The coachman (John Houston) was adduced as a witness, and deponed that the keeper on his return to Glenae had shown the dead grouse to him; that they were still warm, and that the keeper said he 'had got Maxwell at last.' He further deponed that the keeper had no gun, only a walking-stick. . . No written permission to the accused to kill rabbits was proved or averred, and the prosecutor did not dispute that he had a verbal permission." Evidence was led for the defence to show malice on the part of the principal witness against the accused. The case further bore that—"Following a train of decisions culminating in the case of *James* v. *The Earl of Fife*, January 28, 1880, 3 R. (Jus. Cas.) 9, the Sheriff-Substitute held that notwithstanding that accused resided with his father and assisted him in the management of his farm, any right the father had to the ground game on his farm did not extend to the accused so as to protect him from being liable to prosecution under the statute libelled; and (2) although he held it proved that the principal witness—Lauder—must have made use of certain expressions towards the accused of the nature of a threat, the Sheriff-Substitute was of opinion that the witnesses for the defence may have exaggerated these expressions, and that they did not necessarily bear the construction which they put upon them, and that the use of them did not destroy the credibility of the witness, and he accordingly found the charge against the accused proven, and imposed the full penalty with expenses."

The questions of law for the opinion of the High Court of Justiciary were—"(1) Whether the accused being a member of his father's household, and having verbal leave from him to kill rabbits upon his farm, and being lawfully upon the lands, is liable to be prosecuted under the Day Trespass Act? and (2) Whether the allegations of enmity and malice against the principal witness Adam Lauder have been proved to such an extent as to deprive his evidence of the credibility necessary to be given to it in order to sustain the conviction?"

Argued for the appellant—(1) The charge was alternative. It closed with the alternative "or conies." The conviction was general, and for aught that appeared the accused might have been convicted of shooting rabbits, which he had a perfect right to do. (2) A person entitled to be on the ground could not commit a trespass—*James* v. *The Earl of Fife*, January 28, 1880, 4 Coup. 321; *Laurie* v. *Macarthur*, October 29, 1880, 4 Coup. 346; *Stewart* v. *Murray*, November 13, 1884, 5 Coup. 526; *Jack* v. *Nairne*, February 18, 1887, 1 White, 350.

Counsel for the respondent was not called upon.

At advising—

Lord Justice-Clerk—This case is not, I think, very satisfactorily stated, and as regards the second question I do not think it is one which we are called upon to answer.

Upon the first question we are to take it to be the fact that the accused had a verbal permission to shoot rabbits. I give no opinion upon the question whether a verbal permission to shoot rabbits is sufficient to take a person out of the operation of the Day Trespass Act as regards the shooting of rabbits. I shall assume that the accused had a sufficient right to shoot rabbits. The case that the Sheriff held to be proved was that having such a right he shot two grouse. I have no doubt that a person who goes out perfectly innocently with a gun for the purpose of shooting crows, or, if he has a right to do so, for the purpose of shooting rabbits, comes within the operation of the Day Trespass Act whenever he shoots at game, or any of the enumerated animals which follow the word game in the statute, excepting the words "or conies" in the case of a person who has a right to shoot rabbits. It is not necessary that he should start with such an intention. The moment he forms such an intention he is unlawfully on the land, and is a trespasser in the sense of the Act. The tenant himself if he kill game upon his lands is unlawfully there as a trespasser for that purpose.

The only question of difficulty is whether this conviction, being a general one, is a good conviction. It is maintained that in so far as the conviction is concerned the Sheriff might have intended to convict him of shooting rabbits. I do not think that is the way in which the statute has been understood. The enumeration of animals in the statute was not inserted for the purpose of stating a number of alternatives, but solely as illustrative of what was included in the word game. Accordingly, before the Ground Game Act 1880 a general conviction was perfectly competent, and quite usual. The Ground Game Act makes this difference, that if the animals of which the person was in pursuit were rabbits, and he had leave to shoot them, he is entitled to an acquittal. But it is by proving this that he is to escape. Therefore I hold that a general conviction is still perfectly competent. Of course in stating the case the Sheriff would be bound to state whether he convicted on the ground that the person accused shot rabbits or not, and the accused would be entitled to appeal on the ground that he had proved that he had permission to shoot rabbits. But that the conviction, as a conviction, is perfectly correct I have no doubt. I am accordingly of opinion that the first question ought to be answered in the affirmative, and that the second question ought not to be answered at all.

Lord Adam—I think the second question should not be answered.

The other question is, "Whether the accused, being a member of his father's household, and having verbal leave from him to kill rabbits upon his farm, and being lawfully upon the lands, is liable to be prosecuted under the Day Trespass Act?" The facts which have been found to raise this question are that this person was a farmer's son with leave to shoot rabbits, that he was on the lands with a gun, and when so on the lands shot two grouse. The question is, whether the fact that he was entitled to be on the lands to shoot rabbits prevents a conviction for being unlawfully on the lands in respect that he shot grouse? I am clearly of opinion that it does not. I think that is decided by the case of *James* v. *Earl of Fife*. It is said, however, that the authority of that case has been taken away by the case of *Lawrie*. I do not think so. I do not think the passages quoted from Lord Young's opinion in that case mean that. It appears to me that Lord Young recognised the previous decision, and distinguished the case from it upon a question of fact. He said—"I am of opinion upon the facts stated that there was no evidence laid before the Sheriff that the respondent either entered or was upon the land for the purpose of going in pursuit of game, and that he was not a trespasser in the sense of the statute." His opinion seems to turn upon this, that he did not think the setting of a dog at a wounded hare was in point of fact being there in pursuit of game. That being so, I am entirely of opinion with your Lordship, and in conformity with the case of *James*, that a person may have a right to be on lands, and yet, if after entering upon them he proceed to commit illegal acts, he may be convicted of being on the lands for an illegal purpose. I have no doubt that the appellant was upon the lands for an illegal purpose when he formed the resolution which he carried out of shooting these grouse, and am therefore of opinion that the first question should be answered in the affirmative.

There was another question referred to which is not stated in the case. It is said there is an alternative libel with a general conviction. I do not think so. I concur with your Lordship in the construction of that Act. The charge under the Act is trespassing in pursuit of game. It is not limited to game proper. There is an enumeration of the animals included in the term. But the charge is one charge. These are illustrations of the different ways in which it may be committed. It is quite true that since the passing of the Ground Game Act the word "conies," in the case of a person entitled to shoot rabbits, becomes immaterial in the charge, and if it had been proved to the satisfaction of the Sheriff that this person were truly in pursuit of conies he could not have convicted him of trespass in pursuit of game.

Lord Trayner concurred.

The Court sustained the conviction.

Counsel for the Appellant—Rhind. Agent—Wm. Officer, S.S.C.

Counsel for the Respondent—Goudie. Agents—J. C. & A. Steuart.

Monday, January 28.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner).

M'KENZIES *v.* M'PHEE AND ANOTHER.

Justiciary Cases — Police — Glasgow Police Act 1866 (29 *and* 30 *Vict. c.* 273), *secs.* 131 *and* 132—*Exclusion of Review except by Circuit Court—Suspension — Competency — Industrial Schools Act* 1866 (29 *and* 30 *Vict. c.* 118), *sec.* 15—*Order Pronounced without Intimation to Father of Child.*

Sections 131 and 132 of the Glasgow Police Act 1866 provide for the exclusion of review of proceedings under the Act except by the next Circuit Court.

A girl of ten years of age while with her mother in the City Clothes Market in Glasgow, was found to be in possession of articles missing from the stalls. The mother and child were taken to the police office. No charge was made against them. They were requested to appear at the police office on the following morning and allowed to go home. Two police officers called at the woman's house the same afternoon, and again told the woman and her daughter to be at the police office on the following morning. On obeying this order they were placed at the bar, and a charge of theft of the articles found on the daughter having been read over to them they were asked to plead. They pleaded not guilty, and evidence having been led, the mother was convicted and sentenced to imprisonment, and the daughter was ordered to be sent to an industrial school. No intimation was given to the husband that his wife and daughter were to be charged with theft, or that the latter was to be sent to an industrial school, and he was not present when the sentence and order were pronounced.

In a suspension objection was taken to the competency on the ground that the jurisdiction of the High Court was excluded by sections 131 and 132 of the Glasgow Police Act 1866.

Held (*diss.* Lord Adam) that the proceedings on which the conviction of the mother followed, being contrary to the recognised principles of criminal procedure, were *funditus* null, and that the High Court accordingly had jurisdiction to entertain the suspension.

Held that the order complained of having been pronounced under the Industrial Schools Act 1866, the review clauses of the Glasgow Police Act did not apply; that the High Court had jurisdiction to entertain the suspension; and that the order having been pronounced without intimation to the father, and in his absence, could not be sustained.

Jane Wright or M'Kenzie, wife of Henry M'Kenzie, brassfinisher, in Glasgow, and Margaret M'Kenzie, his daughter, were on the 21st November 1888 charged before the Police Court in Glasgow with the crime of theft. Mrs M'Kenzie was convicted and sentenced to prison for thirty days. Margaret M'Kenzie was not convicted, but was

ordered to be sent to an industrial school. They brought a suspension of the sentence and order.

They averred, *inter alia*—"2. On Tuesday, 20th November 1888, the complainer Mrs M'Kenzie told her husband at dinner time (1 p.m.) that she was going in the afternoon to the City Clothes Market to buy a sheet or bed-mat for the children. Accordingly after her husband had returned to his work Mrs M'Kenzie went to the said market, which is situated in Greendyke Street, Glasgow, taking with her her infant, whom she carried in her arms, and the two little girls Margaret and Agnes, aged ten and five years respectively. In the market Mrs Mackenzie's attention was very much occupied in looking out for a suitable sheet or mat (which she did not succeed in finding), and also in taking care of the two younger children. She did not pay special attention to the elder child Margaret, who was able to walk by herself, and who did not remain close to her mother. 3. As Mrs M'Kenzie was leaving the market she looked round for her daughter Margaret, and saw that she was being spoken to and stopped by a policeman. The female complainer Mrs M'Kenzie went up to the policeman to see what was the matter, and stated that she was the child's mother. The policeman thereupon took mother and child to the police office. 4. At the police office the complainer Mrs M'Kenzie and her daughter Margaret were interrogated with reference to certain articles (a plaid, a pair of drawers, an umbrella, and a girl's dress), which it appeared that the girl was carrying when she was stopped by the policeman at the exit from the market. The girl explained what she had already told the policeman who stopped her, viz., that she found the articles lying on the ground, and that thinking any articles lying there were useless she lifted them. The mother also explained that she had not seen the girl with the articles in her possession as her attention was otherwise occupied, and the girl had not been walking close behind her. The complainer Mrs M'Kenzie and her daughter Margaret were then told that they might go home, but that they were to return to the police office at nine on the following morning. No charge was made against either of the said complainers, nor were they told that any charge was to be preferred against them on the following day. Nor were they asked to give bail or leave a deposit by way of security for their re-appearance, which would have been the appropriate course under section 100 of the Glasgow Police Act (29 and 30 Vict. chap. 273) for the officer on duty to have taken in the case of persons against whom a charge had been or was to be made. Shortly after Mrs M'Kenzie and her children reached home two police officers called at the house and looked round. On leaving they told Mrs M'Kenzie to be sure and be at the police office next morning with the girl Margaret. They did not, however, make any charge against the complainers or either of them, nor did they intimate that any charge was to be made on the following day. Nor did they give the complainers any written citation to appear as provided by section 88 of the said Police Act with reference to persons accused of having committed police offences. Mrs Mackenzie asked whether the officers would not like to see her husband, who would be back shortly from his work, and on their answering in the negative, she asked whether he would come along with them to the police office next morning. They answered that there was no occasion for his doing so. 5. On her husband's return Mrs M'Kenzie told him what had passed at the market and at the police office, and also of the visit of the officers and what they had said. The complainer Henry M'Kenzie asked his wife why she had not looked better after Margaret, and she told him that she was fully occupied with the two younger children, and in looking at the stalls for the article she went to purchase. The said complainer then chastised his child Margaret, and warned her against doing anything of the kind in future. 6. On the following day (Wednesday, November 21) the complainer Henry M'Kenzie went to his work as usual. On coming home to dinner he found that his wife and daughter Margaret had not returned from the police office. On inquiry there he was told that his wife had been convicted of theft and sent to prison for thirty days, and that his daughter Margaret had been sent to an industrial school for five years. 7. Mrs Mackenzie with her daughter Margaret went to the police office at 9 a.m. on said 21st November as requested, and were put into a large room where they were kept waiting for some time. They were then conducted to the Police Court. Shortly afterwards, when they were sitting in Court, an officer asked Mrs M'Kenzie for her maiden name, which she gave. Shortly thereafter she and her daughter were called to the bar of the Court. The respondent J. Kilpatrick then read out from a paper in his hand that the female complainer and her daughter were charged with theft. This was the first intimation given to Mrs M'Kenzie or her daughter that any charge was to be made against either of them. They were then at once asked by the Magistrate whether they were guilty, to which they answered that they were not The complainers believe and aver that the charge, particularly that against the mother, was an afterthought on the part of the respondents. It appears from the police charge-book and from the act book of Court that the mother's name was interlined as an addition to a charge originally framed against the daughter only. 8. No written complaint was then or at any time delivered to the accused. Nor were they informed by the Magistrate that they were entitled to an adjournment in order to prepare for their defence, and to call witnesses in exculpation. Nor did he inquire whether the husband and father of the accused was present, or had been informed that a charge was preferred against the parties. The respondents at once proceeded to lead evidence. 9. Only four witnesses were examined by the respondents, viz., two stall-keepers, Ann Cook and Mary Ann Duggan, and two policemen, Inspector Bell and Alexander Law. The former witnesses identified the articles as belonging to them, but stated that they did not see the girl lift any of the articles from their stalls. They added, however, that so far as they knew the articles had not been lying on the ground. The policemen gave evidence to the effect that the girl, when stopped by them at the exit of the market, had the articles lying over her arm; that she had apparently no desire to conceal

them, and that she stated that she found them lying on the floor and picked them up thinking they were useless. No record of the evidence has been kept, but the above is a full and accurate summary of it. 10. The further proceedings in the case are accurately reported in the following extract from the *Glasgow Evening Citizen* of November 21st 1888 — 'Stipendiary Gemmel said there could be no doubt about the child's guilt, but he could not divest from his mind the idea that the child was taken there by her mother for the purpose of stealing.' The mother—'Oh no, sir, I never required to do such a thing. I went to buy a mat, and looked at some as these women have said.' The Stipendiary—'It was impossible that the child could be going from stand to stand with these articles in her possession without you seeing them.' The mother—'I had three children with me—this one in my arms, and the other at my feet. Margaret was walking behind me, and I could not see what she was doing.' The Stipendiary—'I am not going to convict the child, I am going to send her to an Industrial School.' The mother—'Oh no, sir, her father is a most respectable man, and he will go wrong in his mind if you do.' The Stipendiary—'I will send her to an Industrial School for five years; and you, I find you guilty of art and part in the theft, and sentence you to thirty days' imprisonment.' 12. The said Mrs M'Kenzie, complainer, and her daughter Margaret were and are wholly innocent of the crime with which they were charged as aforesaid, and for which they are both undergoing severe and undeserved punishment. The complainer Margaret M'Kenzie did not intend to steal and did not steal the articles in question. She picked them up from the floor, supposing, with the thoughtlessness and inexperience natural to her years, that they had been thrown away as of no value. Further, the complainer Mrs M'Kenzie had no knowledge of what her daughter had done until she found her in the hands of the policeman.

"13. The whole of the proceedings above detailed were most irregular, illegal, and oppressive, and most prejudicial to the complainers. They were also conducted in direct violation of the provisions of the Glasgow Police Act, and of the other statutes regulating summary trials, and in particular the Summary Jurisdiction Acts. 14. It was the duty of the respondents if they intended to make a charge of theft against Mrs M'Kenzie and her daughter to bring the accused into Court by a warrant of citation with reasonable *inducias* in ordinary form, and to give them a copy of the complaint so as to certiorate them of the charge to be brought against them, and enable them to prepare for their defence. No warrant of citation was ever applied for by the respondents, nor did they ever give the complainers a copy of the complaint. It was grossly irregular and oppressive on the part of the respondents to take advantage of the voluntary presence in the police office of Mrs M'Kenzie and her daughter in order to bring a charge against them of which they had had no notice. The respondents were also well aware of the fact that the parties accused were the wife and pupil child of a working man residing in Glasgow, and they also knew that no steps had been taken to acquaint the husband and father of proceedings in which he was vitally interested. 15. Upon the respondent's stating the charge against the complainers it was the duty of the magistrate to inquire whether the accused had been served with a copy of the charge, and duly cited to appear, and if it appeared that this had not been done, it was his duty to explain to the accused that they were entitled to an adjournment for the purpose of preparing their defence and calling witnesses in exculpation. The magistrate culpably failed to perform this duty. The complainer Mrs M'Kenzie had never in her life been in a police court, even as a witness, and being wholly ignorant of her rights, and thoroughly frightened and taken by surprise, she stated no objection to the proceedings. She was entirely without assistance, professional or otherwise. 16. The conviction and sentence and order of detention complained of were wholly unwarranted by the evidence, and were grounded upon 'ideas' in the mind of the magistrate, which he unwarrantably and erroneously assumed to be true, but which were not justified by any evidence. There was no evidence whatsoever to prove or suggest the 'idea' that the girl was taken to the market by her mother for the purpose of stealing, and the mother could have proved the contrary if she had been given an opportunity of leading evidence. Nor was there any evidence to show that it was 'impossible' for the girl to have had the articles in her possession without the knowledge of the mother. There was no evidence to contradict the mother's statement on this point. Mrs M'Kenzie could have proved if she had had an opportunity of doing so (and it is the fact) that she is extremely short-sighted. A medical certificate to that effect will be produced. Further, the girl's statement that she had picked up the articles from the floor was not contradicted, all that the stall-keepers could say being that so far as they knew the articles were not on the floor. 17. The female complainer Mrs M'Kenzie is thirty-two years of age. She has borne seven children and is in delicate health. The infant which has gone to prison with its mother is still being nursed, and is suffering from bronchitis and teething. The confinement and anxiety caused by her imprisonment are seriously injuring the health of the female complainer Mrs M'Kenzie, and through her the health of her infant. In regard to Margaret, even if she had been guilty of the offence charged, the order for her detention in an industrial school for five years would have been most unnecessary and prejudicial, and most cruel and oppressive to all the complainers. It was pronounced in absence of the girl's father, and without any intimation to him that such an order was to be pronounced. The complainer Henry M'Kenzie is quite able to take charge of the child at home. He would have explained this to the magistrate, and have strenuously resisted the order if he had had an opportunity of doing so. In these circumstances the complainers respectfully crave interim liberation for both the said complainers."

The respondents lodged answers in which they admitted that the complainers were taken by the police from the City Clothes Market to the police office on the 20th of November, the girl Margaret M'Kenzie having been found in possession of articles which were missing from some of the stalls, and were alleged to have been stolen; that after the charge was taken they were per-

mitted to return home; that they were not asked to give bail or leave a deposit; that two officers called at Mrs M'Kenzie's house in the afternoon, and that Mrs M'Kenzie was told to appear with her daughter at the police office the following morning; that the procedure which took place at the Police Court was set forth with substantial accuracy by the complainers in articles 7 and 10 of their statement; that no written complaint was delivered to the accused, and that the order for the detention of the girl Margaret was pronounced in absence of the girl's father, and without any intimation to him that such an order was to be pronounced.

The complainers pleaded—"1. The sentence complained of should be suspended, and liberation should be granted with expenses as craved, in respect—(1) The trial of the complainers was proceeded with with undue haste without fair notice of the charge, and in the absence of the husband and father of the accused. *Separatim*, the Magistrate culpably failed to inform the accused that they were entitled to an adjournment. (2) There was no legal evidence of the guilt of the complainers, or at least the evidence was altogether insufficient to warrant their conviction. (3) It was illegal and oppressive to sentence the girl to a prolonged term of detention in an industrial school without first communicating with her father. (4) The whole proceedings were irregular, illegal, and oppressive, and the said whole sentences were excessive, and contrary to natural justice."

The respondents pleaded—"(1) In respect of sections 131 and 132 of the Glasgow Police Act 1866, the present suspension is incompetent, and ought to be dismissed. (2) The complainers' statements are irrelevant, and insufficient to support the prayer of the bill. (3) The whole proceedings having been regular and legal, the suspension ought to be refused. (4) The complainers having been justly convicted on legal evidence of the crime charged against them, are not entitled to suspension. (5) The complainers' statements being unfounded in fact, the suspension ought to be refused."

The Glasgow Police Act 1866 (29 and 30 Vict. c. 273), sec. 131, provides that proceedings before the magistrate shall only be brought to review in the manner and on the grounds specified in sec. 32, which provides—"Any person who feels aggrieved by any order or sentence of the magistrate may, within fourteen days after its date, appeal to the Circuit Court of Justiciary at the next Circuit Court to be held at Glasgow, in the manner and under the rules, &c., contained in an Act 20 Geo. II. c. 43 . . . on the ground of corruption, malice, or oppression on the part of the magistrate, wilful deviations in point of form from the statutory enactments, incompetency or defect of jurisdiction, but on no other ground."

The Industrial Schools Act 1866 (29 and 30 Vict. c. 118), sec. 15, provides—"Where a child, apparently under the age of twelve years is charged before two justices or a magistrate with an offence punishable by imprisonment or a less punishment, but has not been in England convicted of felony, or in Scotland of theft, and the child ought, in the opinion of the justices or magistrate (regard being had to his age, and to the circumstances of the case) to be dealt with under this Act, the justices or magistrate may order him to be sent to a certified industrial school."

The respondents objected to the competency of the suspension, on the ground that review by the High Court of Justiciary was excluded by sections 131 and 132 of the Glasgow Police Act 1866.

They argued—These sections gave the complainers a remedy by appeal to the next Circuit Court at Glasgow upon certain grounds, and excluded all other review. The High Court of Justiciary had sustained its right to interfere wherever the proceedings of the Inferior Court were *funditus* null, the complaint and proceedings being plainly outwith the statutory authority under which it acted, but had always refused to interfere by way of review on any of the grounds contained in the statute where there was no fundamental nullity—*Duffy* v. *Laing*, March 5, 1869, 1 Coup. 328; *Mackenzie* v. *Lang*, November 9, 1874, 3 Coup. 29; *O'Brien* v. *M'Phee*, October 30, 1880, 4 Coup. 375; *Walker* v. *Lang*, November 25, 1867, 5 Irv. 506; *De Belmont* v. *Lang*, June 28, 1871, 2 Coup. 95. The cases in which it had interfered were those in which the complaint disclosed no offence or where there was no proper conviction—*Mann* v. *Macarthur*, March 28, 1878, 4 Coup. 53; *Collins* v. *Lang*, November 3, 1887, 1 White 482; *Kidger M'Phee*, November 22, 1888, 26 S.L.R. 65; *Bell M'Phee*, July 18, 1883, 5 Coup. 372; *Gray* v. *Macgill*, February 27, 1858, 3 Irv. 29. In the present case the complainers were brought before a Court competent to try them. There was a good instance and a relevant complaint. There was no fundamental nullity. The grounds of suspension alleged disclosed a case of oppression, which was one of the grounds on which the Circuit Court might review the conviction. The argument applied to the case of both complainers, for the sections mentioned applied to orders as well as convictions, and what was complained of in the case of the complainer Margaret M'Kenzie was an order. But there was an additional argument in her case. The 43rd section of the Industrial Schools Act 1886 gave power to the Secretary of State to liberate children from industrial schools. No doubt in *Wilson* v. *Stirling*, March 9, 1874, 2 Coup. 578, the High Court had interfered to quash such an order, but in that case there was no charge of crime. Here there was a charge preferred and tried under the Glasgow Police Act, and it was upon his investigation into the circumstances of that charge that the Magistrate proceeded.

Argued for the complainer—The High Court had an inherent power to deal with gross irregularity of procedure amounting to injustice. The cases cited were examples of the exercise of such power, but did not exhaust the cases in which the Court would interfere—*Gray* v. *Macgill* (*supra*) (*per* Lord Ivory, p. 41); *Wright* v. *Dewar*, March 9, 1874, 2 Coup. 504 (*per* Lord Cowan); *Graham* v. *Linton*, Nov. 24, 1856, 2 Irv. 558 (*per* Lord Deas, p. 564); *Devaney* v. *Anderson*, Dec. 16, 1854, 1 Irv. 588; *Gallagher* v. *Auld*, May 21, 1886, 1 White 130; *Ritchie* v. *Pilmer*, Dec. 20, 1848, John Shaw 142; *Robertson* v. *Mackay*, July 21, 1846, Arkley 114; *M'Kean* v. *Wilson*, Dec. 9, 1848, John Shaw, 132; Moncrieff on Review in Criminal Cases, 248. The order

complained of by Margaret M'Kenzie was not pronounced under the Glasgow Police Act, but under the Industrial Schools Act, and was therefore subject to suspension by the High Court—*Wilson* v. *Stirling*, *supra*.

At advising—

LORD ADAM—This is a bill of suspension and liberation brought at the instance of Jane Wright or M'Kenzie and Margaret M'Kenzie complaining of a conviction, dated 21st November 1888, obtained in the Police Court in Glasgow, by which the first suspender Jane M'Kenzie was convicted of the crime of theft, and committed to prison for 30 days, and of an order dated on the same day by which the second complainer Margaret M'Kenzie was ordained to be sent to the Industrial School at Maryhill, and there detained for a period of five years. It is pleaded to us that the suspension of this conviction and this order is incompetent on the ground that the proceedings complained of were proceedings under the Glasgow Police Act of 1866, and that an appeal to this Court of any kind is declared to be incompetent by the provisions of that Act. In my view it is quite necessary to consider separately in this question of competency the case of the mother and the case of the daughter, because they depend upon quite different considerations. Taking then the case of the mother first, the complaint bears to be brought under the Glasgow Police Act of 1866. It sets forth that Jane M'Kenzie, now in custody, stole from the City Clothes Market certain articles therein enumerated, and so on. That is followed by the conviction, which bears that after the charge had been read over to her she pleaded not guilty, and that after evidence had been led she was convicted and sentenced to 30 days, and it is that sentence which is brought under our review. The sections of the Act founded on which are said to preclude appeal are the 131st and 132nd sections of the Glasgow Police Act. Now, it is not denied that we have in this case a good instance; it is not denied that the judge had jurisdiction to try the case; neither is it denied that the complaint was a relevant complaint, and that the sentence was a competent sentence. *Prima facie*, therefore, it appears to me that under the provisions of these two sections of the Act appeal to this Court, not being a Circuit Court, is incompetent.

But it is said on the part of the complainer that her averments disclose a case which shows a fundamental nullity in the proceedings and the sentence; and no doubt if that be so there is plenty of authority for saying that the complainer is entitled to come here for redress. But the respondents say that the averments in the bill of suspension amount only to what is oppression in a legal sense of the term, and that as suspension on the ground of oppression on the part of the magistrate is one of the grounds of appeal to the Circuit Court at Glasgow, there is therefore a special Court appointed for the consideration of appeals upon that ground, and that there being a special remedy by appeal to the Circuit Court of Justiciary, that excludes the jurisdiction of this Court. That I understand to be the argument upon the other side.

Now, if the respondents' view of the averments in this case is well founded I think there is plenty of authority for saying that the appeal here is incompetent. I think the cases of *Dick* v. *Lang*, 1 Coup. 238, and *M'Kenzie* v. *Lang*, 3 Coup. 29, are quite sufficient to sustain that contention. That therefore requires us to look at the averments on which this bill of suspension is founded. If we are to sustain the competency of the suspension it would be necessary, it appears to me, to proceed upon facts either admitted or proved. We cannot sustain the competency of the suspension upon mere averment. But as the view which I take of the case is that the appeal is not competent, in considering the case I must assume the truth of the averments as made in this bill of suspension; and so considering them, as I have said, in my view the suspension is incompetent.

Looking to these averments, and taking what may be called the principal view of this case, it seems to be this:—The child Margaret seems to be about nine or ten years of age. It is said that on the 20th November, the day before the trial and conviction, Mrs M'Kenzie went with this child and two other younger children, one five years old and the other younger, to buy a mat in the Clothes Market at Glasgow; that while there the child Margaret picked up some four articles which are said to have been stolen, and on leaving the market she was stopped by a policeman; that the mother then came up, and the girl stated that she had found them lying on the ground and had picked them up; that they were taken to the police office, and the same explanation given, and the facts recorded in the police books as usual; but nothing more was done then except that the mother was told to bring back her daughter next morning at nine o'clock. No charge of theft was made against either mother or daughter. It is said that during the afternoon of the same day two policemen came to the house, and again told them to be there next morning at nine o'clock; and upon being asked if it would be necessary that Mrs M'Kenzie's husband should go the answer was No. These seem to be the facts of the case—at all events the facts of the case as averred with reference to what took place prior to the proceedings on the trial. The material facts that are set forth as to what took place on the 21st November are in Articles 7 and 8, and I may read them. Article 7 is—"Mrs M'Kenzie with her daughter Margaret went to the police office at 9 A.M. on said 21st November as requested, and were put into a large room where they were kept waiting for some time. They were then conducted to the Police Court. Shortly afterwards, when they were sitting in Court, an officer asked Mrs M'Kenzie for her maiden name which she gave. Shortly thereafter she and her daughter were called to the bar of the Court. The respondent J. Kilpatrick then read out from a paper in his hand that the female complainer and her daughter were charged with theft. This was the first intimation given to Mrs M'Kenzie or her daughter that any charge was to be made against either of them. They were then at once asked by the Magistrate whether they were guilty, to which they answered that they were not. The complainers believe and aver that the charge, particularly that against the mother, was an after-thought on the part of the respondents. It appears from the police charge-book, and from the act-book of court that the mother's name was

interlined as an addition to a charge originally framed against the daughter only." Then in article 8 it is said—"No written complaint was then or at any other time delivered to the accused. Nor were they informed by the Magistrate that they were entitled to an adjournment in order to prepare for their defence, and to call witnesses in exculpation. Nor did he inquire whether the husband and father of the accused was present, or had been informed that a charge was preferred against the parties. The respondents at once proceeded to lead evidence."

Then there is set forth in subsequent articles what took place at the trial, and the evidence led, and so on; but I do not think that is material, because whether it was sufficient to support the charge or not it is the merits of the case of which the Court had to judge.

In article 14 there are set forth the allegations upon which this suspension is rested. It is said there—"It was the duty of the respondents, if they intended to make a charge of theft against Mrs M'Kenzie and her daughter, to bring the accused into Court by a warrant of citation with reasonable *inducia* in ordinary form, and to give them a copy of the complaint, so as to certiorate them of the charge to be brought against them and enable them to prepare for their defence. No warrant of citation was ever applied for by the respondents, nor did they ever give the complainers a copy of the complaint. It was grossly irregular and oppressive on the part of the respondents to take advantage of the voluntary presence in the police court of Mrs M'Kenzie and her daughter in order to bring a charge against them of which they had had no notice. The respondents were also well aware of the fact that the parties accused were the wife and pupil child of a working man residing in Glasgow; and they also knew that no steps had been taken to acquaint the husband and father of the proceedings in which he was vitally interested." Then the 15th article is this—"Upon the respondents stating the charge against the complainers it was the duty of the Magistrate to inquire whether the accused had been served with a copy of the charge and duly cited to appear; and if it appeared that this had not been done it was his duty to explain to accused that they were entitled to an adjournment for the purpose of preparing their defence and calling witnesses in exculpation. The Magistrate culpably failed to perform this duty. The complainer Mrs M'Kenzie had never in her life been in a police court, even as a witness, and being wholly ignorant of her rights and thoroughly frightened and taken by surprise she stated no objection to the proceedings. She was entirely without assistance, professional or otherwise."

The ground upon which suspension is sought in this case is the alleged neglect of duty of the Magistrate and illegality of the proceedings set forth in these articles. Now, the first of these appears to be that the accused was brought into Court without a warrant of citation being served upon her and a copy of the complaint so as to certiorate her of the charge to be brought against her, and to enable her to prepare for her defence. It humbly appears to me that it is not necessary in proceedings in a police court that a warrant of citation or a complaint should be served upon the prisoner before trial. I mean by saying *necessary* that I think it is a question of circumstances whether that should be done, but I think there is no illegality in proceeding to try a prisoner without having a citation and a copy of the complaint served upon him beforehand. I think that is settled, and is in conformity with the practice in many cases, and it was the subject of discussion in the case of *Graham* v. *Linton*, 2 Irv. 558, which was a case where a married woman, who was a licensed broker in Edinburgh, was apprehended on a Monday morning on a warrant granted on the Saturday previous. She was tried summarily, and was convicted and sentenced to 40 days' imprisonment. The conviction was set aside as being in the circumstances oppressive. I quite agree with Lord Deas in that case that there are many cases in which it would be highly improper to proceed to trial without a citation and without a complaint being served. But then, in my humble opinion, it is a question of circumstances whether in a particular case that course should be followed or not.

There is another case of *M'Kean* v. *Wilson*, John Shaw, p. 132, where it was held that it was not necessary that a complaint should be served before trial. Now, looking upon these I think that it is competent and not illegal for a magistrate to proceed to try a case without citation and without service of the complaint, and that it is a question of circumstance whether that should be done in each particular case. It does not appear to me that where that course is not followed by the magistrate it infers a nullity of the proceedings. It may be, and I agree if the facts here are true, which we must assume, that in this case it was a grossly irregular and oppressive proceeding on the part of this magistrate to take advantage of this woman going to the police office. But in my opinion that does not involve nullity. It merely involves oppression in the legal sense of the word as being unfair and unjust towards a prisoner to put her upon her trial in such circumstances. That is my view of the nature of the averments in article 14.

Then in article 15 it is said it was the duty of the magistrate to inquire into these matters, and if it appeared that this had not been done it was his duty to explain to the accused that they were entitled to an adjournment. That the magistrate should in many cases give that intimation to a helpless prisoner at the bar I have no doubt whatever, and that if he fails to do it in many cases it is unfair and oppressive towards the prisoner, and he is entitled to relief; but I can find nothing to show it is the duty of a magistrate to do that. I think there is no duty in this sense that it is illegal for him not to do it, and if it does not amount to illegality—if in these proceedings the magistrate is acting within the powers given to him by the Act—I do not see how it can infer nullity of the proceedings however oppressive it may be. Upon these grounds I am of opinion that the averments in this case do not amount to any averment of nullity of the proceedings. Assuming the averments to be true, I think it was a case of oppression on the part of the judge in a legal sense, and upon that ground she may be entitled to relief.

The first case to which we were referred upon the part of the suspender was the case of *Gray* v.

M'Gill, 3 Irv. 29. That was a case under a previous Glasgow Police statute, but having clauses as to review somewhat similar to those under consideration in this question. The proceedings in that case were of a somewhat similar nature to what took place here, and it would be probably impossible to get a harder case than that of the prisoner who was tried in that case. The suspender Thomas Gray, a child of eight years of age, was in bed in his father's house in Glasgow. Two police-officers came to the house, and without any warrant took him in custody to the police office. He was there summarily placed at the bar of the Police Court, and without any previous explanation to himself or to anyone interested in him, and without any complaint having been served upon him, he was charged with the crime of theft. He was too young to understand the complaint or procedure of the court, and had not the assistance of his father, although he was accompanied to the office by his mother and sister. The charge was that he along with two other boys had been guilty of the theft of a small sum of money. These proceedings were certainly about as bad, to use the word, as the proceedings said to have been taken here—taking a child out of his father's house in the morning, placing him immediately at the bar, trying him without a complaint being served upon him, and convicting him.

It is material to observe how the Court dealt with that case. The opinion is delivered by Lord Ivory. He commented severely upon the proceedings, but in the judgment of the Court he says (p. 48)—"As to the general character of these proceedings. The complainer is a child. His father was known—a householder in Glasgow. The boy is suddenly dragged into Court, tried and punished with reckless haste. I would also abstain, however, from resting my judgment on this ground. But on the whole, and especially (1) on the objection as to the 'evidence and partial admission' on which the conviction bears to proceed—(2) on the defects in the subscription of the sentence—(3) on what I think to be the want of basis for summary procedure—I hold that there are good grounds for vacating and quashing the sentence without touching upon any ground connected with what are properly the merits of the case." That sentence was quashed upon grounds which clearly inferred nullity. Lord Ivory held, and the Court followed him, that the conviction proceeded upon what was in fact no evidence at all. That was the first ground. The second ground was that the sentence was no sentence because it was signed out of court a considerable time after the sentence had been carried into execution. But although what Lord Ivory called the general character of the proceedings very much resembled those in this case, he purposely abstained from putting his judgment upon that.

The next case to which we have been referred is the case of *Marr* v. *M'Arthur*, 5 R. (J.C.) 38. That was a case in which a person was convicted of playing the air "Boyne Water." The Court, of which I was a member, came to the conclusion that the complaint set forth no crime at all. It necessarily followed that the whole proceedings were null. The next case was very similar, and went upon the same grounds. That was the case of *Kidger*, 26 S.L.R. 65, where a man was convicted of posting a bill on his own house. The next case was *Collins* v. *Lang*, 1 White 482. That was a case of a different description. The accused was convicted upon a complaint upon which he had been charged at a previous diet when the diet was deserted *pro loco et tempore*. The Court held that the complaint was dead owing to the desertion of the diet, and accordingly that the accused had been convicted upon no complaint. That also was a case of fundamental nullity, and not a case of oppression. The last case to which we were referred was *Bell* v. *M'Phee*, 5 Coup. 312, and that again was a case of a different description. That was a case where the prisoner was charged on an alternative libel, the charge being followed by a general conviction, so that nobody could tell of what offence the prisoner had been guilty. On the face of it the sentence in that case was clearly null.

I think these are all the cases to which we were referred, and I think they bring out the distinction strongly between those objections which go to fundamental nullity and those which go to oppression on the part of the judge. That being my opinion in this case, I am of opinion that this suspension is incompetent, because the Police Act has provided a special court, viz., the Circuit Court at Glasgow, to which cases of this description shall be committed.

While that is my opinion, I should in this case be quite prepared to sustain the suspension to the effect of continuing the interim liberation. I think that rests on a different ground. It does not touch the merits of the sentence. If we were to continue the interim liberation until the Circuit it would leave it open to the Judges to whom the statute has committed the review of such cases as this to consider the case on the merits. I think this would be a competent and a right proceeding. That is all I have to say about the mother's case.

As I have said, the girl's case is quite different. No doubt it originated in a proceeding under the Glasgow Police Act, but the order complained of is an order pronounced under the Industrial Schools Act. I find no exclusion of appeal to this Court under that Act, and therefore I think it is quite competent to bring up what is alleged to be an oppressive order on the part of the Magistrate to have it considered in this Court. I do not know whether the respondent would wish to say anything upon the merits of this case, but he can do so after we have disposed of the question of competency. Upon these grounds I am of opinion that this bill of suspension as regards the mother is incompetent, and as regards the child that it is competent.

Lord Trayner—The objection stated by the respondents to the competency of this suspension is based upon the 131st and 132nd sections of the Glasgow Police Act 1866, which excludes review of sentences or orders pronounced by a Glasgow Police Magistrate except by way of appeal to the Circuit Court of Justiciary at Glasgow, and upon certain grounds.

I think these clauses have no application to any order, sentence, or proceeding except such as may be pronounced or taken under the Glasgow Police Act. Accordingly they have no application in my opinion to the order pronounced for the detention of the complainer Margaret Mackenzie in an industrial school which did not proceed under or in virtue of any power conferred by the

Police Act (for that Act confers no power on the Magistrate to issue such an order), but, as the order itself bears, "in pursuance of the Industrial Schools Act." The jurisdiction of this Court to review orders pronounced under the Industrial Schools Act is nowhere excluded, and therefore the objection stated to the competency of this part of the present suspension falls to be repelled.

The objection to competency, in so far as it relates to the complaint of Jane Wright or Mackenzie, stands in a different position. *Ex facie* of the proceedings she was charged, convicted, and sentenced under and in terms of the Police Act, and the review clauses referred to will apply unless it appear that the proceedings complained of are of a character not covered or provided for by these clauses.

Now, the case presented by the complainer is, that she was never formally cited to the Police Court to answer any charge; that she was requested to attend at the Police Office with her daughter without being told for what purpose; that being voluntarily present she was placed in the dock, and then for the first time charged with theft without any previous intimation that such a charge or any charge was to be preferred against her; that she was not informed of her right to ask and obtain a continuation of the diet in order to obtain assistance in her defence, or to procure exculpatory evidence; and that these proceedings were adopted in the case of a person whose honesty had never before been impugned, and who was the wife of a respectable law-abiding citizen, whose address was well known to the police. The respondents maintain, that assuming the complainer's averments to be true, they amount to oppression on the part of the Magistrate, but that oppression only gives right to an appeal to the Circuit Court. I think the respondents may very safely admit, that assuming the complainer's averments, the Magistrate was guilty of oppression—I should say gross oppression. But it does not follow that the jurisdiction of this Court is excluded in every case where the conduct of the magistrate can be described as oppressive. What is undoubtedly oppressive may be something more. In every case where a magistrate pronounces a sentence on a plainly irrelevant charge (as in *Collins'* case), or on an erroneous view of the law (as in *Kidger's* case), he acts in a sense oppressively, because illegally.

In such cases, however, the jurisdiction of this Court is not excluded by the review clauses of the Police Act. These clauses are open to construction, and I construe the words "oppression on the part of the magistrate" as meaning only any failure in duty on his part, or any straining or abusing of his powers which in the particular circumstances bears with undue or unreasonable weight against the accused. But what the complainer now complains of is something very different from this. She not merely complains of the Magistrate's sentence, but of what took place before the case reached the Magistrate. Her case is not a case of oppression merely, but is that the whole proceedings which culminated in the Magistrate's sentence were illegal and *funditus* null.

Taking the case as averred, I am of opinion that the objection to the competency should be repelled. I think the proceedings complained of as set forth by the complainer were not merely oppressive but lawless—that is, they were not in accordance with but were opposed to the principles and practice of criminal law known and recognised in the law of Scotland.

Lord Justice-Clerk—I agree with both your Lordships that there is no ground for the contention that the jurisdiction of this Court is limited to its sittings in Glasgow as regards the case of the complainer Margaret Mackenzie. She was not dealt with under the Glasgow Police Act at all. On the contrary, the Magistrate declined to deal with her case under the Glasgow Police Act, and proceeded under the Industrial Schools Act. There is no provision in that Act restricting the powers of this Court to give redress against irregular or oppressive proceedings, and there can therefore be no objection to the competency of suspension in that case.

The case of Jane Mackenzie is different. She was tried and convicted under the Glasgow Police Act undoubtedly. The difference of opinion which your Lordships' judgments on her case disclose places upon me a considerable responsibility. I recognise to the full the restricting quality of the clause in the Glasgow Police Act by which review, otherwise than by appeal to this Court sitting in Glasgow, is excluded. I hold it to be quite clear that if the authorities of police in Glasgow do in the course of proceedings formally permissible by law, act oppressively, the remedy, and the only remedy—except through the State—is an appeal to this Court at its next sitting in Glasgow, and that the Court sitting here is bound to regard the restriction of the *locus* of review contained in the Police Act, however anomalous such restriction may be. In my view the question whether this Court, sitting here, can entertain this suspension, must be considered upon the footing that it is only when proceedings are not merely oppressively conducted within the law but are without the law that the Court sitting in Edinburgh can take up and consider the complaint of the person alleged to have been wronged. A mere oppressive use of legal powers will not make a suspension competent before this Court sitting here. All that I accept as having been conclusively settled by the cases which were quoted by the respondent.

The real question in this case is, whether the proceedings do not disclose something more than mere oppression in the use of permissible procedure. In considering that question it is important to keep clearly in view what the facts are which are averred and not reported. They are these—The complainer's child, when with the complainer in the City Clothes Market in Glasgow, was found to be carrying some articles which were missed from stalls in the Market. A policeman having been called, mother and child accompany him to the police office. No charge is made or notified to them, but they are told they may go home. No bail is asked, but they are requested to be at the police office on the following morning. That evening two officers call at their house. They do not state any charge, nor inform the complainer Mrs Mackenzie that any charge is to be made against her, or give any indication that it is otherwise than as the mother of a child of tender years which might be charged with a crime that she is

invited to come. She asks them whether they will see her husband, or whether he should accompany her and her child to the police office, but is told that this is unnecessary. Next morning mother and child go to the police office. The mother receives no communication of any kind as to what is going to happen till they are called into Court. Then for the first time a charge of theft is read out against her, and the case then proceeds in ordinary course, there being nothing informal or contrary to law in that procedure after the case is entered upon by the Magistrate.

These are the material facts, shortly stated. I have thought it necessary to state the facts which seem to be admitted as substantially correct, because it is very important that the assumed facts which form the basis for judgment on the competency of this suspension should be clearly and sharply defined. These then being the facts of the case as regards what was done, the question is—Is the High Court of Justiciary sitting in Edinburgh deprived by the Glasgow Police Act of its jurisdiction to deal with such a case promptly and at once under a suspension? It is said—"There is a regular complaint, a regular trial, a regular conviction, and a regular sentence. It may be that all the proceedings were regular in form; there has been oppression under cover of the forms. But if so, jurisdiction to deal with the case is restricted to the High Court sitting on appeals at Glasgow."

I cannot assent to that view. If suspension is competent, as it admittedly is where procedure goes outside statutory powers, I hold that suspension is competent where the proceedings of the police in prosecuting a law-abiding citizen on a serious charge are outside of the fundamental principles of the law of the land. I hold that what is alleged to have been done in this case by the police, as public prosecutors, to amount to a travesty of legal procedure in a civilised country—"a mere farce," to use the words of Lord Neaves in the case of *Mackenzie* v. *Lang*—under colour of administration of powers conferred by law. In *Marr's* case the power of this Court was sustained notwithstanding the restricting clause, because, to use Lord Adam's words, what was done was "outwith the statute." Holding as I do that what was done in this case was "outwith all law," that the police proceeded not merely oppressively but in an absolutely lawless manner, that they did what it could never be permissible to do unless some statute specially authorised it, and which it is impossible to believe that the Legislature of any constitutionally governed country would embody in a statute, I must sustain the competency of this suspension. I hold proceedings to be null in which I find that in their initiation there was an absolute disregard of the commonest principles of justice by springing suddenly, at the very moment of the trial, a charge of serious crime against a person who up to that time had not been given the slightest notice that she was to be under accusation as a criminal at all, but on the contrary was, as I think, directly led to understand that she was only brought there as a guardian of a child.

I hold that the police and the prosecutor of police thus acting, "the fundamental rules of all judicial procedure were transgressed," to use the words of Lord Cowan in the case of *Wright*. I feel certain that had the experienced Magistrate who tried the case known the circumstances in which Mrs M'Kenzie stood at the bar of the Court he would not have allowed the prosecutor to proceed with the case then and there. He would, I feel sure, have held, to use Lord Ivory's words in *Gray* v. *M'Gill*, that "in the straining after a more than ordinary measure of despatch or repression the principles of substantial justice ought never to be lost sight of." In this case the blot in the proceedings arises not in the conduct of the Magistrate, but of the officials of his Court who had charge of the initiation of the proceedings. But that conduct is as much a part of the proceedings as what afterwards followed, and I think these words of Lord Ivory are in every respect applicable.

I know of no case the least like this one. I know of no case of a person being at once tried for a serious crime who up to the moment of the commencement of the trial has never been informed that he is charged with a crime, or is accused of it even. The nearest case to it is that of *Ritchie* v. *Pilmer*, in which a man cited as a witness was informed that he would be charged with the crime, and was tried half an hour afterwards. The Court held such procedure to be so flagrantly unjust that "no sentence could be sustained which had followed thereon." That is in my judgment to hold that there was a fundamental nullity in the proceedings as being contrary to every principle of just administration of the law. This case is much more flagrant. For Mrs M'Kenzie was not even allowed half an hour to think over the fact that she was charged with a serious crime, and to compose herself to conduct her own defence. She was allowed no time at all. At the same moment at which she knows for the first time that she is to be accused of serious crime her trial begins. No person even of the strongest nerve could be expected to be in a fit state to watch the case and conduct his own defence in such circumstances, still less a woman who came there as this mother did in charge of her child, and as a guardian only.

On these grounds I concur with Lord Trayner in holding that it is competent to sustain this suspension, the facts averred and not disputed disclosing a case in my opinion *ab initio vitiosum*, and contrary to every principle of law and justice.

The Court having called upon the respondents counsel to speak to the merits of the suspension in the case of the complainer Margaret M'Kenzie,

Argued for the respondents—There was no irregularity of procedure in the case of the complainer. The respondents followed the ordinary procedure in such cases. The charge was properly entered in the police books against her when she was taken to the police office on the 20th November, and both her parents were sufficiently certiorated that she was to be dealt with in reference to this offence on the morning of the 21st November. There was no formal intimation given to the father, but it appeared from the complainers' statements that the information given to the mother had been conveyed to him.

Counsel for the complainer were not called upon.

At advising—

LORD JUSTICE-CLERK—It is certainly new to

me that it is the practice, as we are told, for magistrates in Glasgow when a child of a law-abiding citizen is brought before them for the first time on a charge of theft to send that child to an industrial school for five years upon the result of inquiries by detectives, not communicated in open court or upon oath as information for his guidance, and that without intimation to the father, or opportunity given to him to make explanations with regard to reports about him. If that is the practice it is high time that the Court should interfere to stop it. The object of such an Act as the Industrial Schools Act is to provide for the case of children who are not expected to be dealt with in their own homes. It was intended to provide for exceptional cases, and it cannot be said that a case is exceptional into which full and proper inquiry has not been made

Lord Adam—We can only, as it appears to me, deal with this case upon facts admitted by the respondents. The facts which I hold to be substantially admitted are these—that the policemen, when they called on the afternoon of the 20th, warned the mother that a charge of theft might be made, but did not say that it was unnecessary that the father should be there. I am ready to dispose of the case on that footing, and upon the footing that the father knew of what had taken place that day in the police office; knew that the mother and daughter were to go to the Police Court next morning; and had reason to believe that a charge of theft would be brought against the child. But it appears to me that there was not a suggestion until the proceedings in the Police Court were about to close that this child should be taken from its father's house and sent to an industrial school. The first mention of an industrial school appears in the report of the proceedings quoted from the newspapers in article 10 of the bill of suspension. "The further proceedings in the case are accurately reported in the following extract from the *Glasgow Evening Citizen* of November 21st 1888—'Stipendiary Gemmell said there could be no doubt about the child's guilt, but he could not divest from his mind the idea that the child was taken there by her mother for the purpose of stealing.' The mother—'Oh no, sir, I never required to do such a thing. I went to buy a mat, and looked at some, as these women have said.' The Stipendiary — 'It was impossible that the child could be going from stand to stand with these articles in her possession without you seeing them.' The mother—'I had three children with me—this one in my arms, and the other at my feet. Margaret was walking behind me, and I could not see what she was doing.' The Stipendiary—'I am not going to convict the child, I am going to send her to an industrial school.' The mother—'Oh no, sir, her father is a most respectable man, and he will go wrong in his mind if you do.' The Stipendiary—'I will send her to an industrial school for five years, and you, I find you guilty of art and part of the theft, and sentence you to thirty days' imprisonment.' So far as appears this was the first hint by anyone concerned in the proceedings that the child was to be sent to an industrial school. The Magistrate pronounced the order in the absence of the proper guardian of the child, and in the face of the remonstrance of the mother. It humbly appears to me that this was a proceeding of a most oppressive kind, and if such proceedings are common in the Police Court of Glasgow the sooner they are put a stop to the better.

Lord Trayner—I agree that this order cannot be sustained. The Industrial Schools Act is intended to provide for the case of children who have no guardians, or whose guardians are neglecting them. But it is a new idea to me that children of law-abiding citizens, whatever their position in life, may be sent to an industrial school in this way. It is admitted that the order was pronounced in the absence of the girl's father, and without intimation to him that such an order was to be pronounced. We cannot sustain such an order.

The Court quashed the conviction and order.

Counsel for the Complainers—Comrie Thomson — Campbell — Macdonald. Agents—J. & J. Galletly, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh, Q.C.—Ure. Agents—Campbell & Smith, S.S.C.

Monday, January 28.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner.)

ADAMS *v.* CADENHEAD.

Justiciary Cases—Salmon Fisheries (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 22—"*Place for Exportation.*"

Held that an inland railway station is not a "wharf, quay, or other place for exportation" within the meaning of section 22 of the Salmon Fisheries (Scotland) Act 1868.

John Adams was charged before the Sheriff Court at Aberdeen upon a complaint which stated "that he did, at Aberdeen, between 14th September 1888 and 4th February 1889, being the commencement of the latest and the termination of the earliest annual close time for salmon for any district in Scotland—(1) On 20th September 1888 bring to the joint railway passenger station Guild Street, Aberdeen, and did there deliver to the Caledonian Railway Company, for exportation to France, three boxes containing 42 salmon. (2) On 21st September 1888 bring to said railway station, and did there deliver to the Caledonian Railway Company, for exportation to France, two boxes containing 19 salmon, contrary to the Act 31 and 32 Vict. cap. 123, section 22." Objections were stated to the relevancy of the complaint on the ground that it was not charged against the appellant that he had failed to enter the salmon intended for exportation with the proper officer of Customs at the port or place of intended exportation before shipment thereof, which was an essential element of the offence, and that the railway station Guild Street, Aberdeen, was not a port or place of exportation in the sense of the section of the statute. The Sheriff-Substitute (Dove Wilson) repelled the objections, and upon evidence led convicted Adams of the contravention charged.

Adams took a case. The facts proved were set forth by the Sheriff-Substitute as follows—"Upon 20th September 1888 the appellant delivered to the Caledonian Railway Company at Aberdeen three boxes addressed to 'Bigot & Co., Fish Market, Paris.' With these boxes he delivered a consignment note or declaration produced, in which the sender's name and address is given as 'A. Walker, Aberdeen,' and the consignee's 'Bigot & Co., Paris,' the description of the goods being '3 boxes whitings.' I held it proved that 'A. Walker' was a fictitious name which was used by the appellant in consigning fish for the Continent. Over the address to Bigot & Co. upon each box there was put by an official of the railway company a label in the following terms, 'parcels agent, L. B. & S. C. Rly. Co., Newhaven harbour.' A consignment note in the name of 'A. Walker' as sender was made out to said parcel agent as consignee, and to that note was attached the consignment note or declaration made out by the appellant above referred to. This was all done in presence of and with the authority of the appellant. No express evidence was led to show whether the appellant did or did not intend to enter the salmon with the officer of Customs at the port of Newhaven before actual shipment, but the consignment note having stated the contents of the boxes as 'whitings,' which do not require to be so entered, showed that accused did not intend to enter the salmon. In course of transit it was discovered that these boxes contained salmon with a layer of whitings on the top and they were seized by the Customs authorities at Newhaven. Upon 21st September 1888 the appellant similarly consigned, under the name 'A. Walker,' to the same consignees, 2 boxes accompanied by a similar consignment note or declaration, the contents being described as 'lemon soles.' These boxes were re-addressed and consigned in the same way to the parcels agent, Newhaven harbour. No express evidence was led of intention to enter them at Newhaven, and, as in the previous case, the consignment note having stated the contents of the boxes as 'lemon soles,' showed that accused did not intend to enter the salmon. They were discovered in course of transit to contain salmon with a layer of lemon soles on the top, and were seized by the Customs authorities at Newhaven. On hearing that the first consignment had been seized, and while the second consignment was still *in transitu*, accused endeavoured to stop the second consignment at Crewe and have it re-consigned to Liverpool to prevent its seizure by the authorities at Newhaven. After both consignments had been seized an attempt was made by the appellant to satisfy the Customs by emitting a declaration of capture before a magistrate, but the authorities were not satisfied, and the salmon were destroyed."

The questions of law for the opinion of the Court of Justiciary were:—"1. Whether, in order to make the complaint relevant, it was necessary to charge against the appellant that he had failed to enter the salmon intended for exportation with the proper officer of Customs, at the port or place of intended exportation, before shipment? 2. Whether it was a contravention of the Act to bring to the joint railway passenger station Guild Street, Aberdeen, and there deliver the salmon in question to the Caledonian Railway Company for exportation to France by inland railway carriage to Newhaven in England, and by shipment thence to France?"

The Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123), section 22, enacts—"All salmon intended for exportation shall be entered for that purpose with the proper officer of Customs at the port or place of intended exportation before shipment thereof, and any salmon shipped or exported, or brought to any wharf, quay, or other place for exportation between the commencement of the latest and the termination of the earliest annual close time for any district in Scotland contrary to this section shall be forfeited, unless proof be given to the satisfaction of the Commissioners of Customs of the salmon having been legally captured, and the person so illegally shipping or exporting, or bringing the same for exportation, shall be liable to a penalty not exceeding two pounds for every salmon so shipped or exported or brought for exportation, and no salmon caught by rod and line during the annual close time for net fishing shall be shipped, exported, or brought for exportation under the like penalties; and any officer of Customs may, during the aforesaid period, open any parcel entered or intended for exportation, or brought to any quay, wharf, or place for that purpose, and suspected by him to contain salmon, and may detain any salmon found in such parcel until proof is given to the satisfaction of the Commissioners of Customs of the salmon being such as may be legally exported; and if the salmon, before such proof is given, become unfit for human food the officer of Customs may destroy the same."

Argued for the appellant—(1) The complaint ought to have libelled failure to enter the salmon with the proper officer. That was an essential element of the offence. The words "contrary to this section" in the second clause referred back to the first clause, which provided for such entering. (2) The railway station at Aberdeen was not a "wharf, quay, or other place for exportation" within the meaning of the section.

Argued for the respondent—(1) Failure to enter was no part of the offence. To enter salmon in the circumstances set forth would be an offence under 26 Vict. cap. 10, sec. 3. Failure to do what could not lawfully be done could not be an element in an offence. Section 22 kept the two matters quite separate. The words "contrary to this section" meant "during close time without proof to the commissioners." (2) The section was contravened by the accused putting the salmon into a course of transit over which he had no further control, and which in ordinary course would take the salmon out of the country.

At advising—

Lord Justice-Clerk—As I read the section of the Act of Parliament under which this charge is brought, the place at which the offence must be committed must be a wharf, quay, or other place for exportation, the offence being committed in one or other of two ways, either by shipping or exporting the salmon, or by bringing them to any wharf, quay, or other place for exportation during the close time. I have no hesitation in holding that the words "or other

place" mean a place similar to a wharf or quay, and that the purpose must be manifested to be for exportation by the salmon being brought to such a place. I do not think that the station of Aberdeen is such a place. The offence charged here would be committed by the bringing of the fish to the port of Newhaven in circumstances which upon a proof would be held to establish that they were brought there for exportation, but I do not think that we can hold it to be a relevant complaint under this section that at the station of Aberdeen certain boxes were delivered to a railway company in order to be taken to a wharf, quay, or other place for exportation. The place at which the offence must be committed must be a place from which immediate exportation may follow. I therefore think we ought to answer the second question in the negative, and that it is unnecessary to answer the first question at all.

Lord Adam—It appears that the appellant here was convicted of two offences of different dates, the offences being alleged to be contraventions of the 22nd section of the Salmon Fisheries (Scotland) Act 1868. Now, I am clearly of opinion with your Lordship that this section is not intended to apply to inland railway stations, but to shipping ports. That is obvious from the words of the statute. This charge is brought under the second clause of the section which reads—[*His Lordship here quoted the clause*]. It is said that the Aberdeen railway station is a place for exportation within the meaning of these words. I am very clear that it is not. I think that according to the general rule of construction they mean wharf, quay, or other places *ejusdem generis*. A railway station is not a place for exportation of the same kind as a wharf or quay. That this is the proper reading of these words is seen from the rest of the section, which requires proof to the Commissioners of Customs that the salmon have not been killed during close time. Is it to be expected that this proof is to be given at an inland railway station? I think this provision clearly shows that the statute is intended to apply to shipping ports. I have no hesitation in concurring in the judgment proposed by your Lordship.

Lord Trayner concurred.

The Court quashed the conviction.

Counsel for the Appellant—Low. Agents—Menzies, Coventry, & Black, W.S.

Counsel for the Respondent—Lord-Adv. Robertson—Kennedy. Agent—R. Pringle, W.S.

COURT OF JUSTICIARY.

Saturday, December 29, 1888.

GLASGOW CIRCUIT.

(Before the Lord Justice-Clerk).

M'KENZIES *v.* M'PHEE.

Justiciary Cases—Act 19 *Geo. IV. cap.* 29, *sec.* 1—*Criminal Procedure* (*Scotland*) *Act* 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 46 *and* 48—*Appeal to Glasgow Winter Circuit Court—Competency.*

The Act 9 Geo. IV. cap. 29, sec. 1, provides for the holding of a Winter Circuit Court at Glasgow, to "be continued from day to day until the whole criminal business to be brought before the Court at that time is concluded, and no longer."

The Criminal Procedure (Scotland) Act 1887, sec. 46, empowers the Lords Commissioners of Justiciary to "hold such sittings for the trial of criminal causes as may be necessary, . . . and every sitting of the Lords Commissioners . . . shall be a sitting of the High Court of Justiciary."

Held that the Act 9 Geo. IV. cap. 29, has not been abrogated or superseded by the provisions of the Criminal Procedure (Scotland) Act 1887 with reference to the holding of Circuit Courts, and that the Glasgow Winter Circuit Court is held by virtue of it and subject to its provisions; and, following *Davidson* v. *Gray*, 2 Brown 13, that it is incompetent to appeal any case, even though criminal, to that Court.

This was an appeal to the Circuit Court of Justiciary at Glasgow held during the Christmas recess of the Court of Session against a sentence by the Police Magistrate of Glasgow pronounced on the 21st November 1888, by which Jane Wright or M'Kenzie was sentenced to thirty days imprisonment for the crime of theft, and against an order by the same Magistrate of the same date by which her daughter Margaret M'Kenzie, who was charged with the same offence, was ordered to be sent to an industrial school for five years.

The Act 9 Geo. IV. cap. 29, provides by sec. 1—"It shall and may be lawful for the High Court of Justiciary at Edinburgh, and the said Court is hereby authorised and required on or before the twentieth day of November in every year, to fix by Act of Adjournal a day for holding a Circuit Court of Justiciary at Glasgow, for trying criminal causes, during the recess of the Court of Session in the end of December and beginning of January yearly, and to name two of the Judges of the said High Court to discharge the duties of the said Circuit Court, and such Circuit Court shall be held at Glasgow accordingly, and shall be continued from day to day until the whole criminal business to be brought before the Court at that time is concluded, and no longer."

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), sec. 46, provides—"The Lords Commissioners of Justiciary shall hold such sittings for the trial of criminal

causes as may be necessary, on requisition of the Lord Advocate, subject to such Orders as Her Majesty in Council may issue ordaining Courts to be held, and every sitting of the Lords Commissioners whether under the existing law and practice or under this Act, or under such Order in Council, shall be a sitting of the High Court of Justiciary and the ceremonies of fencing and closing courts by proclamation of a macer shall be discontinued, and it shall not be necessary for the Lords Commissioners of Justiciary to remain in any town for a longer time than is required for the disposal of the criminal and civil business falling to be disposed of at such sitting."

Sec. 48—"It shall not be necessary for the High Court of Justiciary to proceed to any town for the purpose of holding any Court in use to be held in such town when there are no cases indicted for the sitting of the Court at such town, or when so many of the persons indicted thereto have pleaded guilty before the Sheriff at the first diet as to make the holding of a special Court inexpedient, and in that event such cases as remain for trial may be ordered to be brought up at another Court, . . . and any appeal which may have been taken to such Court may be heard by the High Court of Justiciary in Edinburgh, or may when both parties consent be heard at any sitting of the High Court of Justiciary at any place."

The respondent objected to the competency of the appeal on the ground that it was excluded by the provisions of the Act 9 Geo. IV. c. 29, sec. 1.

Argued for the respondent—By the provisions of the Act 9 Geo. IV. cap. 29, sec. 1, under the authority of which the Winter Circuit Court at Glasgow was held, the judges had power to sit "till the whole criminal business to be brought before the Court at that time is concluded, and no longer." It had been decided under this clause that it was incompetent to appeal any case, even though criminal, to the Winter Glasgow Circuit Court—*Davidson* v. *Gray*, January 6, 1844, 2 Brown 13.

Argued for the appellants—The Act cited by the respondent and the decision in *Davidson* v. *Gray* did not apply. The Court was not sitting under authority of that Act, but under the authority of the Criminal Procedure (Scotland) Act 1887. It was sitting as the High Court of Justiciary and was empowered to sit till the whole criminal and civil business was disposed of—section 46.

At advising—

Lord Justice-Clerk — The question of the competency of this appeal has been very properly raised, as it is desirable that the meaning of the Criminal Procedure Act 1887 should be distinctly ascertained with reference to these appeals. Having given the points the best consideration in my power, I have come to be of opinion that the hearing of appeals at this Winter Circuit is not competent. The question does not now come up for the first time, for in the case of *Davidson* v. *Gray*, 2 Brown, 13, that question was decided, and the judgment has ever since been acquiesced in, and accordingly no appeals have since been heard at this Winter Court except in one case, which was heard and disposed of with the consent of both parties. I accept that decision as binding, and the real question before the Court now is, whether the Act of 1887 makes any alteration upon the ruling given in that case.

I am of opinion that the Act of Parliament (9 Geo. IV. c. 29) under which that decision is given is still in force, and is the Act under which this Court is held. The Act expressly provides by section 1, that from and after the passing of this Act the Circuit Court to be held at Glasgow during the winter recess of the Court of Session "shall be continued from day to day until the whole criminal business to be brought before the Court at that time is concluded, and no longer." I do not find any clause in the Act of 1887 repealing this provision. The first part of clause 46, relied on by Mr Thomson, refers to a Court being held on the requisition of the Lord Advocate, which is just the old practice of fixing High Court sittings anywhere when business made them advisable, but which practice has of late years been only applied to Edinburgh and the district of the Lothians. All the other Courts have been held under the Acts appointing Circuit Courts, or under the Orders in Council and Act of Adjournal following on them of 1881, appointing additional Circuits. I do not think, therefore, that the first part of clause 46 has any bearing on the question, for it distinctly recognises that Courts are still to be held under the existing law and practice after the passing of the Act, and makes this alteration only, that these Courts are to be called sittings of the High Court of Justiciary. The intention of the Act on this point I understand to be that a Circuit Court is no longer to be considered a thing of itself, but that the sittings of the High Court of Justiciary all over the country should fall into one arrangement, provided that the High Court does not neglect to appoint those Courts to be held which under the existing law and practice were in use to be held. But while this Court is a sitting of the High Court, it is held under the existing law and practice, and that existing law and practice, as set forth in the Act of 9 Geo. IV. c. 29, is, that it is to sit "till the whole criminal busiuess is disposed of, and no longer." It has been said that the Courts which used to be called Circuit Courts have been abolished by the Act of last year. I do not think so, and this is clearly shown by clause 48, and by the dispensing clauses authorising cases in certain circumstances to be remitted to the High Court or to a Court of a neighbouring Circuit district. I am therefore of opinion that the Act of Geo. IV. is still in force, and that obeying its very plain terms this Court is held for the hearing of criminal cases only, and that the hearing of civil appeals is not part of the business to be transacted during its sitting

The Court pronounced this interlocutor—

"Having heard counsel for the parties, the Lord Justice-Clerk finds that the Winter sitting of the High Court of Justiciary at Glasgow is held under the Act 9 Geo. IV. c. 29, and that it is not competent to hear or dispose of any appeals thereat."

Counsel for the Appellants—Comrie Thomson—Macdonald. Agents—J. M. & J. H. Robertson, Writers, Glasgow.

Counsel for the Respondent—Ure. Agent—Party.

Saturday, December 29.

GLASGOW CIRCUIT.

(Before the Lord Justice-Clerk.)

H. M. ADVOCATE *v.* LE BOURDAIS.

Justiciary Cases—Ship—Destroying a Ship with Intent to Defraud Insurers—Indictment—Relevancy—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. c.* 35), *secs.* 8 *and* 60.

The master and mate of a vessel were charged on an indictment which set forth that certain insurances having been effected on the vessel, and being then in force, they did bore one or more holes in the vessel, and did attempt to force out her bow-ports in order that she might sink, and did spread oil over her in order that she might be set on fire, and "did thus attempt to sink and destroy the said barque with intent to defraud the insurers liable under said insurances."

Objection was taken to the relevancy on the ground that the indictment failed to set forth in the *modus* any facts relevant to infer fraudulent intent.

Held that the words "you well knowing that the ship had been so insured," were to be implied by virtue of section 8 of the Criminal Procedure (Scotland) Act 1887, and that the indictment was relevant.

Opinion that in the event of fraudulent intent not being proved it would be competent for the jury to convict the accused of an attempt to sink the ship maliciously, the word "maliciously" being in that event read in to qualify the acts charged, and a conviction of a part of what is charged in an indictment, if in itself an indictable crime, being competent by sec. 60 of the Criminal Procedure (Scotland) Act 1887.

Louis le Bourdais and Joseph le Bourdais were charged before the Circuit Court at Glasgow, on 27th December 1888, on an indictment which bore, "and the charge against you is, that the insurances set out in the schedule appended hereto having been effected on the British barque 'Gylfe' of Quebec, freight thereof and cargo, on a voyage from Quebec to any port in the United Kingdom, so far as ship and freight were concerned, and to the Clyde as regards the cargo, which insurances were all in force on the dates after mentioned; and the said barque having left St John's, Newfoundland, on 16th August 1888, in course of said voyage from Quebec, to proceed to Port Glasgow, being a port in the United Kingdom and on the Clyde, with a cargo of timber, you, Louis le Bourdais, being master in charge of said barque, and you, Joseph le Bourdais, being chief mate of said barque, did, on 18th, 19th, or 20th August 1888, on board the said barque on the high seas, while the said barque was on said voyage, bore one or more holes in said barque below water-mark thereby causing her to leak, and did on several occasions on said dates, and on 21st August 1888, attempt to force out the bow ports of said barque, all in order that the said barque should sink, and you did on last mentioned date, in order that the said barque should be immediately thereafter set on fire, spread over the cabin floor, decks, and other parts of said barque, paraffin or other inflammable oil, and you did thus attempt to sink and destroy the said barque with intent to defraud the insurers liable under said insurances respectively, or otherwise you did, times and place and in manner foresaid, by wilful breach of your duty, attempt to sink and destroy the said barque contrary to the Act 17 and 18 Vict. cap. 104, sec. 239."

The panels objected to the relevancy of the indictment. The charge was that the accused attempted to destroy the vessel with intent to defraud insurers. That was a charge of attempt to commit fraud. But the indictment failed to set forth in the *modus* any facts relevant to infer fraudulent intent. It failed to set forth that the insurances upon the vessel were known to the accused, and without such knowledge there could be no fraudulent intent. The only acts alleged against the accused were that they bored holes in the vessel below water-mark and attempted to force out the bow-ports in order that she might sink, and spread oil upon the decks that she might be set on fire. There was nothing to infer fraud in all that. Nor would the indictment be in any way improved by words being supplied from sec. 8 of the Criminal Procedure (Scotland) Act 1887. It would not be relevant to say that they did "falsely and fraudulently" bore holes. The word "maliciously" might be supplied, but that would not make a relevant charge of fraud. Such an act would be one of barratry, which is one of the perils insured against, and the owners would be entitled to recover in respect of it without the intervention of any fraud. The case of *Brown*, November 8, 1886, 1 White, 243, was distinguishable because in that case the intention and interest on the part of the prisoner to benefit the owner and to do so by fraudulent representation was set forth. The indictment might be relevant as one of malicious mischief, and it was not disputed that by the operation of section 60 of the Criminal Procedure Act it might be used as an indictment to that effect, instead of being rejected because it did not relevantly set forth facts to infer the more serious crime charged, viz., the attempt to defraud. But the words "with intent to defraud" ought to be struck out of the indictment as not supported by any relevant facts, and the case sent to trial upon the charge of attempting to destroy the ship and upon that only.

Counsel for the Crown were not called upon.

At advising—

LORD JUSTICE-CLERK—It does not seem to me that it is necessary to call for a reply here. On the other hand, it was quite right that the objection should be brought forward, as it is very desirable that parties should know how they stand under the new Procedure Act.

The aim of the clauses of the Criminal Procedure Act of last year which relate to libelling is to simplify indictment. The Legislature thought it wise to get rid of the complicated forms in use, and to limit the indictment to a statement of the facts alleged to have been done, in the view that the privilege of proceeding by indictment is given to the public prosecutor only, he acting for the public interest; and that

in bringing a prisoner to the bar, the public prosecutor does so on his official responsibility, and undertakes to prove the acts alleged to have been done to have also been done contrary to the common law of the country where the indictment is at common law, or contrary to the special statute libelled on where the offence charged is a statutory one. In the case of a statutory charge it is also the duty of the public prosecutor to state specifically the statute and sections under which the prosecution is instituted.

In the present case the prisoners are charged alternatively at common law and under a particular statute, and an objection is stated as regards the common law charge that the prosecutor should have set forth the facts in such a manner as to qualify the acts alleged to have been done as having been criminally done.

Now, section 8 of the Act of last year (50 and 51 Vict. cap. 35) seems to give very striking illustrations of the kind of allegations which are to be implied and therefore may be omitted. For example, in the case of uttering a forged document, it is of the essence of the crime that the person who utters it should do so "knowing the same to be forged." A person may utter a forged writing knowing nothing about the forgery, and that is no crime. Suppose a clerk to cash a forged cheque at the request of his employer, he cannot be held guilty of forgery unless it be proved that he was privy to the forgery by previous knowledge. The new statute authorises the public prosecutor in indictments for forgery to omit the words "knowing the same to be forged," and leaves these words to be implied. The public prosecutor is bound, however, to prove such knowledge on the part of the accused, and it is the duty of the Court with the assistance of counsel to see that no prisoner is convicted of uttering forged documents without proof of such knowledge.

Now, the phrase in the clause applicable to forgery is given as a specimen of the kind of qualifying allegation which may be omitted. The clause does not give the words applicable to every case where it applies, but a sufficient number are given to show how it is to be applied, and then the following words are added, "or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case," &c.

In this case it is not disputed that the words omitted would have been sufficient under the old law to make the charge relevant. These words are, "you well knowing that the ship had been so insured," and without that fact being proved it is clear that there could be no conviction of the first crime charged. But what the prosecutor alleges in this indictment is an attempt to sink and destroy the ship with intent to defraud the insurers, and it appears to me that these words sufficiently set forth the intent, and that the allegation of knowledge of insurances having been effected must be implied under the directions of section 8. It would be impossible for anyone to have an intent to defraud insurers without knowing that there were insurances. Here there is a distinct allegation of the intention to defraud insurers, and I hold that the words "you well knowing that the ship had been so insured" were properly omitted in accordance with that section.

I wish to add a word as regards what has been pleaded to the effect that there can be no conviction under the first charge unless knowledge of the insurance is proved. I think that under section 60 of the Criminal Procedure Act, even assuming that the prosecutor fails to prove insurances or knowledge of them, it will be still competent to convict the prisoners of an attempt to sink the ship maliciously should the attempt to sink be proved by evidence. That section provides that "where in an indictment two or more crimes or acts of crime are charged cumulatively it shall be lawful to convict of any one or more of them, and any part of what is charged in an indictment, constituting in itself an indictable crime, shall be deemed separable to the effect of making it lawful to convict of such crime, and when any crime is charged as having been committed with a particular intent or with particular circumstances of aggravation it shall be lawful to convict of the crime without such intent or aggravation." There is no doubt that to bore a hole in a ship in order to sink or destroy it is an offence at common law if the word "maliciously" is implied as section 8 declares it may be. The great advantage of the recent Act is that after evidence led, which of course is limited to the facts charged, the question whether the acts proved were done criminally can be left to the jury on direction by the Judge as to what they must find to have been the quality of those acts before they can convict under the indictment. I have no difficulty in repelling the objection and holding the libel relevant.

The following was the interlocutor:—

> "The Lord Justice-Clerk having heard parties, repels the objection and finds the charge relevant under the Criminal Law Amendment Act 1887."

Evidence having been led, the jury by a majority found the panels severally guilty of the first charge of the indictment as libelled.

Sentence of ten years' penal servitude was pronounced upon each of the panels.

Counsel for the Panels—Comrie Thomson—M'Clure. Agents — R. & J. Neill, Writers, Greenock.

Counsel for H.M. Advocate—Duncan Robertson — A. O. M. M'Kenzie. Agent — P.-F. of Renfrewshire.

COURT OF SESSION.

Tuesday, January 29.

SECOND DIVISION.

[Sheriff of Stirlingshire.

THOMSON, JACKSON, GOURLAY, & TAYLOR *v.* LOCHHEAD.

Implied Contract—Employment—Recompense.

A trader having fallen into difficulties laid before his creditors a state of his affairs prepared by his agent. An accountant employed by two of the creditors attended the meeting, and was requested by the meeting of creditors to examine into the affairs. He did so, and thereafter, having ceased to act for the two individual creditors, he negotiated and carried through a composition arrangement, which the creditors accepted. Thereafter he sued the trader for his professional fee, maintaining that he was liable for it either (1) because he had constructively employed him, or (2) because he had obtained the benefit of his services. *Held* (*diss.* Lord Rutherfurd Clark) that the trader, not having employed the pursuer, was not liable for his account.

Upon 2nd November 1887 Mr Robert Lochhead, manufacturer, Alva, called a meeting of his creditors, when a statement of his affairs, prepared by his man of business Mr Archibald, was presented to them. By minute of that date it was agreed that Mr John Gourlay, C.A., Glasgow, who attended the meeting, as the minute thereof bore, on behalf of two creditors, and Mr John Lochhead should be appointed to make an examination into the bankrupt's affairs. Mr Gourlay made an examination of Lochhead's affairs, and at a meeting of creditors in his office in Glasgow on 11th November laid a statement of affairs before the creditors. At the same meeting Lochhead, by the advice of his agent, offered a composition of 13s. 4d. in the £. This was refused by the creditors. Thereafter Gourlay, having seen certain of the creditors, wrote to Lochhead's agent enclosing an offer of 14s., which he thought would be accepted. At a meeting on 16th November, the minute whereof stated that "Mr Gourlay, on behalf of Mr Robert Lochhead, submitted the following offer of composition, viz., to pay 14s. per £ as follows"—and then came the various times at which the sums were to be paid—"the last instalment to be secured to the satisfaction of John Gourlay, C.A., Glasgow." This offer, with a slight alteration, was agreed to, and Mr Gourlay thereafter made up a scheme of ranking and division for the composition dated 16th December 1887. To this scheme was appended the following docquet:—"16*th December* 1887.—We have examined the foregoing scheme of ranking and division, compared it with the assents of creditors and the list of liabilities, and we find same correct, and authorise Messrs Thomson, Jackson, Gourlay, & Taylor, C.A., Glasgow, to complete the composition arrangement, notwithstanding that Mr John Clachan and Messrs Walker, Drybrough, & Company have not yet assented.—JOHN ARCHIBALD; ROB. LOCHHEAD."

Mr Gourlay then procured bill-stamps, &c., and prepared the composition bills. Thereafter his firm, Thomson, Jackson, Gourlay, & Taylor, C.A., Glasgow, sued Lochhead for outlays and fees for professional services, amounting to £58, 9s. 9d.

The defender averred that "at no time did the defender or his agent employ the pursuers, who throughout acted in the interests and under the instructions of the creditors of the defender."

The pursuers pleaded—"(2) The defender having employed the pursuers, or at all events availed himself of their services, he cannot now refuse to pay for the same, and decree should be granted in terms of the prayer of the petition."

The defender pleaded—"(2) The defender not having employed the pursuers, the action should be dismissed."

The Sheriff-Substitute (BUNTINE) allowed a proof, and the defender deponed that he had consulted Mr Archibald only as to the conduct of the affair, that he had never employed Mr Gourlay, and that he considered him as acting in the interests of the creditors, and that he never instructed his agent to employ Mr Gourlay. He never supposed Mr Gourlay had any claim upon him for professional services.

The pursuer deponed that he was employed by two of the creditors to attend the first meeting, and made an investigation of the bankrupt's affairs. "I was certainly acting in the interest of the defender, because his estate would have been in bankruptcy if it had not been for me. When I went to Alva I found there had been concealment of assets, and this being brought to light made an alteration of the statement of affairs, and the creditors thought they were entitled to get a larger offer than was submitted in Stirling. Before the meeting in Glasgow I showed my statement to defender, and it was there and then Mr Archibald and the defender agreed to make the offer of 13s. 4d. Then the offer was made in the meeting and refused, the creditors indicating 14s. or 14s. 6d. After the meeting dispersed, two of the creditors said that if I could get an offer of 14s. or 14s. 6d. they would advise acceptance. I wrote to Mr Archibald, got that offer submitted, and carried it through. I afterwards made up the scheme of ranking. When Mr Archibald offered to become security, I advised the creditors to accept the offer. *Cross-examined*—I never indicated either to defender or his agent that I had any claim upon them in regard to this matter."

Upon 17th August 1888 the Sheriff-Substitute issued this interlocutor:—"Finds in fact that the pursuer Mr Gourlay has failed to prove either that he was employed by the defender, or that the latter has made himself liable in payment of his professional account: Therefore assoilzies the defender from the conclusions of the petition: Finds him entitled to expenses of process, and decerns, &c.

"*Note.*—It is admitted by the pursuer, the said Mr Gourlay, that he was originally employed by two creditors of the defender to attend the first meeting of creditors, and that the creditors then assembled employed him to make an investigation into the affairs of the defender, and report to a future meeting of creditors.

"It is true that defender assented to this

investigation, and gave every facility to the pursuer in carrying it out. But it cannot be said that it was conducted on defender's employment, or that it was carried out in defender's interests.

"It is further admitted that at no time did defender employ the pursuer, but it is contended that the defender having availed himself of the professional services of the pursuer is liable in payment therefor.

"The Sheriff-Substitute is unable to concur in this proposition.

"The pursuer throughout the whole negotiations which resulted in the composition arrangement acted on the express employment and entirely in the interest of the creditors. The defender was represented by his law-agent.

"The composition arrangement must be assumed to have been beneficial alike to the creditors and to the insolvent.

"The negotiations which preceded it were conducted by the pursuer and by defender's law-agent. It appears to the Sheriff-Substitute that both creditors and insolvent benefited equally by the services of both these parties fully, and availed themselves of them. But this does not make the creditors responsible for the payment of the insolvent's law-agent any more than it makes the defender liable for his professional account.

"It may be the general custom that the professional accountant employed by the creditors to carry out a composition arrangement is paid out of the insolvent's estate, and such an arrangement is probably both convenient and just. But undoubtedly the claim ought to be made and admitted before the debtor has paid over his estate to the creditors under the composition arrangement, and not held over, as in the present case, till the debtor has been practically discharged."

The pursuers appealed, and argued — The defender had employed the pursuer to carry through this composition, and was therefore liable to pay him for his services. It is true that he originally attended the meeting in Glasgow on the employment of certain creditors, but afterwards, although no doubt he attended to the interests of the creditors, he also attended to the interests of the bankrupt, and got this composition carried through. It was plain from the character of the items, purchase of bill-stamps, &c., that the debtor was really due the account, as the creditors obviously could not pay these sums. If the debtor did not pay this account he had not carried out his contract, because he had not paid a composition of 14s., but only one subject to the deduction of carrying through the composition. It was an understood thing in all cases of a composition that the debtor paid the expenses of carrying it through, as the man of business by whomever originally employed was acting in the interests of the debtor. If the composition was not successfully arranged, then sequestration must be taken out, and that was not in the debtor's interests.

The respondent argued—The pursuer had failed to discharge the burden of proof upon him that he was employed by the pursuer. He was employed by certain of the creditors to look after their interests, and it was absurd to ask the debtor to pay him for doing the work of others. The mere fact that the defender took benefit from the work of the pursuer did not entitle the latter to make a claim for payment. The defender had employed a man of business to look after his interest, and in the case of the debtor employing one man of business and the creditors another, in the absence of any bargain, the rule of law was that each party should pay his own agent. Although the docquet attached to the scheme of division appeared at first sight to show that the pursuer was acting in the defender's interests, it really was not so as appeared from the minutes, and the docquet must be read in that light.

At advising—

Lord Young—This action is put either on the ground of employment or on that of recompense for services rendered to and taken advantage of by the defender without employment. Employment indeed is not averred on record, the pursuers' averment being merely that the defender is "due to the pursuers for outlays and fees for professional services incurred by him," the sum sued for. The second plea-in-law, however, comes nearer a case of employment, for it runs —"The defender having employed the pursuers, or at all events availed himself of their services, he cannot now refuse to pay for same, and decree should be granted in terms of the prayer of the petition." The Sheriff-Substitute states in his note that before him it was "admitted that at no time did defender employ the pursuers, but it is contended that the defender, having availed himself of the professional services of the pursuer, is entitled to payment therefor."

Now, the pursuer Gourlay was employed, and very properly employed, as he explains in his evidence, first by two creditors, and then by other two. There were other creditors who did not employ him, or indeed employ anyone. The defender employed a man of business of his own. I say a man of business, and he was not less such or less qualified to act because he was no otherwise an accountant than all men of business are. On the advice of this man of business the defender called together his creditors, and laid before them a state of his affairs. I cannot enter on the question whether it was a satisfactory state or one to which there existed objections. The four creditors I have mentioned employed the pursuer, sending him to the meeting to attend to their interests, and to see that they did not suffer wrong in any arrangement with the defender. That was very proper. The result was that the creditors who were at the meeting desired the pursuer Mr Gourlay to examine into their debtor's affairs, and see his books and papers so far as necessary, and he on his part, with his man of business, undertook to give every facility for the examination.

In the absence of anything further, I think the pursuer attended on the employment he had received, which was to act in the interest of the creditors, and by seeing that the debtor and his man of business acted justly to them, and preventing them from accepting an offer which was not satisfactory. The result was that a composition was ultimately effected by means of a correspondence between the pursuer Gourlay and the defender's man of business, a higher composition being obtained than had formerly been offered. Here there is the case of the employ-

ment of a man of business by the debtor, and another by the creditors, each of these gentlemen with the interest of his own employer in his care, the result being an arrangement for a compromise by which the debtor got his discharge.

Now, I think it would be a fair matter of arrangement that the creditors should stipulate that the debtor should pay the expense incurred by them in looking into his affairs. But I do not think that was done here. How the proposal would have been received if made we do not know. In the absence of any such bargain I think Mr Gourlay must look for payment to those who employed him for their interest. They might have been satisfied with the examination of the debtor's affairs by his own man of business, and if so, they would have had no other expense. It is no blame to them that they were not, and they seem to have got a better composition because they were not. But I concur with the Sheriff-Substitute in thinking that the person they employed has no action against anyone but them, and that he cannot maintain an action against the defender on the suggestion that but for his services no composition would have been arrived at.

Lord Rutherfurd Clark—I have felt a good deal of hesitation in this case, and all the more because I know that I stand alone. I incline to think, however, that the pursuer is entitled to our judgment on the simple ground that all the expenses necessarily incurred in carrying through the composition arrangement should be paid by the defender. In my opinion such expenses should all be charged against the debtor.

It appears to me that the composition contract was effected by means of the pursuers' services, and by means of them alone. Being services which were necessary to the end which the defender had in view, and which were successfully attained, I think that he should pay for them. He has had the benefit of them, and in such a case, when he obtains a discharge on a composition, I think that it may be fairly said that he alone has had the benefit of them.

It is said that the defender employed another person. It is true that at first he did. But the services of this person were of no use, and gave no aid in effecting the composition contract. The chief, if not the only thing which he did, was to prepare a state of affairs; but it was so defective that the creditors would not consider it.

Lord Lee—I do not doubt that in the general case it is reasonable that the expenses properly incurred in carrying through a composition arrangement should fall on the debtor. But I think the question here is whether any arrangement to that effect has been proved? The pursuer was employed by the creditors and not by the defender. In that state of the facts I think that if it was intended to throw the expenses incurred under that employment on the defender, this ought to have been intimated to and should have been made a condition of the acceptance by the creditors of the composition. That might have been quite a reasonable arrangement, and my impression is that it is quite a common one, but in this case I find no trace of such an arrangement. I concur in the opinion of Lord Young.

I think there is no proof of the ground of action.

Lord Justice-Clerk—I concur in the opinion of Lord Young. It is unfortunate that the pursuers did not accept the offer of £30 which appears to have been made in the original defences. Mr Gourlay, it is certain, was in the first place employed not by the defender but by the creditors. I cannot find evidence to show that he afterwards became the agent of the defender, or that it was ever suggested to the defender that he was to be held liable to pay for Mr Gourlay's services. It would have been easy to bring to the defender's knowledge that Mr Gourlay's services were to be understood as rendered to him, and I think it would be dangerous to hold that a professional man who was originally employed for one party should without some clear change in his position obvious to the other party be held to have become entitled to claim remuneration from the other whose interest is altogether different from that of the original employer.

The very fact that Mr Gourlay was employed by the creditors leads to the inference that he was to endeavour to come to an arrangement as favourable as possible to them. Now, if he was afterwards to act for both, or for the debtor Lochhead alone, the change ought to be made perfectly clear. Lochhead ought, if he was to be expected to pay for two professional men—both his own agent and Mr Gourlay—to have had that put before him. It is quite clear that if we gave the pursuers decree the result would be that the defender would have to pay for the services both of Mr Gourlay and of his own agent, and there is no ground for supposing he intended to incur double costs. On these grounds I agree with Lord Young.

The Court pronounced this interlocutor:—

"Find in fact that the pursuer Mr Gourlay was employed by the creditors of the defender and not by the defender: Find in law that the defender is not liable in payment of the sum sued for: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute; of new, assoilzie the defender from the conclusions of the petition," &c.

Counsel for the Pursuers—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Defender—Wilson. Agents—Wishart & M'Naughton, W.S.

Tuesday, January 29.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BROWNE AND OTHERS *v.* M'FARLANE.

Reparation—Slander—Issues—Evidence in Mitigation of Damages without Issue in Justification.

An action of damages for written slander was brought against the proprietor of a newspaper published in Scotland, in which it was represented that one of the pursuers had planned an outrage on himself in order to

make it appear that his political opponents had been guilty of a crime; that he had made his sons parties to the fraud; and that they had become privy to their father's design. The article, which was contributed by a correspondent of the newspaper in Ireland, was admitted, and it was stated in defence that upon the occasion in question, and about the time when the aforesaid pursuer and a companion were expected to reach home, two police constables were attacked with stones near the pursuers' house; that the police captured the assailants, who proved to be the pursuer's sons, and who stated that they had mistaken the police for their father.

No issue of *veritas* was taken.

The defender proposed at the trial to prove the statements in defence as facts which affected the mind of the correspondent, but the evidence was disallowed by the presiding Judge.

On a bill of exceptions the defender maintained the competency of the evidence for the purpose of mitigating damages. *Held* that as the action was laid against the publisher of the newspaper, and not against the correspondent, evidence as to the state of mind of the latter when he wrote the article was not relevant, and had been properly excluded.

This was an action of damages for written slander by the Rev. John James Browne, County Antrim, Ireland, and his three sons, Arthur Browne, George C. Browne, and John James Browne, against John M'Farlane, Edinburgh, the proprietor, printer, and publisher of the *Scottish Leader* newspaper.

The libel complained of was contained in the issue of the *Scottish Leader* of 16th November 1887 under an article headed—"Affairs in Ulster," purporting to be written by the Belfast correspondent of the paper, and was to the following effect—"A very interesting and amusing episode has just come to light, which illustrates the growing tendency of the North toward Home Rule, and the desperate shift to which foolish people of 'Unionist' leanings are sometimes driven to alarm the Protestant population when they begin to manifest any signs of fraternising with the people of Ireland in prosecuting their just claim to self-government. Toome is a small place where the river Baun receives the waters of Lough Neagh before entering Lough Beg. It is a railway-station, and the place is famous for its fishery. It is still more famous perhaps because here is a building called the 'Temple of Liberty,' erected by a Mr Carey, a wealthy man, who found that very often in bigoted neighbourhoods well-meaning people could not get a hall to have a meeting in. Here, accordingly, the Protestant Home Rulers have held several successful meetings, and it is plain the seed there sown is bearing fruit. At one of these meetings a Protestant rector attended, named Brown, and gave some little trouble, but declared himself a species of Home Ruler. Now, there is much fun over Rector Brown, whose sons have been brought up before the Magistrates at Toome Petty Sessions charged with throwing stones at a police patrol. When charged, the boys, who are young in knavish tricks, very artlessly let the cat out of the bag. They had been posted there by their father to throw stones at him by way of getting up an outrage for the papers, and for the Loyal and Patriotic Union, and had in the darkness mistaken the police for their reverend parent, who had that evening invited a Roman Catholic gentleman of the village to accompany him to the site of the forthcoming outrage by way of protection. The affair was of course hushed up, and the boys let off with a caution by the Magistrates. As it has not yet been, and could not be, reported in our local 'Unionist' papers, I thought it better to let it see the light in the *Leader*. I am sure your readers will appreciate it as they did the Dolamon incident."

The pursuers averred that the statements in this paragraph falsely and calumniously represented that the Rev. Mr Browne was guilty of planning an outrage on himself in a manner which would make it falsely appear that his political opponents had been guilty of a crime, that he had made his sons parties to the fraud, and that they became privy to their father's design.

The defender admitted the article complained of, but denied the pursuer's averments subject to the following explanation—"The pursuer, the Reverend John James Browne, has made several complaints to the police, all of which have turned out to be unfounded, and upon none of which the authorities have taken action. On the evening of the 3rd of August 1887 he left Toome for his own house accompanied by a gardener of the name of M'Astocker. Some delay occurred on their journey, but at the hour when they should have reached home, in ordinary course, the following occurred—Not far from pursuer's residence two police constables were attacked with stones. The police pursued their assailants, whom they secured and discovered to be the pursuers Arthur Molyneux Browne and George Capel Browne. On being challenged for their conduct they stated that they had mistaken the police for their father. The circumstances were reported by the police to their superiors."

On 9th August 1888 the defender published in the *Scottish Leader* a contradiction of the said paragraph, and apologised for the statements having been allowed to appear in his paper. The defender further upon record withdrew the said article, and repeated the apology and expression of regret already made, and that as regarded all the pursuers.

The following issues were adjusted for the trial of the cause:—

I.—Issue for the Rev. John James Browne.

"It being admitted that the defender is the printer, proprietor, and publisher of the *Scottish Leader* newspaper, published in Edinburgh: It being also admitted that in the number of the said newspaper which was published on 16th November 1887 there was printed the paragraph set forth in the schedule annexed hereto—Whether the said paragraph, or part thereof, is of and concerning the pursuer the Reverend John James Browne, and falsely and calumniously represents him as having been guilty of attempting to impose upon and deceive the public, to the loss, injury, and damage of the said pursuer? Damages laid at £500."

II.—Issues for Arthur Molyneux Browne and Mandatory.

"It being admitted that the defender is the

printer, proprietor, and publisher of the *Scottish Leader* newspaper, published in Edinburgh: It being also admitted that in the number of the said newspaper which was published on 16th November 1887 there was printed the paragraph set forth in the schedule annexed hereto—1. Whether the said paragraph, or part of it, is of and concerning the pursuer the said Arthur Molyneux Browne, and falsely and calumniously represents him as having been guilty of attempting to impose upon and deceive the public, to the loss, injury, and damage of the said pursuer? 2. Whether the said paragraph, or part of it, is of and concerning the said pursuer, and falsely and calumniously represents him as having been charged with a criminal offence, and as having admitted or been found guilty of said offence? Damages laid at £100."

Issues in similar terms to those last above quoted were lodged for the Rev. Mr Browne as tutor and administrator-in-law for the other pursuers George C. Browne and John James Browne.

No issue in justification was taken for the defender.

The defender obtained a commission and diligence for the examination of Samuel Kelly and James Mullan, both constables in the Royal Irish Constabulary, Toomebridge, County Antrim, Ireland, as witnesses for the defender, and in accordance with the appointment of the Court the witnesses were examined upon adjusted interrogatories, and the report of the commission was transmitted to the Clerk of Court to lie *in retentis*.

The trial took place on 24th December 1888 before the Lord President and a jury. Evidence was led by both parties, and in the course of the evidence for the defender his counsel proposed to read evidence, taken on commission as aforesaid, to prove the statement in answer 3 for defender, viz.—"Not far from pursuers' residence two police constables were attacked with stones. The police pursued their assailants, whom they secured and discovered to be the pursuers Arthur Molyneux Browne and George Capel Browne. On being charged for their conduct, they stated that they had mistaken the police for their father." The Lord President rejected the said evidence, and the counsel for the defender excepted to the said ruling.

The jury found for the pursuer the Reverend John James Browne, and assessed the damages at £100, and further found for the other pursuers Arthur Browne, George Browne, and John James Browne jun., and assessed the damages at one farthing for each of the said pursuers. The counsel for the defenders then proposed the foresaid exception, and requested the Lord President to sign a bill of exceptions, which was done on the 11th day of January 1889.

The defender argued in support of the bill—What was alleged in the articles was a conspiracy between the father and his sons for political purposes, and that was the point of the issue for the principal pursuer. The object of desiring the admission of the Irish evidence was in mitigation of damages. Its exclusion proceeded upon too rigorous a construction of the rules of evidence in such cases. This was not a case in which the defender, in order to have the evidence in question admitted, was bound to take an issue of *veritas*, all that he desired was to show that his information was true. He had proved how the information came to him, and he was entitled to show that it was reliable, and what was narrated actually took place—*Ogilvie* v. *Scott*, March 19, 1836, 14 S. 729; *Bryson* v. *Inglis*, January 15, 1844, 6 D. 363; *M'Neill* v. *Rorison*, November 12, 1847, 10 D. 15; *Craig* v. *Jex Blake*, July 7, 1871, 9 Macph. 973; *Paul* v. *Jackson*, January 23, 1884, 11 R. 460.

The pursuer argued—The evidence sought to be admitted was completely rejected; it was not part of the *res gestæ*. While the general circumstances in which an alleged libel was uttered ought to be laid before a jury; the evidence here which was rejected was not of a character to have affected the jury even if it had been admitted and no issue of *veritas* had been taken. Reference was made to the authorities above quoted, and to *Brodie* v. *Blair*, July 17, 1834, 12 S. 944; *Burnaby* v. *Robertson*, March 8, 1848, 10 D. 855.

At advising—

Lord Mure—This case raises an interesting and somewhat difficult question as to whether the presiding Judge was right in refusing at the trial to allow certain evidence which had been taken upon commission in Ireland to be submitted to the jury. That evidence related to the defender's statement in answer 3 of the record to the effect that upon the occasion in question certain police officers were assaulted with stones, and upon overtaking and arresting the offenders, who turned out to be the sons of the pursuer, they stated that they had been posted there by their father with instructions to throw stones at him, and that they had mistaken the police for their father.

Now, upon further reference to the record, there can I think be little doubt that the allegation that the boys so acted is just a part of the libel complained of, because in the report of the alleged outrage in the *Scottish Leader* this passage occurs—"They had been posted there by their father to throw stones at him by way of getting up an outrage for the papers and for the Loyal and Patriotic Union; and had in the darkness mistaken the police for their reverend parent, who had that evening invited a Roman Catholic gentleman of the village to accompany him to the site of the forthcoming outrage by way of protection. The affair was of course hushed up, and the boys let off with a caution by the magistrate." That is the libel, and in article 3 of the condescendence it is most distinctly averred that these statements falsely and calumniously represent that the pursuer, on purpose to deceive and falsely alarm members of the public against his political opponents, planned this outrage on himself.

It appears to me to be plain that the defender's statement in answer 3 is part of the libel itself. It is part of what the boys are said to have done and said, and it has been repeatedly laid down that it is not admissible to prove part of the *veritas* in mitigation of damages unless an issue of *veritas* be taken. This was authoritatively laid down in the case of *Paul* v. *Jack*, 11 R. 460, and in other cases prior to it. In the case of *Craig* v. *Jex Blake*, a question similar to that we have now before us was raised, and an attempt was made to prove *veritas* without taking an issue

in justification, and this line of inquiry I as presiding Judge disallowed.

Lord Shand—In argument the defender distinctly disavowed any intention of attempting to prove *veritas*, but it appears that at the trial it was proposed to read the evidence which was taken on commission in order to prove the statement in answer 3 for the defender, that the pursuer's sons on being challenged for throwing stones at the police, stated that they had mistaken them for their father. Your Lordship disallowed this evidence, which if it had been admissible would have gone in mitigation of damages. The question between the parties therefore comes to be this, whether this evidence should have been allowed in a question with the pursuer the Rev. John Browne himself. The information contained in the article complained of came to the defender from a correspondent in Ireland. But the action is not directed against the correspondent who supplied the news, but against the proprietor and publisher of the newspaper, and he has accepted any responsibility which may attach to the publication of the article in question. He at the same time admits he knew nothing of the facts of the case, but received all the information he has on the matter in the ordinary course of business. In such circumstances there is no room for letting in evidence as to the state of mind of the writer in order in any way to limit the responsibility of the owner of the paper. In considering as to the admissibility of this evidence, it is as well to have before us the terms of the issue for the pursuer the Rev. John Browne—[*His Lordship here read the issue quoted above*]. Now, upon this issue the point for the jury to consider was, whether Browne, in order to attain the position of a political martyr, had placed his sons outside his house with directions to throw stones at him. It is not now denied by the defenders that this allegation is false, and therefore it is calumnious. But it has been urged that the evidence which has been rejected should have been admitted in mitigation of damages, and that because the pursuer's sons are alleged to have said that in throwing stones at the police they mistook them for their father. But why should an allegation of that kind in any way mitigate damages? Even if the boys had, upon being challenged by the police, told such a story, it could have had no effect in a question like the present, and accordingly the evidence which his Lordship disallowed fell to be rejected.

It could only have been admitted in mitigation of damages provided the writer of the article or the publisher had known that the boys as a matter of fact had told this story. But the defender frankly admits he knew nothing whatever of the facts of the case, and accordingly this evidence was most properly disallowed.

A different question would have been raised if this had been an action directed against the writer of the article, but even then, in order to have got the benefit of this evidence, he would have required to have taken an issue of *veritas*.

In ordinary cases of actions of damages for slander I still hold that the jury ought to have before them every fact which can in any way affect their judgment. This does not, however, apply to the evidence sought to be admitted here, and I therefore come to the same conclusion in the whole matter as as has been arrived at by Lord Mure.

Lord Adam—I concur in disallowing the evidence which the defender desires to have admitted. My opinion on the question is just this. We have here as defender not the writer of the article complained of, but only the proprietor and publisher of the newspaper in which the article was inserted. If the defender had been the writer of the article complained of, and if he had put in issue the state of his mind when he wrote it, and had appeared for examination and cross-examination, and if in these circumstances such evidence as was here disallowed had been tendered in order to show that he had not been actuated by malicious motives, I should have had great difficulty in refusing to admit it. The evidence in question would in such circumstances have been relevant; but if he had kept out of the box, and had proposed to prove this isolated fact, I rather think I should not have admitted the evidence. That question is, however, not before us, and I do not discuss it further. As the matter stands I have no doubt that it would be quite competent for the publisher of this newspaper to prove the state of his own mind when he admitted that article to the paper and published it. But I do not think it is competent for him to prove the state of mind of an anonymous correspondent who sent him the article, and that by proving a fact which may or may not have affected his mind at all. Upon that ground therefore I think this evidence was rightly rejected.

Lord President—I think this matter is well settled by authority. The points which have been determined have been very clearly stated by Lord Adam, in whose opinion I entirely concur.

The Court disallowed the bill of exceptions.

Counsel for the Pursuers—M'Kechnie—Stevenson. Agent—W. B. Wilson, W.S.

Counsel for the Defenders—J. Comrie Thomson—Shaw. Agents—Millar, Robson, & Innes, S.S.C.

Friday, February 1.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MAXWELL'S TRUSTEES *v.* GORE AND OTHERS (GILL'S TRUSTEES).

Process — Multiplepoinding — Claim — Riding Claim.

In an action of multiplepoinding a person who is creditor of a creditor of the holder of the fund cannot claim to be ranked directly on the fund *in medio*, nor can a person who is creditor of a creditor of another claimant claim to be ranked as a rider upon the claim of that claimant.

In his trust-disposition and settlement Maxwell directed his trustees in certain events which happened, to realise the residue of his estate, and to pay one-half thereof to

Gill. By indenture made between Gill and certain persons named as trustees therein it was declared that the trustees should hold Gill's prospective share in the residue of Maxwell's estate for behoof of Gill, his wife, and his daughter, and, *inter alia*, they were directed to pay to Gill three-fourths of the income which might arise therefrom.

At the date of Gill's death the whole capital of his share in Maxwell's estate, and a portion of the income which had become due, was in the hands of Maxwell's trustees, who raised an action of multiplepoinding and exoneration to determine who had right thereto.

The trustees under the indenture appeared, and claimed the whole fund, and certain persons who alleged themselves to be creditors of Gill claimed to be ranked and preferred to the amount of their alleged claims either directly on the fund *in medio*, or as riders on the claim of the trustees under the indenture, averring that the indenture had been granted without any consideration, and was invalid in competition with B's creditors; and further, that the fund *in medio* consisted of income due to B to an amount more than sufficient to pay the debts due to them.

The Court repelled the claims of the alleged creditors of Gill, either as direct or riding claims, in respect that they were neither creditors of Maxwell's trustees nor of the trustees under the indenture.

By his trust-disposition and settlement Sir William Alexander Maxwell conveyed to the trustees therein named his whole estate, heritable and moveable, for certain purposes. He directed them, *inter alia*, to pay the whole free income of the residue of the estate to Hugh Bates Maxwell, his brother, and on his death, to William Maxwell, son of Hugh Bates Maxwell, should he survive his father, and on the death of the survivor to convey and make-over the whole residue of the estate to the heirs of the body of Hugh Bates Maxwell and William Maxwell in the order specified in the deed, and lastly, but only in the event of William Maxwell and Hugh Bates Maxwell, and the children of their bodies having died without leaving issue, Sir William Alexander Maxwell directed and appointed his trustees and executors to make payment of the free residue and remainder of his said whole estate and effects, heritable and moveable, real and personal, wherever situated when realised, to his stepsons, the said Walter Henry Gill and Dundas Reinhardt Gill equally between them and their respective heirs.

The testator died on 4th April 1865. Hugh Bates Maxwell died without issue, other than the said William Maxwell, on 9th February 1870, and Wliliam Maxwell died without issue on 4th December 1885.

By indenture executed the 16th April 1877 between Walter Henry Gill on the one part, and Frederick Augustus Gore and others (thereinafter called trustees) of the other part, proceeding on the narrative that the said Walter Henry Gill was desirous irrevocably to settle the moiety of the residue of Sir William A. Maxwell's estate, bequeathed to him in the manner therein mentioned, it was declared that "the trustees were to invest the said moiety in their own names, and pay one-fourth part of the dividends and income arising therefrom to the said Catherine Adeline Maxwell Lambert (afterwards Mahon), the only child of the said Walter Henry Gill, during her life, for her sole and separate use, and the remaining three-fourths to the said Walter Henry Gill and his assigns during his life, and after his death, survived by his wife Elizabeth Saunder Gill as therein provided. Upon the death of the survivor of the said Walter Henry Gill and Mrs Elizabeth Saunder Gill, the said trustees were directed to pay the dividends, income, and interest of the whole principal trust premises to the said Catherine Adeline Maxwell Lambart (now Mahon) as therein provided."

Mrs Elizabeth Saunder Gill predeceased her husband Walter Henry Gill, who married for his second wife Mrs Alice Gill. He died on 22nd October 1887.

The present action of multiplepoinding and exoneration was brought by the trustees under the trust-disposition and settlement of Sir William Alexander Maxwell, to determine who had right to the moiety of the residue of Sir William Alexander Maxwell's estate falling to Walter Henry Gill. Among other parties called as defenders were the trustees under the indenture of 16th April 1877—Mrs Catherine Adeline Maxwell Mahon, the only child of Walter Henry Gill and Mrs Alice Gill, his widow and executrix.

In their condescendence the pursuers, after setting forth the facts above narrated, averred—That they had been advised that doubts existed as to the sufficiency of the indenture of 16th April 1877 to convey the estate therein mentioned, and also as to the right of the defender, the said Catherine Adeline Maxwell Gill, formerly Lambart, now Mahon, to nominate new trustees without the consent and concurrence of the persons to whom she charged her interest in the funds under the said indenture by way of mortgage or assignment. In order to determine who had right to the half of the free residue and remainder of the whole estate and effects, heritable and moveable, real and personal, of the said Sir William Alexander Maxwell falling to the said Walter Henry Gill, and in order to the exoneration and discharge of the pursuers the present action had become necessary. Dundas Reinhardt Gill and Walter Henry Gill and the trustees under the indenture of 16th April 1877 had desired payments to account of their respective shares of the residue. The pursuers accordingly made certain payments to Dundas Reinhardt Gill, and on or about the same dates they set aside the like sums, and paid the same into bank for behoof of Walter Henry Gill and his trustees, as they, the trustees of the indenture of 16th April 1877, were not in a position to grant a discharge to the pursuers for such payments. These sums were as follows—

On 25th July 1887 . .	£5028	6	6
On 16th August 1887 . .	447	10	8
And on 21st September 1887	4000	0	0

The pursuers had all along been and were willing and ready to hand over the same to the persons entitled thereto on receiving a proper discharge. They had since realised sums amounting to over £26,000, but there were large portions of the estate still remaining to be realised.

Frederick Augustus Gore and others, the trustees under the indenture of 16th April 1877, lodged a claim to the whole fund *in medio*, and there being no other claimant, on 22nd May 1888 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"In respect no other claim has been lodged, and no objection stated, for aught yet seen, and on the motion of the claimants Frederick Augustus Gore and others (Walter Henry Gill's trustees) ranks and prefers them on the fund *in medio* in terms of their claim; authorises and ordains the pursuers and real raisers to endorse and deliver up to the said claimants, or their agents Messrs J. & A. Peddie & Ivory, W.S., the two deposit-receipts of the Clydesdale Bank, Limited, in name of 'Messrs Ronald & Ritchie, S.S.C., for Sir William Alexander Maxwell's trustees, for behoof of W. H. Gill, Esq., or his trustees,' for £5028, 6s. 6d., and £447, 10s. 3d., dated respectively 25th July and 16th August 1887, and a third deposit-receipt of the said bank in name of 'Charles Ritchie, Esq., S.S.C., for Sir W. A. Maxwell's trustees, for behoof of Captain Walter Henry Gill, or his trustee,' for £4000, dated 21st September 1887, and decerns."

Thereafter two other claimants appeared, viz., Mr David Patrick and Messrs Hill, Thomson, & Company, and claimed to be ranked and preferred as riders upon the interest the said Frederick Augustus Gore and others, as trustees foresaid, have been found to have in the fund *in medio* to the extent of the sum due to them, or otherwise to be ranked and preferred on the fund *in medio* to the extent foresaid preferably to the said claimants.

Mr Patrick's claim was for £30, with interest thereon from 30th November 1877, on which date he averred he had cashed a cheque for Walter Henry Gill, which had been subsequently dishonoured.

Messrs Hill, Thomson, & Company's claim amounted to £22, 4s. 8d., for goods supplied and cash advanced to Walter Henry Gill, for the greater part of which debt they held a bill by Walter Henry Gill in their favour dated 18th May 1886, of which, however, they had not been able to get payment.

Both claimants averred that Walter Henry Gill granted the indenture of 16th April 1877 without any consideration, and the same was invalid in competition with his creditors. The claimants were therefore entitled, to the extent of the said debt, to be ranked and preferred to the funds and estate thereby bearing to be conveyed *primo loco*, and in preference to the trustees of said settlement who have been ranked and preferred for aught yet seen to the whole fund *in medio*. By the same indenture Walter Henry Gill retained right to the income arising from the capital sums transferred thereby, and the said income was liable in payment of his debts, and, *inter alios*, the debt due to the claimants. The fund *in medio* consisted of income due to Walter Henry Gill to an amount more than sufficient to pay the debts due to the claimants.

In answer to these averments the claimants Frederick Augustus Gore and others, the trustees under the indenture, denied that the indenture had been granted without any consideration, and explained that it was an onerous postnuptial provision by Walter Henry Gill for his first wife Mrs Elizabeth Saunder Gill and his daughter. With regard to the income of Walter Henry Gill's share of the residue of Sir W. A. Maxwell's estate accruing between 4th December 1885 and 22nd October 1887, they were bound to account for three-fourths thereof to Mrs Alice Gill, the widow and executrix of Walter Henry Gill. They submitted that they should be authorised to uplift £9000 of the £9447, 10s. 3d. deposited by the pursuers and real raisers in the bank, and that the balance should be retained to meet the riding claims, and that before they were disposed of intimation should be made to Mrs Alice Gill, as executrix aforesaid, and to the Norwich Union Insurance Company, who also claimed to be a creditor of Walter Henry Gill.

The executrix did not lodge a claim.

The Lord Ordinary (M'Laren) on 19th June 1888 pronounced the following interlocutor:—"Finds that the claimants Hill, Thomson, & Company and David Patrick are entitled to be ranked and preferred on the fund *in medio* as riding claimants on the claim of the claimants Frederick Augustus Gore and others (Walter Henry Gill's trustees) in terms of their claims, and ranks and prefers them accordingly, and decerns: Finds them entitled to expenses; allows accounts thereof to be given in, and remits to the Auditor of Court to tax the same and report: Further, ranks and prefers the said claimants Frederick Augustus Gore and others to the balance of the said fund *in medio*, and decerns: and authorises the pursuers and real raisers to pay to the said claimants the amounts to which they have now been ranked and preferred, and the expenses now found due, when taxed, and decerns."

The claimants, the trustees under the indenture, reclaimed, and argued—If the indenture were assumed to be inept the claims of Patrick and Hill, Thomson, & Company were directly against Maxwell's trustees. But they could not have sued these trustees unless they had first arrested the funds in their hands, for Maxwell's trustees were not entitled to settle the validity of claims against Gill or his representative. The only person who could sue a deceased person's debtors was the representative of the deceased who had the duty of distributing his estate, and there was no ground for drawing a distinction between lodging a claim in a multiplepoinding and suing directly—*Hinton* v. *Connell's Trustees*, July 6, 1883, 10 R. 1110; Lord Shand's opinion in *Rae* v. *Meek*, July 20, 1888, 15 R. 1050. If the indenture were assumed to be valid, then Patrick and Hill, Thomson, & Company claimed as riders on the claim of the reclaimers, but they were in no better position in this case, for they had no direct claim against the reclaimers, but only against Gill's executrix, and a person lodging a riding claim was in no more favourable position than a person lodging a substantive claim. Creditors with unconstituted claims could never compete with an intimated assignation—*Royal Bank* v. *Stevenson*, December 4, 1849, 12 D. 250.

Argued for the claimants Patrick and Hill, Thomson, & Company—The claims of these claimants were not unconstituted. One held a bill for his debt, the other a cheque which had been dishonoured. The *Royal Bank* case was therefore not in point. The indenture was invalid to exclude creditors. No one could so

convey his own property as to preserve to himself the beneficial use of it, but exclude his creditors —*Learmonth* v. *Miller*, November 21, 1871, 10 Macph. 107, and 2 R. (H. of L.) 62. The claimants should therefore be ranked *primo loco* on the fund *in medio*, or otherwise as riders on the claim of the trustee under the indenture. If the executrix had appeared in the process they could no doubt have claimed to be ranked as riders on her claim. Why should they not be ranked on the claim of the trustees under the indenture, who would have to account to the executrix for the income due to Walter Henry Gill at the time of his death?

At advising—

Lord President—The raisers of this multiplepoinding are the testamentary trustees of the late Sir William Maxwell of Calderwood Castle, under a deed of settlement dated 3rd November 1862, and certain codicils. They sold the estate for various purposes, but according to the events which have happened they are now holding, or at least recently did hold, the entire residue of the estate for the benefit of two gentlemen of the name of Gill—Walter Henry Gill, and Dundas Reinhardt Gill, who were the stepsons of the testator, and who, failing other purposes of the trust, are entitled to divide the residue of the estate between them. There is no question about the right of Mr Dundas Reinhardt Gill to get his one-half of the share of that residue, and the fund *in medio* consists of the half which is destined by the settlement of Walter Henry Gills The condescendence of the fund *in medio* set. out these different facts, and also a certain deed of indenture dated the 16th of April 1877, by which apparently Mr Walter Gill settled his share of Sir William Maxwell's estate by creating a trust in the person of Mr Frederick Augustus Gore and others, who are the reclaimers. The raisers say in the 15th article of the condescendence of the fund *in medio* that doubts exist as to the sufficiency of the said indenture of April 1877 to convey the estate therein mentioned, and also as to the right of the defender Mrs Catherine Mahon to nominate new trustees under that deed, and in consequence of these doubts they bring this multiplepoinding calling the trustees under the indenture, and also the executrix of Mr Walter Gill, and some other parties, but the two other parties who are of the most importance as defenders of this action are the executrix of Mr Walter Gill and the trustees under the indenture of 1877. They further set out that they have made payments to Mr Dundas Reinhardt Gill out of his share of the residue of the estate, but as Mr Walter Gill and the trustees under the indenture of 1877 were not in a condition to grant a discharge, they paid corresponding sums into bank on their account, amounting in all to £9465. And then they go on to state that they have made further recoveries of the estate amounting to very large sums. In short, the succession is a very lucrative one, and there are ample funds apparently to meet every claim that can be brought against it.

Now, in these circumstances the only party who appeared as a claimant in the multiplepoinding was Mr Frederick Augustus Gore, and the other trustees under the indenture of 1877, and there being no other claimant the Lord Ordinary pronounced an interlocutor on the 22nd of May 1888, and "in respect that no other claim has been lodged, and no objection stated, for aught yet seen," he ranked and preferred Frederick Angustus Gore and the other trustees of Mr Walter Gill on the fund *in medio* in terms of their claim, and authorised the pursuers to endorse and deliver up to them the receipts for the sums which had been lodged in bank to account of Mr Walter Gill's share of the estate. After that there appeared in the process two other claimants, viz., Mr Patrick, and Messrs Hill, Thomson, & Company. Now, these persons are creditors or alleged creditors of the deceased Walter Gill, and they claim alternatively to be ranked and preferred as a rider upon the interest of Frederick Augustus Gore and the other trustees under the indenture of 1877, or otherwise to be ranked and preferred on the fund *in medio* to the extent foresaid preferably to the said claimants—that is, preferably to Gore and others, the trustees under the indenture. Now, upon the appearance of these claimants the Lord Ordinary of consent recals the decree of 22nd May last. That appears to me to be rather a mistake in the course of this proceeding. In so far as regards the direct claims against the fund *in medio* as made by these parties preferably to Gore and others, there were ample funds I think to meet these claims without recalling the authority which had been granted by the previous interlocutor to deliver up the receipts for the £9400 that was in bank. There is one bond alone for £19,000 which has been realised since that date, and therefore in so far as funds to meet the direct claim of these now appearing claimants are concerued there was no need to recal that part of it. And in so far as regards the riding claim which they state alternatively, it is quite a mistake to have recalled the ranking of Gore and others as trustees, because unless they were ranked on the fund *in medio* there could be no riding claim, and there could be nothing taken through their sides by a riding claimant. And therefore it appears to me that the interlocutor of the 22nd of May 1888 ought to have stood.

But that brings us to a consideration of what these claimants represent in the way of interests in this multiplepoinding. If they claim directly against the fund *in medio*—that is to say, against the fund in the hands of Maxwell's trustees—the question naturally arises, What have they got to do with the estate or funds of the late Sir William Maxwell? and the only answer that they can make to that is to say that Maxwell's trustees are debtors to their debtor. Now, that is by no means clear even if it were relevant. Maxwell's trustees are debtors to somebody on behalf of Mr Walter Gill, but the question comes to be whether the trustees under the indenture of 1877 are not preferable to everybody. They are in the position, as they represent, of taking a right under an assignation which has been intimated to the holders of the fund, and certainly a creditor of Walter Gill with an unconstituted claim could never compete with an intimated assignation. That is altogether out of the question. If, indeed, they had brought an action against Walter Gill or his executrix, and upon the dependence of that action had attached the fund *in medio* by arrestment, I could quite understand their coming into competition with an inti-

mated assignation. But they have done nothing of the kind, and having done nothing in any way to attach the fund *in medio* their direct claim against that fund cannot possibly be entertained. And accordingly the Lord Ordinary has not entertained that claim. But what he has done is this—He has sustained their riding claim, and upon this footing apparently that they are entitled to claim as against Gore and others, trustees under the indenture of 1877.

Now, it appears to me that the very same objection arises there as in the pursuer's case, as in the case of the claim directly against the fund *in medio*, because neither of these personal creditors of the late Walter Gill had any direct right against Gore and others, trustees under the indenture. The indenture is not granted for their benefit. It is granted for other purposes altogether. If, indeed, they could show that the indenture is bad, which they have not attempted to do, or if they could show that in any way whatever Mr Gill is really a party interested directly in that fund which they claim, they would be in a different position, although even then they could not possibly have a direct right against the fund in the hands of the trustees under the indenture, because the parties who are benefitted by that indenture have a direct claim against that fund, whereas the trustees under the indenture are in relation to these riding claimants nothing but debtors of their debtor. Therefore whether as regards the fund *in medio* or the fund belonging to the trustees under the indenture of 1877, there is no direct claim whatever in the person of these creditors. It must be kept in view that Mr Walter Gill had no connection with Scotland apparently at all, except his interest in Sir William Maxwell's estate under his settlement. He was a gentleman living in England, and the debts apparently incurred to those riding claimants were debts incurred in England. Now, the only course which a party can follow in these circumstances with the view to do diligence so as to attach a fund belonging to his debtors is to raise action against his debtors in the first place, or, Mr Gill being dead, to raise action against his executrix, and that is just the course which they have not adopted. That is the only competent course by means of which they could have access either to the fund *in medio* or to the fund to be obtained in this process of multiplepoinding by the trustees under the indenture of 1877. The Lord Ordinary in the interlocutor under review has found that these claimants are entitled to be ranked and preferred as riding claimants on the claim of the claimants Frederick Augustus Gore and others in terms of their claims. Now, it is a very curious interlocutor that, pronounced in the circumstances, because he has already recalled the ranking and preference in favour of Gore and others, and how the riding claims can be admitted upon a claim that is not yet ranked I do not very well see. But apart from that difficulty in point of form, I am decidedly of opinion that the Lord Ordinary is wrong in ranking these riding claims at all as riding claims for the reasons that I have already assigned, that they have not in any way attached the fund upon which they seek to set up these riding claims.

Lord Mure—I agree with your Lordship in thinking that the Lord Ordinary's interlocutor must be recalled, because I do not think the case is in shape for giving effect to a riding claim of the description of Mr Patrick's, or of Hill Thomson, & Company's. They, as I understand, allege themselves to be creditors of the late Walter Gill, and they claim upon a part of the fund *in medio*, which is said to have belonged to Mr Gill, and which is now payable to his representatives whoever they may be. And they claim here as riders upon the claim of Mr Gore, who claims the fund *in medio* upon the grounds set forth under an indenture by which he takes a particular portion of that fund. Mr Gore, as I understand the matter, is not a debtor of the claimants. Their debtor is Mr Gill's executrix, who has been called in the action, but does not appear. Now, if she had been called, and had put in a claim to be preferred to that fund as against Gore, and had been preferred, I could then have quite well seen that Mr Patrick and Hill, Thomson, & Company might have claimed as a rider on Mr Gill's executrix upon the share of the fund *in medio* that is said by them to belong to Mr Gill. But she has not claimed, and therefore Gore and others, as trustees under the indenture, have the right to get hold of the money belonging to Mr Gill, to be paid to whoever was his creditor in other matters.

I agree with your Lordship that the riding claim in these circumstances upon what is coming into Gore's hands is not a competent proceeding in point of form, and cannot be entertained. The only hesitation I have had in this case about the matter was in consequence of certain statements on the record in answer to the claiming party. A proposal was made on the part of Mr Gore, which it strikes me was in the circumstances a very fair proposal, and by which the matter might possibly have been extricated in this process had that proposal been adopted, for Mr Gore frankly admits that of the £9400 that was claimed a considerable proportion is the sum which he probably will have to hand over to Mrs Gill, the executrix of Walter Gill. But then they say that it represented income which in point of fact belonged to Mr Gill. But they go on to say—"The claimants submit that they should be authorised to uplift £9000 from the said deposits—that is, from the £9400—and that the balance should be retained to meet the riding claims, and that before they are disposed of intimation should be made to Mrs Alice Gill as executrix foresaid and to the Norwich Union Insurance Company." Now, that stands as a proposal made by Gore, and I think in the circumstances it was a very fair proposal. I called attention to it during the discussion, and I never heard any explanation as to why that proposal had not been adopted, because if Mrs Gill had got notice, and had come forward and claimed, this riding claim would have been in shape, but at present it appears to me to be altogether out of shape. It is very likely that there was some good reason for the course adopted, but as matters now stand I agree that this is an incompetent mode of working out the matter, and that these riding claims should be refused.

Lord Shand—I have come to the same conclusion as your Lordships. It appears that the trust which was created by Mr Gill was by virtue of a

deed executed, I think, in April 1877, and the deed was intimated to the trustees, the holders of the fund, on the 3rd of May 1877. At that time neither Mr Patrick's debt nor Hill, Thomson, & Company's debt was in existence. They became creditors for the first time in November 1877, after the fund in question in the hands of Maxwell's trustees had been assigned to Mr Gill's trustees for the purposes of the deed of 1877.

In that state of matters the question that arises is, in the first place, Is there a good riding claim here on the claim of Gill's trustees to the fund *in medio*? Undoubtedly Gill's trustees *prima facie* are the persons entitled to draw the money from Maxwell's trustees. They have an assignation intimated, and they are prepared to give a discharge for any money they get. As I understand, the first view of this case presented for the claimants Hill, Thomson, & Company and Mr Patrick is this, that they are entitled to come in as riders on the claim of Gill's trustees. I agree with your Lordship in thinking that that cannot be allowed in the state in which matters are. Mr Patrick and Hill, Thomson, & Company claim to be creditors of Mr Gill, but he is dead; there is no decree of constitution here, there has been no proceeding adopted by way of action against Gill's executrix to constitute the claim and to obtain a warrant of arrestment, and no arrestment has been used either in the hands of Gill's trustees or in the hands of the raisers Maxwell's trustees. I doubt very much whether an arrestment would have attached anything in Maxwell's trustees' hands, but assuming it to be so, there is no *nexus* of that kind here, and therefore I think Gill's trustees are in a position to say, these claimants who propose to have a riding claim on our claim have no title whatever to take up that position. There is neither constitution nor arrestment nor *nexus* of any kind attaching this fund. It is a personal claim, bearing to be a claim against Mr Gill, who had a claim against his own trustees, who again had a claim against the raiser. In these circumstances it appears to me that in the absence of any *nexus* there is no room for the riding claim on Gill's trustees so as to attach money in the hands of the raisers.

On the other question, whether there is any direct claim, I concur in what your Lordship has said. What the Lord Ordinary has done is to sustain the riding claim. If there had been an arrestment there might have been a direct claim, but looking to the circumstances in which parties here are, there having been no proceeding against the executrix and no arrestment of any kind, I do not see that there is a case for a direct claim against Maxwell's trustees interpelling them from paying to the holders of the assignation so much of the fund as would meet the claims of Patrick and Hill, Thomson, & Company. So that in either view of the case I agree with your Lordship in thinking that these claims must be disallowed.

Lord Adam—The parties we have here are Maxwell's trustees, who are raisers of the multiplepoinding, and are or were the holders of the fund *in medio*. Then we have Captain Gill's trustees under a certain indenture, who are claimants, and we have also here creditors of Mr Gill, or at least they allege themselves to be creditors of Mr Gill, Mr Patrick and Hill, Thomson, & Company. These are the parties. Now, Mr Patrick and Hill, Thomson, & Company claim alternatively. They claim either as a riding claim upon Gill's trustees' claim, or, if that be not successful, they claim directly against the fund *in medio* as against Maxwell's trustees. That is the position of matters.

Now, it is to be observed that these two creditors —Mr Patrick and Hill, Thomson, & Company— do not allege that they are creditors of Maxwell's trustees. If that be so, it appears to me perfectly clear that they could not have sued Maxwell's trustees directly for the sums alleged to be due to them by Mr Gill, because that would be, as your Lordship has pointed out, simply a creditor suing his debtor's debtor, and that we have decided very recently, upon well-known principles, is quite incompetent. So far as the claim is made directly against Maxwell's trustees, I hold that any claim directed by these two creditors against Maxwell's trustees is quite out of the question. But in my opinion the position is exactly the same as regards Gill's trustees. They do not allege that they are creditors of Gill's trustees, and they do not allege that they have any claim under Gill's trust. What they claim, as I said before, is that they have a claim against the late Mr Gill. That again is simply a claim by a creditor against his debtor's debtor or alleged debtor. It is neither more nor less than that, and I hold that such a claim as that is quite out of the question. It humbly appears to me that that being so, this claim of these trustees must on either branch of it be repelled, and I think that the whole case lies there, and that it is a clear and a simple case. It is quite clear to my mind that the claim of these parties is upon Gill's representative, and against nobody else directly, and if they desire to get payment of their money that is their course to follow.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor reclaimed against: Repel the claims of the claimants Hill, Thomson, & Company and David Patrick, and rank and prefer the claimants the said Frederick Augustus Gore and others as trustees foresaid in terms of their claim, and decern: Grant warrant to, authorise, and ordain the pursuers and real raisers to endorse and deliver up to the said Frederick Augustus Gore and others, as trustees foresaid, or their agents Messrs J. & A. Peddie & Ivory, the following deposit-receipts of the Clydesdale Bank, Limited, dated 24th October 1888, viz.—(1) deposit-receipt for the sum of £5153, 16s. 4d. in name of Ronald & Ritchie, S.S C.; (2) deposit-receipt for £458, 3s. 9d. in name of the said Ronald & Ritchie; (3) deposit-receipt for £4086, 11s. 5d. in name of Charles Ritchie, S.S.C.; and (4) deposit-receipt for £502, 7s. 5d. in name of the said Ronald & Ritchie, and that upon a certified copy of this interlocutor; and remit the cause to the Lord Ordinary to proceed further therewith as shall be just and in terms of law," &c.

Counsel for the Claimants (Reclaimers)—D.-F. Mackintosh—Lorimer. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for the Claimant David Patrick—C. S. Dickson. Agents—Ronald & Ritchie, W.S.

Counsel for the Claimants Hill, Thomson, & Company—C. S. Dickson. Agents—Davidson & Syme, W.S.

Saturday, February 2.

SECOND DIVISION.

SCHOOL BOARD OF ECKFORD *v.* THE RATEPAYERS.

School Board — Retiring Allowance — Teacher's House.

Held (1) that the amount of the retiring allowance of a teacher appointed before 1872, provided only it be not less than two-thirds of his salary, is entirely in the discretion of the school board; and (2) that a school board may competently allow a retiring teacher to continue to occupy rent free the teacher's house as part of such allowance—Lord Lee *dub.* whether a teacher's house, so long as it is kept up, should not be occupied by the person actually discharging the duties of teacher.

The School Board of the parish of Eckford, in the county of Roxburgh, in December 1886 arranged with Mr Henry Richardson Lawrie, the teacher of the Eckford School, that he should retire upon an allowance of £60 per annum, with the use of the teacher's house and garden rent-free for the rest of his life.

Mr Lawrie was then nearly seventy-eight years of age, had taught in the parish for fifty-eight years, and had occupied the house and garden attached to Eckford School for fifty-five years.

Mr Lawrie's emoluments consisted of a salary of £50, the school fees, which amounted to about £32 or £33 per annum, and four-fifths of the annual Parliamentary grant, amounting to between £33 and £39. His whole emoluments as teacher of Eckford Public School accordingly amounted to about £120 per annum, exclusive of the house and garden.

Certain of the ratepayers objected to the arrangement made by the School Board, holding that they were not entitled to give the retiring teacher the use of the house and garden, or more than the amount of his salary—£50 per annum in money.

A Special Case was presented to the Court by the School Board of the first part, and by the said ratepayers of the second part, to have the legality of the School Board's action determined.

The following questions were submitted—"1st, Whether the first parties in granting Mr Lawrie a retiring allowance were (*a*) restricted to a sum not exceeding the gross amount of his salary? or whether (*b*) their power in fixing the amount was entirely discretionary? 2nd, Whether the first parties (*a*) were entitled to grant to Mr Lawrie, in addition to the retiring allowance in money, the free use of the schoolmaster's house and garden during his life? or whether (*b*) they were bound to make them over to the person actually discharging the duties of schoolmaster? 3rd, Whether, assuming that the first parties are wrong in giving Mr Lawrie the continued use of the schoolmaster's house and garden, they have power, in addition to his retiring allowance of £60 (*a*) to provide him with another house and garden of the same annual value? or (*b*) to pay him a further yearly sum equal in amount to such annual value? or (*c*) to let the schoolmaster's house and garden to him?"

The Parochial and Burgh Schools (Scotland) Act 1861 (24 and 25 Vict. c. 107), provides, *inter alia*—Sec. 18. "Nothing in this Act shall be held to interfere with any arrangement which may have been concluded between the heritors and schoolmaster of any parish for the retirement of such schoolmaster, except as regards the house and garden, and premises attached thereto, which shall in every case be made over at the term of Whitsunday next after the passing of this Act to the person actually discharging the duties of schoolmaster, and where the use of such premises may have formed part of a retiring allowance, the heritors shall make reasonable compensation to the ex-schoolmaster." . . . Sec. 19. . . . "Provided that where such resignation shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation thereof, and shall not exceed the gross amount of such salary." . . . Sec. 20. "In all cases in which the minister and heritors are by this Act empowered to provide a retiring allowance for a schoolmaster who shall resign or shall be removed from his office, it shall be lawful for them, if they see fit, to provide for such schoolmaster in addition to such allowance, and in like manner, a further yearly sum equal in amount to the annual value of any dwelling-house and garden to which he may be entitled as such schoolmaster, as the same shall be valued by the assessor of the county."

The Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), provides by section 60 that "Any teacher of a public school appointed previously to the passing of this Act may be removed from his office in manner following. . . . (2) If the school board of any parish or burgh shall consider that any such teacher is incompetent, unfit, or inefficient, they may require a special report regarding the school, . . . and in receiving such report the school board may, if they see cause, remove such teacher from office, . . . provided also that in the case of teachers of parish schools appointed previously to the passing of this Act who may be so removed, the school boards shall have the same powers of granting retiring allowances, and the teachers shall have the same rights to retiring allowances, as were vested in heritors and ministers and in parish schoolmasters respectively by sections 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, in the case of parish schoolmasters permitted or required to resign, or dismissed or removed from office as therein provided." Section 61 provides that "A school board may permit any teacher of a public school to resign his office upon the condition of receiving a retiring allowance, and the said board may award or pay to such teacher out of the school fund such retiring allowance as they shall think fit, provided always

that nothing herein contained shall affect the right under the existing law to a retiring allowance of any teacher appointed under the recited Acts or any of them."

Argued for the first parties—Section 60 of the Education Act, which dealt with removals of teachers, was not in point. This was a retirement by arrangement under section 61, which left the School Board full discretion to give what retiring allowance they thought fit, provided only they did not give less than the teacher would have been entitled to under the 1861 Act. That Act was repealed by the 78th section of the 1872 Act, except in so far as its 19th and 20th sections were retained by sections 60 and 61. Consequently the 18th section of the Act of 1861, making it obligatory that the house attached to the school should be occupied by the person actually discharging the duties of schoolmaster, was not binding upon the School Board. By section 54 school boards were only bound to keep up the teachers' houses during their tenure of office, after which the school boards were free to deal with the houses as they saw fit. It was no longer compulsory to provide houses for teachers. This house and garden were just a part of the allowance, upon receipt of which the teacher had agreed to resign. The new teacher did not suggest that his rights were being interfered with, and the second parties here had really no interest in objecting to the arrangement made. Even if it were upset they would gain nothing, for in that case an increased money payment would have to be made to the retiring teacher out of the school fund which was maintained by the rates.

Argued for the second parties—(1) As to the money payment, the 19th section of the 1861 Act was still in force, and limited the allowance to the gross amount of the salary, which was here £50. The school fees and the Parliamentary grant were uncertain in amount, and in any case were not to be taken into account as part of the salary. (2) As to the house and garden—The intention of the Legislature must be looked to, which clearly was, that although in some places it might be unnecessary and inexpedient to keep up teachers' houses, where they were kept up they must be occupied by the acting teachers. It was *ultra vires* of the School Board to allow anyone else — even the retiring teacher—to occupy the teacher's house.

At advising —

Lord Justice-Clerk—I think this is a clear case. The first parties, the School Board of the parish of Eckford, have made an arrangement by which the aged schoolmaster is to retire. The Board propose, in the language of section 61 of the Education Act of 1872, "to award and pay" to him "out of the school fund such retiring allowance as they shall think fit." In the exercise of the discretion which this section confers upon them they have fixed the retiring allowance at so much money, viz., £60, and they have agreed to give him rent-free for life the use of the teacher's house and garden which he has so long occupied in connection with the school.

Now, the first question raised is, whether the School Board are restricted in fixing the retiring allowance to observe the limits which were laid down by sections 19 and 20 of the Parochial and Burgh Schoolmasters Act of 1861, which sections are kept in force by section 60 of the Act of 1872 for the purpose of being applied to cases of "removal" of teachers who are "incompetent, unfit, or inefficient." The amount of retiring allowance which these sections contemplate is a sum which "shall not be less than two-third parts of the amount of the salary pertaining to such office at the date of such resignation thereof, and shall not exceed the gross amount of such salary." The second parties, who are ratepayers in the parish, say that Mr Lawrie's salary was only £50, and that the school fees and other emoluments must not be taken into account in fixing the retiring allowance, which therefore, they maintain, cannot in any view exceed £50. I think it unnecessary to decide the question which they thus seek to raise on section 60, because the School Board are not giving the allowance under section 60. That section refers, as I have mentioned, to removal of a teacher, but this case is under section 61, which applies to a resignation arranged and agreed on between the schoolmaster and the Board. Section 60 is appropriate to removal, against the teacher's will, for bad conduct or inefficiency, while section 61 contemplates such a case as the present—a resignation. It is meant for cases in which the School Board very probably could not remove the teacher, but in which, for all that, they think that for the interest of the parish and in fairness to him, such arrangements should be made as will induce him to resign. Such arrangements will certainly not be lightly interfered with by the Court. I do not think the Court would interfere with them unless they appeared to be so outrageously contrary to the interests of the parish as to amount to malversation by the Board in their office as trustees for the interests entrusted to them.

On these grounds I think that the first question which is raised ought to be answered in favour of the School Board.

The other question in the case is, whether the School Board has acted beyond their powers in regard to the house and garden, in respect that they have thought fit, instead of giving the new teacher the house attached to the school, to give to the aged teacher in consideration of his long services to the parish the use of it for the rest of his life. The second parties say that the Board had no power to do that.

Now, I do not think that even under the old law it would have been illegal for the heritors to arrange in the interest of all concerned that the old teacher should remain in the house, and the new teacher should be properly provided for elsewhere in the neighbourhood. But however that may have been, I think that under the new system which the Act of 1872 has introduced it is in the discretion of the School Board to say whether a teacher's house is or is not to be part of the educational equipment of the parish. The question truly is, whether the use of the house and garden is to form part of the retiring allowance?

So far as appears the new teacher is quite satisfied they should, and is quite satisfied with the arrangement that he should have provision made for his residing elsewhere. It is by certain ratepayers that the objection is taken. They maintain that the Board are not entitled to keep on

the house unless it is to be occupied by the teacher who is discharging the duties of teacher in the parish. Now, I do not see what real interest these ratepayers have to raise that question. They are only interested in preventing any illegal application of property which improperly adds to the rates. But here if this question were answered in their favour no benefit would accrue to the ratepayers, for the Board would simply change the allowance as regards house and garden into a money allowance in addition to the £60 already given. I could even conceive circumstances in which the course the second parties contend for would be against the interest of the ratepayers.

I am clearly of opinion in law that the School Board may make such an arrangement as they have done with Mr Lawrie, and that no misuse of office has been substantiated which calls upon this Court for interference with their action. They have acted within their powers, and we have no power to control them in a reasonable exercise of the discretion vested in them by the Act.

Lord Young—I am of the same opinion. I think the second parties here have no title and interest to state their objections, and have neither law nor reason to support them. Retiring allowances under the existing law are clearly governed by section 61 of the Act of 1872. Retiring allowances are entirely in the discretion of the School Board, and I do not assent to the view that the allowance fixed in this case was £60, and that the house was a free gift in addition to the retiring allowance. I think that the retiring allowance which the School Board determined upon in the exercise of their discretion was the £60 together with the house and garden. They might, instead of the house and garden, have increased the money allowance so as to enable the old teacher to secure a house for himself, say by making it £75. There could have been no objection on the ground of want of power. It might have been represented as an outrageous use of their discretion, but we should hardly have listened to that suggestion.

If, then, it was within their power, their power was not abused by what they have done, and would not have been abused if they had made the allowance £60, and £15—that is, £75—to enable the retiring teacher to provide a house for himself. But, dealing with an old man, they acted wisely in listening to the suggestion that he should not be turned out of his house, but that an arrangement should be made with his successor to provide a house for himself while the old man lived. The money withheld from the allowance of the old teacher will enable the new teacher to get a house for himself, and in so arranging, the School Board acted reasonably and within their discretion. Even supposing they had put the new teacher into the schoolhouse, they would not have been bound to restrain him from letting it, unless by doing so he neglected his duties. He might, for the sake of his health it may be, have let it, and let it to the old teacher for a sum enabling him to get a more suitable house elsewhere. Would it have been illegal to let it? Schoolhouses are constantly let in summer, so are manses. No doubt the Presbytery might interfere if a minister let his manse and left the neighbourhood, so that his parish suffered, but not otherwise, and the notion of there being any illegality or indiscretion in a schoolmaster letting his house with the consent of the school board is extravagant. I think the questions submitted to us are needlessly numerous and elaborate, and I propose that we should simply answer that the arrangement made by the School Board with regard to the retiring allowance, both as to the money payment and as to the house and garden, was lawful and in the proper exercise of their discretion.

Lord Rutherfurd Clark concurred.

Lord Lee—The objection here taken is that the arrangement is *ultra vires* of the School Board in two particulars—First, as regards the £60, and secondly, as regards the house and garden. I cannot say that I share the view that the ratepayers have no good title to state their objections as affecting the rates, but I agree in thinking that the first objection is unfounded, because the 61st section gives the School Board exclusive discretion in fixing the amount of a retiring allowance. As to the house, my only doubt has been whether a school board, so long as they hold the house, are not bound to use it for the schoolmaster. They may change the site and sell the buildings, but it is not clear to me that they have full right and title to deal with the house as if it were private property belonging to them. While expressing this doubt, I have nothing to add to the opinions expressed by your Lordships.

The Court pronounced an interlocutor finding that the School Board had acted within their powers in fixing the teacher's retiring allowance at £60, and in allowing him the use of the teacher's house and garden.

Counsel for the School Board—Sym. Agents—J. & J. Ross, W.S.

Counsel for the Ratepayers—W. E. Fraser. Agent—J. P. Sym, W.S.

Tuesday, February 5.

FIRST DIVISION.

SIMPSON *v.* HORSBURGH (LIQUIDATOR OF THE BOSON OIL COMPANY, LIMITED).

Public Company — Voluntary Liquidation — Application to Court by Liquidator for Powers — Companies Act 1862 (25 *and* 26 *Vict. c.* 89.)

The Companies Act 1862, sec. 138, provides—"When a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the Court in . . . Scotland . . . to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court, and the Court, . . . if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede wholly or partially to such applica-

tion, on such terms and subject to such conditions as the Court thinks fit." . . .

A shareholder in a company which was being voluntarily wound up, applied to the Court for the rectification of the register by the deletion of his name therefrom in respect of certain shares standing therein in his name.

The liquidator of the company came to terms with the petitioner, and by note applied to the Court to sanction the compromise, and the Court, in terms of section 138 above quoted, and without inquiry, approved of the minute of agreement, and authorised the rectification of the register in terms thereof.

On 30th April 1884 the Boson Oil Company (Limited) was incorporated under the Companies Acts 1862 to 1880, and on 15th August 1888 it was duly resolved that the said company should be wound up voluntarily in terms of the said Acts, and Henry Moncreiff Horsburgh, C.A., was appointed liquidator.

George Simpson, Lomond House, Trinity, was entered on the register of members of the said company as proprietor of, *inter alia*, 1440 shares. In October 1888 he presented the present petition to have the register of members rectified and his name deleted as a shareholder of the 1440 shares.

Section 35 of the Companies Act of 1862 provides that "If the name of any person is without sufficient cause entered in . . . the register of members of any company under this Act . . . the member aggrieved . . . may, as respects companies registered in Scotland, by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified." . . .

The liquidator lodged answers, in which he averred that the shares in respect of which the petitioner's name stood on the register of the company consisted of two lots—(1) A lot of 1391, which were part of a lot of 1441 which had been improperly allotted to the petitioner, and for the calls upon which the directors were advised that the petitioner could not be made liable. (2) 49 shares, which were part of 100 shares which the petitioner acquired by transfer in October 1885; £1 per share had been paid upon these shares, and the balance of £9 per share (amounting in all to £441) was still due.

In January 1889 a note was presented to the Court by the liquidator stating that since his answers to the petition had been lodged he had succeeded in effecting an arrangement with the petitioner of the matters in dispute between them.

The material provisions of this arrangement were (1) that the petitioner was to pay the liquidator the sum of £196, being £5 per share on the foresaid 49 shares (less £1 per share already paid thereon); (2) that both parties agreed that the aforesaid 1440 shares be deleted from the register of the said company in liquidation, and held as cancelled.

The liquidator accordingly prayed the Court to approve of the minute of agreement, and to order the rectification of the register of the Boson Oil Company in terms thereof.

Argued for the liquidator—This was an incidental application in the course of a voluntary liquidation, and was competent under section 138. It was just the kind of application contemplated by the section; and the Court should give effect to the section by sanctioning the agreement come to between the liquidator and the petitioner. — *Sdeuard* v. *Gardiner*, March 10, 1876, 3 R. 577, and 5 R. 867; *Clark* v. *Wilson*, June 7, 1878, 5 R. 867; *Gardner* v. *Hughes*, July 11, 1883, 10 R. 1138.

Argued for the petitioner—The petitioner and the liquidator were at one in desiring that effect should be given to the agreement arrived at, and as the whole facts were before the Court no further inquiry was necessary.

The Court pronounced the following interlocutor:—

"Approve of the said minute of agreement, and on payment of £196 by the petitioner to the said liquidator, order and direct that the register of shareholders or members of the Boson Oil Company, Limited, be rectified by deleting or removing therefrom the name of the petitioner as a shareholder of the said company in so far as the 1440 shares of the said company mentioned in the petition and proceedings are concerned, and that due notice of such rectification be given to the Registrar of Joint-Stock Companies." . . .

Counsel for the Petitioner—C. S. Dickson. Agents—Richardson & Johnston, W.S.

Counsel for the Respondent—G. W. Burnet. Agents—George Andrew, S.S.C.

Tuesday, February 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GEORGE SMITH & COMPANY AND MILLAR *v.* SMYTH AND ANOTHER.

Bankruptcy—Act 1696, *c.* 5—*Illegal Preference—Assignation in Security—Sale of Bankrupt Estate under Deed of Arrangement—Right of Purchaser to Challenge Preferences.*

A firm assigned their book debts to the amount of £387, 15s. in security of an advance of £330 and a bill for £57, 15s. previously granted by them to the lender. A further assignation of their book debts was made in respect of other advances, and in security of any possible deficit on the first assignation. Three weeks after the date of the first assignation the firm was sequestrated, but by deed of arrangement the sequestration was wound up, and the whole property of the estate was sold.

In an action by the purchaser against the assignee in security for transference of the book debts, the purchaser objected to the assignee crediting himself with the sum of £57, 15s., the amount of the bill, on the ground that it had been granted within sixty days of bankruptcy. *Held* that as the deed of arrangement did not convey to the pur-

chaser a right to challenge preferences by the bankrupt, he had no title to challenge the assignation in respect of the said bill.

Opinion (*per* Lord Young) that the said assignation would not have been challengeable even at the instance of prior creditors or a trustee in a sequestration.

The Act 1696, c. 5, "declares all and whatsumever voluntar dispositions, assignations, or other deeds, which shall be found to be made or granted directly or indirectly be the foresaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of befor in favors of any of his creditors, either for their satisfaction or further security in preference to other creditors, to be void and null."

On 6th May 1887 George Smith & Company, ironfounders, Sun Foundry, Kennedy Street, Glasgow, and David Prentice Menzies, and George Whitehall, partners of the firm, granted the following assignation—"In consideration of the sum of £330 advanced by Hugh Farries Smyth, 4 Main Street, Anderston, and a bill dated 31st March 1887 for £57, 15s. granted by us, We do hereby assign, convey, and make over to the said Hugh Farries Smyth, and his heirs, executors, and assignees whomsoever, the following book debts due and owing to us, and to be held and collected by him in security of the said advance and bill, videlicet."

On 20th and 23rd May 1887 the firm made further assignations of their book debts to Smyth in security of advances by him amounting respectively to £300 and £50, and any deficit that might arise on former assignations.

Upon 25th May 1887 the estates of the firm were sequestrated. At a meeting of creditors held on the 11th day of July 1887 for the election of trustee in the sequestration, the creditors present or represented at said meeting unanimously resolved that the estate ought to be wound up under a deed of arrangement, and that an application should be presented to the Sheriff to sist procedure in the sequestration for the period of three weeks, and a trustee accordingly was not elected.

The Sheriff granted the application, and a deed of arrangement was entered into between George Smith & Company, Gavin Bell Millar, and the creditors of the firm, whereby Millar purchased the whole estate, property, and assets constituting the sequestrated estate, including the goodwill of the business, and a right to use the firm's name, for the payment of £3500 for a discharge of the heritable debts due to the firm, and £3000 for division among the unsecured creditors.

In May 1888 George Smith & Company and Gavin Bell Millar brought an action in the Sheriff Court of Lanarkshire at Glasgow against Hugh Farries Smyth and his assignee David Prentice Menzies, to have the defenders ordained to grant to the pursuers a valid assignation or translation of the book-debts and others contained in these assignations in so far as the debts were still due and unpaid, and also to ordain them to produce an account of their intromissions with the said book debts. The defender Smyth admitted his liability to account for the book debts, and he proposed to credit himself with the sum of £387, 15s. The pursuer denied the defender's right to take credit for the sum of £57, 15s. He averred—"The bill for £57, 15s. represented a prior debt due by the defender Menzies as an individual to the defender Smyth. The granting of said bill by the firm of George Smith & Company was a preference in favour of the defender Smyth, and the granting of an assignation in security of said bill was a further preference in favour of the defender Smyth. The estates of George Smith & Company were sequestrated within sixty days after the date of said bill and assignations, and they were insolvent at the dates of said documents."

The pursuers pleaded—"(1) The pursuers being in right of the assets of the late firm of George Smith & Company, the defenders are bound to account to them for their intromissions with the debts assigned to them as aforesaid. (2) The pursuers having tendered and being prepared to consign the balance due to the defenders, they are entitled to have the said book debts, so far as still unpaid, assigned to them."

The defenders pleaded—"(2) The defender Smyth, being assignee for value of the accounts in question, was legally entitled to assign the same to the other defender without challenge on the part of the pursuers. (3) The pursuers having declined to pay the balance of the defender Smyth's claims, the latter was in no way bound to transfer the assigned accounts to the pursuers. (4) The defender having always been ready and willing to account for the sums received under the assignations in question, the prayer of the petition craving for an accounting should not be granted."

Upon 20th July 1888 the Sheriff-Substitute (LEES) found that the pursuers had no title to sue.

"*Note.*—Only one point is now left in issue. The pursuers have acquiesced in the charges for commission which are made by the defender Smyth, and having regard to the other deliverances in the case, the only question on the merits that requires to be disposed of is the challenge by the pursuers of the bill for £57, 15s. Assuming that that bill constituted or evidenced a debt by the company, I cannot regard the three assignations that were granted as other than in further security of it and of the advances which were made at the time in cash. So far as regards these advances the assignations of the book-debts of the firm are good. But as regards the bill they are, I think, open to challenge. It is plain that they were not a payment of the debt contained in the bill. They bear to be only in security of it, and as the debts included in each assignation largely exceeded the sums for which they were assigned it is plain that these assignations were matters which are struck at by the Act of 1696.

"But, then, have the pursuers a title which authorises them to found a challenge on that Act? The statute did not restrict the remedy it granted to prior creditors, but an unfortunate course of decisions so consistently interpreted it as having that implication that the matter must be accepted as beyond question. Now, there is no proof that the pursuers, or either of them, are creditors prior to Mr Smyth. They may be, but it is not shown that they are. The 11th section of the Bankruptcy Act of 1856 gives a trustee in bankruptcy such right of challenge. No trustee, however, was appointed here, because the bankrupts' estates were wound up under deed of arrangement. The section which authorises such settlement provides 'that the sequestration shall

receive full effect in so far as may be necessary for the purpose of preventing challenge or setting aside preferences over the estate' (section 38). The pursuers contend that the effect of this *proviso* is to authorise challenges to be made of preferences, although not by the trustee. Accepting that as a fair interpretation of the *proviso* in question, does that clause confer on the pursuers, or either of them, the right of challenge? As regards the bankrupts themselves, it is required as a condition of such title to challenge that they shall have been re-invested in their estates, that they shall have obtained a special assignation of such right to challenge from the creditors, and that notice shall have been given to the creditor whose preference is to be challenged so that he may have the opportunity of stating his views in regard to the propriety of the resolution of the creditors to authorise such challenge. It seems to me that the deed of arrangement founded on by the pursuers confers no such right upon the bankrupts. Mr Goudy remarks (p. 385) that the bankrupt must stipulate for an express assignation of the right of challenge, and not make a mere vague reservation of it. Now, I fail to find in the deed of arrangement anything approaching to an express assignation of the right of challenge. And it is not alleged that any notice was given to Mr Smyth. Indeed, on the assumption that the deed does contain an assignation of authority to challenge, it leaves it quite uncertain whether that right is with the bankrupt firm or Mr Millar. It seems to me, however, that the deed contains no such assignation, but simply transfers the estate as it then stood.

"But it is urged that Mr Millar by his purchase of the estate took the position and received the rights which the trustee would have got. But if the trustee had been appointed and thereafter relieved of his office, and the bankrupts been re-invested, as has been the case here, he would have lost his title to challenge without having transferred it to the bankrupts. Therefore even on this line of argument Mr Millar seems to me to have no title to sue. And if the bankruptcy estate had been bought by various parties in portions, difficulty might and probably would have arisen as to where such right to sue lay. I am disposed therefore to hold that the mere purchase of the estate, with the goodwill of the bankrupt's business and the right to use their name, does not in itself suffice to constitute a right to challenge preferences in favour of such purchaser, and that without special assignation of such right he has no title to challenge preferences, and that such assignation or its equivalent is awanting here. As the point, however, is one of some delicacy as well as novelty, I am willing that the pursuers should bring this judgment under review, if so advised."

The pursuers appealed, and argued—The real question here was, whether when in a sequestration a deed of arrangement had been entered into, and the purchaser of the bankrupt estate wished to reduce an illegal preference, it was necessary that the power of challenge should be specially conveyed to him in the deed? It was admitted that under a composition contract it was necessary that a special assignation should be granted, and notice given to the creditor that such a challenge was to be brought, but that was not necessary under a deed of arrangement. The clause of retrocession in the deed was purely for conveyancing purposes; to enable the bankrupt firm to give Millar a feudal title to the heritable subjects, so that that did not affect its real charucter. The Bankruptcy Statute 1856, section 38, which provides for a deed of arrangement, enacts further—"Provided always, that the sequestration shall receive full effect in so far as may be necessary for the purpose of preventing, challenging, or setting aside preferences over the estate." It must therefore be taken that the right of the creditors to reduce illegal preferences had been assigned to the pursuer Millar, although there was no special assignation. The three assignations in May had been granted within sixty days of bankruptcy, and therefore constituted an illegal preference so far as related to the bill of £57, 15s., because that was a prior debt due by Menzies as an individual. If Millar had been a trustee in bankruptcy he would have been able to reduce this preference without any assignation, and although the sequestration had not been carried through to the extent of appointing a trustee, Millar had taken his place as representing the creditors—*Douglas, Mitchell, & Company* v. *Hunter, Newall, & Company*, July 14, 1859, 21 D. 1302; Bell's Comm. ii. 458.

The defenders argued—The transaction was not struck at by the Act 1696. Upon the 6th May 1887 the defender Smyth granted a loan to the firm of George Smith & Company of £330. He then handed back the bill for £57, 15s. which was current, and received an assignation to the book-debts for the whole sum of £387, 15s.; there was no distinction between the two sums, they were made one debt under this new arrangement. The creditors had not by implication assigned their right to challenge preferences to the pursuer Millar as the purchaser of the bankrupt estate of George Smith & Son. All that was assigned to the pursuer were the creditors' rights in the bankrupt estate, but the power to challenge preferences was no part of the bankrupt's estate; it was a special and peculiar right in the creditors and the trustee in bankruptcy as acting for the creditors. If it were intended that this right was to be transferred to a person other than a trustee for the creditors, who endeavoured to get as much out of the estate as possible for himself, that intention must be shown by a special assignation. The 38th section had no bearing here, as it was intended to meet the case where the creditors desired to keep up the sequestration for the purpose of challenging preferences.

At advising—

Lord Young—This case raises a question which is not without interest, although in my view it is not attended with much difficulty. In May 1887 Messrs George Smith & Company required an advance of £330. They applied for accommodation to Mr Farries Smyth, who held their bill, granted sometime previously, for £57, and the agreement come to was that he should advance the sum of £330 to them and give up the bill for £57 upon receiving security in the shape of an assignation to their book debts, entitling him to uplift these debts to the extent of £387, 1s. 9d., the £57 for which they were already indebted to him under the bill, and £330 which they received from him on the spot. Shortly afterwards George Smith & Company be-

came bankrupt, and their estates were sequestrated, but before a trustee was appointed, an arrangement was come to whereby the creditors transferred the bankrupt estates, including of course the book debts, to Mr Gavin Bell Millar for the price of £6500, and they arranged among themselves to divide that sum, which thus represented the bankrupt estate. There is no doubt of the validity of such an arrangement, and Millar I presume knew—we must at anyrate take the case upon the footing that he knew—that the book debts had been already pledged to Smyth for the sum of £387. As the purchaser of the bankrupt estate, Millar was entitled to call on Smyth to account for the book debts, and accordingly he has brought the present action, which is in substance an action of accounting against Smith. In this action Smyth debits himself with the amount of the book debts which he has ingathered, and he credits himself with the sum of £387. Millar admits the correctness of this accounting except as regards £57, but he disputes Smyth's right to take credit for this sum, on the ground that it represents the amount of a bill which was current within sixty days of George Smith & Company's sequestration, and is consequently struck at by the Act 1696.

Now, I think it more than doubtful whether if this transaction had been challenged by some one entitled to challenge it—by the trustee in the sequestration, if there had been one, or by prior creditors—it would have been set aside as involving an illegal preference under the Act 1696. The inclination of my opinion is that it is not. It would, I think, have been quite legitimate, according to the principles fixed by a series of decisions, for Smyth to say—"Give me a bill not only for the £330 which I am now advancing, but also for the £57 which you also owe me, and let me have an assignation of your book debts in security of the whole £387." I think that that assignation would not have been challengeable under the Act, even at the instance of a trustee acting for prior creditors, assuming that there are prior creditors.

That I think would have been sufficient for the determination of the case; but passing by that, and assuming that this assignation would have been challengeable at the instance of prior creditors to the extent of £57 out of £387, the question remains—Did they convey that right of challenge to Millar under the arrangement by which they transferred the bankrupt estate to him for £6500? Now I am of opinion that while the parties might have contracted as they pleased expressly about that right, an assignation of it in favour of Millar is not to be raised up by implication. Such an assignation could be exercised only to the prejudice of the general body of creditors, and it is not to be presumed that they intended to transfer a right which could be exercised to their own prejudice. In the absence of express stipulation I think the contrary is to be presumed, and as there is no such express stipulation here I am of opinion that Millar has no title to challenge the conveyance of the book debts to Smyth to any extent.

I am not much moved by the argument on which Mr Asher mainly relied, founded on the words at the end of the 38th section of the Bankruptcy Act. I think the purpose of these words plainly is, where creditors agree to terminate the sequestration and have their claims satisfied by some other machinery, to provide that the sequestration shall nevertheless continue to the effect of cutting down illegal preferences; but I think that has no bearing on the question now before us.

I am of opinion therefore, in the first place, that this assignation is not challengable either in whole or in part at the instance of anyone, and, secondly, if I thought the right of challenge existed at all, I think it belongs to the creditors alone in virtue of a peculiar and exceptional law, and is not presumed to have been transferred by them under such an assignation as we have here, I should also wish to say that if I had thought otherwise—that the right of challenge had been transferred to Millar—I should have felt unable to decide that question in the absence of the creditors.

Lord Rutherfurd Clark—Upon the question whether this assignation of the book-debts could have been reduced by anyone having a proper title to do so, I desire to give no opinion. I think it is a question of difficulty.

Upon the question whether under the deed of arrangement with the creditors Millar has a right to reduce the assignation under the Act 1696, I am of opinion that he has no such right. If he possessed such a right he could use it only to the prejudice of his cedents, and we are not entitled to presume that the cedents intended to convey a right which could be used only to their prejudice.

I am also of your Lordship's opinion that if we had taken another view we could not have decided the question in the absence of the creditors.

Lord Lee—I am of the same opinion. I only wish to say that I do not understand your Lordships to decide the question of the validity of the assignation, but only that of the title to sue.

Lord Young—The case may be decided on either ground. I decide it on both.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute appealed against: Find that on 6th May 1887 Messrs George Smith & Company and David Prentice Menzies and George Whitehall, the partners of the company, in consideration of a sum of £330 advanced to them by the defender Hugh Farries Smyth, and of a bill dated 31st March 1887 for £57, 15s. granted by them to him, assigned to him certain book debts in security of the said advance and bill: Find that on 20th and 23rd May 1887 the said George Smith & Company granted to the said Hugh Farries Smyth assignations of certain other book debts in security, *inter alia*, of any deficit there might be on the assignation of 6th May 1887: Find that by deed of arrangement the sequestration of the said George Smith & Company, which was awarded on 25th May 1877, was brought to an end, and George Smith & Company were re-invested in their estates: Find that by the said deed of arrangement the pursuer Gavin Bell Millar became purchaser of the whole estate, property, and assets constitut-

ing the sequestrated estate of George Smith & Company as they then stood: Find that the challenge of the said assignations by the pursuer has been departed from by them, except as regards the said bill for £57, 15s.: Find that by said deed of arrangement no special authority was given to the pursuers, or either of them, to challenge any preferences that may have been granted by the bankrupt: Find in law that the pursuers have no title to challenge the said assignation in respect of the said bill: Find that the pursuers are entitled to an assignation of the book debts enumerated in the said assignations of 6th, 20th, and 23rd May 1887, so far as these are unpaid, upon payment to the defender David Prentice Menzies of the balance of the sums due to him, and interest thereon at 5 per cent. from 3rd May 1888 to the date of payment: Grant warrant to the Sheriff-Clerk of Lanarkshire at Glasgow to pay to the pursuer Gavin Bell Millar the sum of £132, 2s. 10d., the amount consigned on 18th May 1888, and that upon production of a certified copy of this interlocutor: *Quoad ultra* dismiss the action," &c.

Counsel for the Appellant—Asher, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Respondents—Goudy. Agents—J. W. & J. Mackenzie, W.S.

Friday, February 1.

FIRST DIVISION.

[Lord Trayner, Ordinary.

STEEL COMPANY OF SCOTLAND *v.* TANCRED, ARROL, & COMPANY.

(*Ante*, vol. xxv., p. 178.)

Contract—Construction—Words of Estimate or Expectancy.

A company contracted to supply "the whole of the steel required" by the contractor for the Forth Bridge, less 12,000 tons of plates, at certain prices. The general conditions appended to the contract contained the following clause—"The estimated quantity of the steel we understand to be 30,000 tons, more or less." From the specification attached to the contract for the construction of the bridge, to which the above contract referred, it appeared that the part of the bridge for which in the contemplation of the parties the steel was required was the superstructure of the four main spans.

In an action by the company against the contractor for damages on account of breach of contract—*held* that the pursuers were entitled to supply the whole steel required for the construction of the superstructure of the four main spans, in respect that the estimate of "30,000 tons, more or less," was merely a guide to the parties as to the amount which would probably be required, and did not in any way limit the legal obligation under the contract.

This was an action at the instance of the Steel Company of Scotland (Limited) against Messrs Tancred, Arrol, & Company, the contractors for the construction of the Forth Bridge, to have it found and declared "that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge at present being constructed at Queensferry, and that at the prices and subject to the terms and conditions contained in offer by the pursuers, dated 27th February, and acceptance thereof by the defenders, dated 7th March 1883, and the defenders ought and should be decerned and ordained to make payment to the pursuers of the sum of £100,000 sterling, or such other sum as shall be ascertained in the process to follow hereon as the damages due to the pursuers in respect of the defenders having supplied themselves elsewhere with steel needed for the construction of the said bridge."

In their offer the pursuers wrote—"We hereby offer to supply the whole of the steel required by you for the Forth Bridge, less 12,000 tons of plates, subject to the terms and conditions herein contained, at the following prices, viz.—Steel plates, per ton, £10; angles, £8, 10s.; tees, up to 12 united inches, £8, 10s.; tees, 12 in. by 6½ in. by 1 in., £12; channels, 10 in. by 3 in., £10, 10s.; channels, 12 in. by 4 in., or 14 in. by 3 in., £14; flats, £8, 10s.; rivet bars, £9, 10s." The offer contained the following clause—"The estimated quantity of steel we understand to be 30,000 tons, more or less."

The defenders accepted the offer in the terms in which it was made. The offer and acceptance were subject to the following general conditions, which are here given as appended to the acceptance— "*General Conditions.*

"The work and material herein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract for the construction of the Forth Bridge, and to the entire satisfaction in all respects of the engineer for the time being of the Forth Bridge Railway Company, who shall have full liberty at all times to inspect in person or by deputy the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory, or not in accordance with the said specification, and his decision is to be final and conclusive. You will provide at your own cost all requisite apparatus and labour for the purpose of testing the steel. No part of the work will be considered as being in accordance with the contract until the engineer or his deputy shall have given his certificate in writing that it is satisfactory, but if the same be afterwards found to be defective, or not in accordance with the contract, it may, notwithstanding such certificate, be liable to rejection at our works. You agree at your own cost and charge to satisfy all royalties or claims in respect of any patent rights affecting any part of the works. Upon the first day of each month you shall render us an account of the material delivered during the preceding month, and the amount found due by us thereon is to be paid by us to you in cash on or before the first Tuesday of the following month. We are to have the power to cancel this contract should our contract for the erection of the bridge be from any

cause determined, as provided in our principal contract with the company, upon the condition that we give you three calendar months' previous notice in writing, and supply you with specifications for those three months to keep you fairly employed for that time, and upon the further condition that we will pay to you the contract price for all steel you may complete according to specification at or before the expiry of such notice, whether the steel be delivered or not within that time. Further, we undertake to pay you the amount of loss (if any) you may sustain by the cancelment of your contract or materials (pig iron, ores, &c.) which you may have purchased before notice as against this contract. This loss (if any) to be the difference on the last day of the said three months between the actual cost (delivered at your works) of such materials to you, including interest on price at 5 per cent. per annum, and their then market value. . . . . The steel to be manufactured at the works of the Steel Company of Scotland (Limited), and deliveries are to be made at such times and in such quantities as we may from time to time require, and to extend over four years, unless otherwise specially agreed, or unless the contract be cancelled as already provided, it being understood that we will furnish specifications so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named. The estimated quantity of steel we understand to be 30,000 tons, more or less."

In the specification attached to the contract for the construction of the Forth Bridge there were the following references to the steel which would be required—

"*Iron Work in Caissons.*

"51. . . . The cutting edge of the caissons will be formed of steel plates, or of a cast steel curb, as may be determined by the engineer."

"*Superstructure.*

"54. The contract sum must be based upon the assumption that the superstructure will include 42,000 tons of steel work in main spans, and 20 tons of cast steel in bed plates and sundries, 3000 tons of wrought iron in approach viaduct, 200 tons of cast iron work in bed plates of approach viaduct and sundries, 2000 tons of old iron to weight ends of cantilevers, 1½ miles of permanent way for double line, with expansion joints complete, and asphalted side walks with hand rails, as shown on the drawings, and any alterations or omissions in or additions to the above quantities will be estimated at schedule rates, and be added to or deducted from the contract sum as the case may be."

"*Steel Work.*

"70. The whole of the metal in the main spans will be steel, of a make specially approved of by the engineer, and no wrought or cast iron will be used unless hereafter ordered by the engineer."

The pursuers averred—"The defenders have been supplying themselves with steel for the purpose of being used in the construction of the said bridge from other sources over and above the said excepted amount of 12,000 tons, as to which no question is raised. This they have been doing at prices considerably under the contract prices above mentioned."

In their statement of facts the defenders maintained that the contract was for "30,000 tons of steel, more or less," and averred as follows—(Stat. 4) "By the custom and practice of the iron and steel trade in Glasgow as well as elsewhere, a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described in general terms and not definitely fixed, but which has a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed. According to the said custom and practice, the contract libelled is a contract for 30,000 tons of steel, more or less. The words 'more or less' in said contract are by the said custom and practice understood to mean, and were intended by the parties to mean, that the quantity delivered should not exceed or fall short of the estimated quantity by more than 5 per cent. The parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers, they might get any extras elsewhere as not being within the contract of the parties. The pursuers have consistently read the contract between them and the defenders in the way contended for by the latter, and when the present questions arose they endeavoured to get the defenders to amplify the contract on the allegation that there was an agreement, subsequent to that now founded on, to take all extra steel from them however much it might exceed 30,000 tons." (Stat. 5) "In particular, the contract founded on embraced, *inter alia*, steel rivet bars. These were specified with the view to the defenders manufacturing the rivets themselves at the Forth Bridge works, but they subsequently found that it would be more convenient to buy them in a manufactured form. They accordingly, on or about 12th September 1884, ordered 700 tons of steel rivets from the Clyde Rivet Works, providing in their contract that the steel should be obtained from one of two makers, viz., the pursuers, or D. Colville & Sons, Motherwell. The Clyde Rivet Company accordingly purchased steel for making said rivets from the pursuers at the market rate then current, which was much lower than the rate in said contract. This steel was tested at the pursuers' works on behalf of the defenders, and the pursuers were well aware that the rivets to be made from it were for use at the Forth Bridge. The pursuers' manager at first objected to what was being done, on the ground that this steel fell within the contract in question. The defenders, however, informed the pursuers that 30,000 tons of steel would be taken under the contract, and that being so, that the contract would be satisfied. This view was acquiesced in by the pursuers, and the steel was sold to the Clyde Rivet Company as before mentioned. Subsequently the following additional quantities of steel were purchased by the defenders from the Clyde Rivet Works Company, viz.—March 25, 1886, 500 tons at £6, 5s., less 5 per cent.; January 24, 1887, 250 tons at £6, 10s. less 5 per cent. All the said steel was purchased by the Clyde Rivet Works Company from the pursuers, who were quite aware that it was intended for use in the construction of the Forth Bridge Railway. The steel was tested at pursuers' works on behalf of the defenders." (Stat. 6) "Again in April 1886 the defenders required 1000 tons of

steel to be used first for temporary purposes, and afterwards to be used in the construction of the Forth Bridge. The pursuers were invited to tender for this, and they thereupon claimed that it fell under their contract. The defenders again explained that they would take 30,000 tons independently of the said 1000, and that the pursuers had no right to ask anything more under the contract. This view was acquiesced in by the pursuers, and the steel was supplied at the pursuers' current prices, which were much lower than the prices in the contract founded on. (Stat. 7) "Further, the caissons for the Forth Bridge were originally intended to be made entirely of iron, but afterwards the engineer of the works requested, under the powers given him in the contract, that steel shoes should be used for these caissons. For this purpose 500 tons of steel were needed. The defenders gave this work to Arrol Brothers of Glasgow, who bought the steel from Neilson Brothers, Glasgow, who again bought it from the pursuers, who were well aware that it was required for the Forth Bridge, and it was tested on behalf of the defenders at the pursuers' works, but nevertheless the pursuers supplied it at their current prices, which were lower than the prices in the contract founded on. (Stat. 8) "Further, the approach viaduct to the bridge, according to the original specifications between the defenders and the Forth Bridge Railway Company, was to be made of iron. After the date of the pursuers' contract, steel was substituted for iron by the engineer. The defenders sub-contracted with Messrs P. & W. M'Lellan, Glasgow, for the supply of this steel. The pursuers supplied it without demur at their current market prices, and not under the contract founded on, though well aware that it was required for the Forth Bridge. Further, in or about 1884 there was a discussion between the pursuers and defenders as to the terms of payment and delivery of the said steel, on which a minute of the pursuers' directors followed. In said minute the defenders believe and aver that there is a proposal to the effect that in respect of certain alleged concessions made by the pursuers in regard to times of payment, the defenders should give the pursuers an order for steel in excess of the contract quantity."

In answer the pursuers averred that their manager complained to Mr Arrol that it was a breach of contract to get the steel rivets elsewhere, but Mr Arrol assured him it was a small matter, and the pursuers did not press it; that the 1000 tons of steel supplied by the pursuers outside the contract were ordered and supplied expressly for temporary purposes, and not for the permanent structure. They were not aware that the 500 tons of steel bought from them by the Neilsons and M'Lellans was for work which fell under the contract, and that consequently they did not at that time raise action against the defenders. In 1884 there was a proposal on the part of the defenders for extended credit, which was acceded to and acted on. There having been some discussion as to the meaning of the contract, the pursuers made it a condition of granting the credit asked, that the defenders should accept that view of the contract then and now contended for by the pursuers, and the defenders by their partner Mr Arrol agreed to this condition.

The defenders further offered to take 32,000 tons of steel from the pursuers in satisfaction of their contract.

The pursuers pleaded—"(1) The pursuers being able and willing to supply the whole of the steel required for the construction of the Forth Bridge other than the 12,000 tons excepted as aforesaid, the defenders are bound to take the same from the pursuers in terms of the contract constituted by said offer and acceptance. (2) The defenders having committed a breach of said contract, are liable in damages to the pursuers."

The defenders pleaded—"(4) The declaratory conclusions of the summons being inconsistent with a sound construction of the contract of parties, and with the construction put upon it by both parties in their actings under the same, ought to be refused. (5) The pursuers are debarred by their own actings under the said contract and by *rei interventus* from maintaining the declaratory conclusions of the summons. (6) On a sound construction of the contract of parties the pursuers were not thereby bound to deliver to the defenders, nor the defenders to take from the pursuers, more than 30,000 tons of steel, more or less, for use in the construction of the Forth Bridge."

Before answer the defenders were allowed a proof of their averments as to the custom and practice of the steel trade (*vide ante*, vol. xxv., p. 178), the result of which appears sufficiently from the opinion of the Lord Ordinary.

The following minutes of meetings of the pursuers' company were founded on by the defenders:—

"23*rd September* 1885.—Messrs Tancred, Arrol, & Company asked that the company accept bills occasionally in payment of their account and bear one-half the charge of discounting. It was decided that Mr Riley wait on them and agree to do this, provided they agree to give us the order for any steel they may require over our contract quantity, and at our contract prices for the Forth Bridge."

"*7th October* 1885.—Mr Riley reported that he had seen Messrs Arrol and Philips, of Messrs Tancred, Arrol, & Company, and had arranged with them that this company would, when desired by their firm, draw upon them in payment of their account, and only one-half of the costs of discounting to be charged. In consideration of this concession these gentlemen agreed that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge, except that covered by the contract with the Landore Siemens Steel Company, which is for 12,000 tons plates. Messrs Arrol and Philips pledged themselves to carry out this arrangement, but stated that they did not think it judicious to embody it in a formal letter."

The Lord Ordinary (Trayner) on 2nd March 1888 pronounced this interlocutor:—"Repels the fourth, fifth, sixth, seventh, and eighth pleas-in-law for the defenders: Finds and declares that the pursuers are entitled to supply, and that the defenders are bound to take from the pursuers, the whole of the steel required in the construction of the Forth Bridge, at present being constructed at Queensferry, in so far as such steel is or may be required in the construction of the four main spans of said bridge, and decerns; reserves all questions of expenses; and *quoad ultra* continues the cause."

"*Opinion.*—The first question to be decided in this case is, What is the meaning of the contract between the parties which was constituted by the letters of offer and acceptance set forth upon record? The pursuers maintain that that contract is to be read literally according to its expression, and that it binds the pursuers to provide and the defenders to take the whole steel required by the defenders for the construction of the Forth Bridge at the prices specified. On the other hand, the defenders maintain that the contract is one for 30,000 tons of steel, more or less, but not a contract for the whole steel required for the bridge.

"The defenders aver that according to the custom and practice of the steel trade 'a contract for the supply of a quantity of manufactured iron or steel, in which the quantity to be supplied is described in general terms and not definitely fixed, but which has a clause expressing the estimated quantity to be delivered and taken under said contract, is regarded and held to be a contract only for the estimated quantity so expressed. According to the said custom and practice the contract libelled is a contract for 30,000 tons of steel, more or less.' When this case was debated before me in the Procedure Roll, I allowed the defenders a proof of this averment of custom, reading the defenders' statement as amounting to this, that the contract was framed in such a manner as technically to express (in the particular trade referred to) a contract for 30,000 tons, with a certain margin, more or less. The Court, however, on a reclaiming-note took a different view, holding that there was nothing technical about the contract or its expression requiring or admitting of interpretation by proof of custom, and accordingly the proof (so far) which I had allowed was refused. Dealing therefore now with the contract as one in no way technical, and one which is to be enforced according to the natural and ordinary meaning of its terms, I have no hesitation in holding that it binds the defenders to take from the pursuers the whole steel required for the construction of the Forth Bridge, 'less 12,000 tons of plates' ordered from another firm. This is a matter which does not admit of any argument, it is simply a question of what the contract says, and its words do not appear to me to have more than one meaning.

"The defenders, however, further aver that the 'parties have, since the contract was made between them, acted on the footing that if the defenders took 30,000 tons of steel from the pursuers they might get any extras elsewhere, as not being within the contract of the parties,' and in support of this averment the defenders condescend on several specific transactions. Of this averment, as well as of the alleged specific transactions, a proof was allowed, and has now been led, with the result that in my opinion the defenders have failed to establish their averment. The directors of the pursuers' company (so far as available at the proof), and their manager and secretary, distinctly deny that they ever acted in regard to the contract in question on the footing averred by the defenders, and the several specific transactions are explained satisfactorily, and in such a way as to show that they were neither known to nor regarded by the pursuers as in any way infringing or modifying the contract.

"A word or two in regard to each of the specific transactions will be sufficient to indicate my view of the evidence bearing upon each.

"(1) In 1883 the pursuers supplied 3000 tons of steel to Messrs P. & W. M'Lellan, to be used by them in the construction of the viaduct approaches of the Forth Bridge. These viaduct approaches it had been originally intended to form of wrought iron, but it was afterwards determined by the engineer that they should be constructed of steel. P. & W. M'Lellan had made a contract with the defenders for the iron work, and their contract was continued after the change to steel had been resolved upon. The steel obtained by them from the pursuers was for the purposes of this contract. The defenders rely on this transaction as showing that the pursuers did not read their contract as one for the 'whole steel required for the Forth Bridge,' as they supplied steel to P. & W. M'Lellan in the knowledge that it was to be used in the construction of the bridge. The pursuers explain in reply that they did not regard the viaduct approaches as part of the 'bridge,' as that word was read by them in their contract. They regarded the bridge as the four main spans—nothing else. It may be that the contract in question, strictly read, covers the approach viaducts, and that the pursuers were wrong in law in giving it the limited construction which they did. They do not now wish to depart from that limited construction rightly or wrongly; it is the view they have always held, and they are willing to abide by it. If they are right, then the transaction with P. & W. M'Lellan has no bearing upon the case, but if they are wrong it does not avail the defenders. For if Mr Riley's explanation is an honest one (as I do not doubt it is), their supplying steel for what was believed not to fall within the pursuers' contract could not be regarded as a departure by them from their contract rights as understood by them. And it is worthy of notice that in 1883 no question had arisen between the parties as to the meaning of their contract. But the pursuers' position as regards their contract came out very distinctly when the second transaction took place, to which I shall now refer.

"(2) In 1884 the defenders ordered from the Clyde Rivet Company a large quantity of steel rivets. The Rivet Company applied to the pursuers to know at what price they would supply the necessary steel bars, informing the pursuers that the rivet bars were 'for Forth Bridge contract.' The pursuers at once communicated on this subject with the defenders, and afterwards there was a meeting between the defender Mr Arrol and the manager and secretary of the pursuers' company. What took place at that meeting appears from the proof. Mr Arrol says that he maintained that it was no matter to the pursuers where he got his rivet bars (although they formed a specific item in the pursuers' contract) provided he took from the pursuers the 'contract quantity' of 30,000 tons of steel in all, which he said he would do. Mr Riley and Mr M'Lellan say, on the other hand, that 30,000 tons, as 'contract quantity,' was not mentioned; that Mr Arrol said he had ordered rivets, not rivet bars, and was not therefore violating the contract; that his partners wished rivets ordered and not rivet bars, and

that the pursuers should let the matter pass as there would more steel be required than was originally expected, which would fall to be supplied by the pursuers under their contract. This meeting, and what took place at it, having been reported to the directors of the pursuers' company, it was agreed that they should waive their rights in reference to the rivet bars in order to get on smoothly with Mr Arrol.

"I do not hesitate to accept, in this conflict of evidence the statements of Mr Riley and Mr M'Lennan rather than the statement of Mr Arrol. It is, besides, the statement of two witnesses against the statement of one—the two having no pecuniary interest in the matter, the one having great interest. At the very lowest it is impossible to hold on such evidence that the defenders have proved (and the *onus* lies on them) that in the transaction about the rivets the pursuers acted upon a reading or construction of their contract such as the defenders aver they acted upon.

"(3) The steel for the shoes of the caissons stands in the same position as regards the steel sold to P. & W. M'Lellan for the viaduct approaches, and I need not say more on this transaction.

"(4) The fourth transaction was steel sold for 'temporary purposes,' and it is admitted by the defenders that the evidence on this matter is not very strong in support of their view. I think the evidence is distinctly against them. The steel sold for temporary purposes was sold by the pursuers to the defenders on the statement of the latter that it was not to be used in the permanent structure, and the correspondence about the steel distinctly bears that it was 'not to be placed against contract, being intended to be used merely for temporary purposes,' and was at the defenders' request advised, priced, and invoiced 'so as to keep them distinct from the bridge construction.'

"The defenders relied very much on the terms of the minute of the pursuers' directors dated 23rd September 1885. I agree with Mr M'Lellan in thinking that that minute is 'unfortunate' in its expression, but I also agree with him as regards the explanation to be given of it, and which is given by him. I will only say further with regard to this minute and the explanation that it appears to me that the pursuers would never have ventured to approach Mr Arrol with the proposal that he should pay for steel 'at our contract prices for the Forth Bridge' if they had been asking him for orders which their contract did not cover. The prices of steel had by September 1885 fallen so much below what they were in 1883, when 'the contract prices for the Forth Bridge' were fixed, that any such proposal would only have made the pursuers ridiculous, as Mr Arrol would not have been slow to show them. As regards what took place at the meeting on 2nd October 1885, I again prefer the evidence of Mr Riley to the evidence with which he is in conflict. I regard the minute of the 7th October 1885 as an honest statement of what took place at the meeting on the 2nd. Further, I accept as correct the evidence of Mr Riley and Mr M'Lellan as to the meeting held on 29th April 1887.

"On the whole matter, I am of opinion that the defenders have failed to establish the averments on which their fourth and fifth pleas are based, and that these pleas ought therefore to be repelled."

Thereafter a joint minute for the parties was lodged containing, *inter alia*, the following admissions:—"(1) That the defenders had ordered outside the contract, and have used or will use for the permanent work of the four main spans of the Forth Bridge, not less than 5000 tons of steel, viz., 2400 tons plates, 2000 tons angles, 300 tons tees up to 12 united inches, and 300 tons flats. (2) That, assuming the previous interlocutors in the cause to be well founded, the pursuers are entitled to damages in respect of said 5000 tons. (3) That the measure of damages in respect of said 5000 tons shall be held to be the difference between £6, 5s. per ton overhead and the contract prices for the different classes of steel specified in article 1 hereof. That the amount of damages represented by this admission is £14,850."

The Lord Ordinary on 13th June 1888 pronounced this interlocutor—"Interpones authority to the joint minute, and in respect thereof decerns against the defenders for £14,850 sterling: Finds the defenders liable to the pursuers in expenses," &c.

The defenders reclaimed, and argued—The pursuers' original contention was that they were entitled to supply the whole steel required for the bridge save 12,000 tons. That contention was now departed from, and the question was what was the proper restriction. The moment that the universality of the contract was departed from, the only reasonable and intelligible limitation was the one contended for by the defenders, viz., that the contract was to be limited to what was declared to be the "estimated quantity," and the "understanding" of parties—that is to say, "30,000 tons, more or less." This estimate appeared among the general conditions appended to the contract, and was part of the contract. That was the preferable interpretation which gave a meaning to every part of the contract, and it was very reasonable that these words should have been introduced as a safeguard to the Steel Company that they might know what amount of steel the contract bound them to supply. The pursuers attached a meaning to these words which rendered them pactional, because they maintained that they were the measure of damage in the case of cancellation. But once they were considered as in any way pactional it was difficult to refuse them the full binding force contended for by the defenders. The clause as to "equal monthly deliveries" also favoured this reading of the contract, which was borne out by the actings of the parties as disclosed in the evidence, and by the minutes of meeting of the pursuers' company of 23rd September and 7th October 1885.—Benjamin on Sale (4th ed.), 699; *Morris* v. *Levison*, Feb. 10, 1876, L.R., 1 C.P.D. 155.

The pursuers argued—The specification in the contract between the defenders and the Forth Bridge Railway Company was part of the contract to be here construed, and comparing that with the contract between the pursuers and defenders, it was clear that the steel which it was anticipated would be required, and which the pursuers contracted to supply, was the whole steel for the superstructure of the four main spans with the exception of 12,000 tons. That had been the contention of the pursuers since they came into Court, and neither the evidence

nor the minutes showed that they had ever understood the contract differently, or deviated from that construction of it. The words "the estimated quantity of steel we understood to be 30,000 tons, more or less," were merely words of expectancy, inserted as a guide to the parties as to the probable amount required. It was important to have an estimate of the quantity likely to be required as a protection against a possible *mala fide* increase or diminution in the amount; and also (1) to afford a measure of damage in case of cancellation of the contract, and (2) to regulate the amount of the monthly deliveries, and the position of the above words in the contract strengthened this view. On the other hand, if these words had been really a binding part of the contract they would not have appeared in the general conditions appended to the offer and acceptance, but in the offer and acceptance themselves. The case of *Morris* v. *Levison* was distinct from a case like the present, for there it was reasonable that the estimate of a party who had complete means of knowledge of the capacity of his own ship should be taken as part of the contract. The case was quite different where there was no means of knowing with certainty the amount of material which might be required under a contract.—*Gwillim* v. *Daniel*, 1835, 5 Tyr. 644; *M'Connell* v. *Murphy*, April 22, 1873, L.R., 5 P.C. 203; *Leeming* v. *Snaith*, Jan. 17, 1851, 16 Ad. & Ell. 265; *North British Oil and Candle Company* v. *Swann*, May 27, 1868, 6 Macph. 835; *Brawley* v. *United States*, 1877, 6 Otto. 168.

At advising—

Lord President—We have now before us the evidence which has been led under the authority of Lord Trayner's interlocutor of the 26th of November 1887, as modified by our interlocutor of the 22nd of December 1887, and with the additional light thus afforded we now resume consideration of the terms of the contract between the parties.

The offer which was made by the pursuers and the acceptance by the defenders are precisely in the same terms—that is to say, the one is just an echo of the other, both being expressed in the very same words, making allowance for the difference of expression arising from the parties being different. And therefore it is quite plain that the terms of this contract, although it is expressed in letters, must have been the subject of very careful and anxious consideration between the parties, and that is not surprising, because it was a contract of a very heavy kind involving great interest and great risks both on the one side and on the other.

The contract is for the supply of steel work, the pursuers of the action being steel manufacturers, and the question comes to be, what is the steel work that falls under this contract, or, in other words, what is meant when the one party offers to supply "the whole of the steel work required by you for the Forth Bridge, less 12,000 tons of plates," and the other in the same words accepts of that offer. There seems very little room for construction or doubt in regard to the words that I have quoted, "the whole steel required for the Forth Bridge." But there are considerations arising from other terms in this contract that require to be taken into view in order to understand what is meant by the term "required for the Forth Bridge."

Now, the first observation that occurs to one is that in specifying the prices which are to be charged for each kind of steel we get a view of what sort of steel—what form of steel work—is intended to be supplied under the contract. There are enumerated steel plates at £10 per ton, angles at £8, 10s. per ton, and in like manner so much a ton for tees of a certain size, for tees of another size, for channels and for channels of another size, for flats, and for rivet bars. Therefore it is natural to suppose that the kind of steel—by which I mean the form of the steel that is to be supplied for the purpose of this contract—consists of these different things, steel plates, angles, tees, channels, flats and rivet bars. Now, the next observation that occurs to one is that there are immediately after this enumeration of the forms of steel work that is to be supplied certain general conditions, and the first of these appears to me to be very material, "the work and material therein described or referred to is to be executed and supplied in strict accordance with the specification attached to our contract" (that is, Tancred, Arrol, & Company's contract) "for the construction of the Forth Bridge, and to the entire satisfaction in all respects of the engineer for the time being of the Forth Bridge Railway Company, who shall have full liberty at all times to inspect in person or by deputy the entire process of manufacture, and to reject any of the material or portions of the work which in his judgment are inferior or unsatisfactory or not in accordance with the said specification, and his decision is to be final." Now, this reference to the specification applicable to the contract between the defenders and the Forth Bridge Railway Company is extremely important, because it shows very clearly upon the face of it what is the steel work required according to the terms of that specification for the construction of the Forth Bridge. It shows, quite in accordance with the enumeration of the forms of steel which I have already referred to, that the steel required is just the steel that has been priced in the contract between the two parties before us. It shows that that steel work is to be used exclusively for the construction of the superstructure of the four main arches of the bridge, and has nothing to do with any other part of the bridge whatever.

There is just one exception to that statement which it is necessary to notice in passing, and that is, that in the specification, in speaking of the caissons upon which the main pillars of the bridge are to stand, it provides that "the cutting edge of the caissons will be formed of steel plates or of a cast steel curb, as may be determined by the engineer." Now, that occurs under the head "iron work in caissons," and therefore the steel there mentioned is a mere incident of the very heavy iron work required for the caissons. It is the cutting edge of the caissons by which I understand from the evidence we have had the lowest part of the caissons, which cuts into the ground below water, and to say that that is a part of the steel work required for the Forth Bridge is I think a misconstruction altogether of that part of the specification. That is not dealt with in the specification as steel work. It is dealt with as iron work,

the edging of steel being a mere incident. Therefore I return to what I said before, that the steel which, according to the specification in the contract between the defenders and the Forth Bridge Railway Company, is required is steel that is to be applied exclusively in the construction of the superstructure of the four main arches of the bridge.

By these means we are enabled to fix, I think, with precision and accuracy what is meant by the words of the contract between the parties before us when they say that the pursuers are to supply the whole of the steel required for the Forth Bridge, less 12,000 tons. It means, and can mean, at the date that these letters were written, nothing but the steel work specified in the specification of the principal contract. Now the words, "the whole of the steel required" are certainly very emphatic. It is difficult to understand that the parties could have meant something less than the whole of the steel which is according to the specification of the principal contract necessary for the construction of the bridge. Surely the words "whole of the steel" would never have been used unless that was in the contemplation of the parties. But if these words are emphatic, I think they are rendered even still more emphatic by the exception which is introduced, "with the exception of 12,000 tons of plates," which, as we learn, had been already secured by the defenders and paid for to another steel company altogether. It is to be the whole steel that is required by the contract with the Forth Bridge Company less 12,000, but less nothing else.

That being so, I think the contract could not have admitted of the slightest doubt as to its meaning if it had not been for some words which are used at the very end of the conditions to which I have already referred, and upon which indeed the whole argument of the parties turns. The words are these—"The estimated quantity of steel we understand to be 30,000 tons more or less." It is contended that that limits the words of obligation to supply and of obligation to take, to 30,000 tons or thereabouts. It appears to me that these are not words of contract at all, but the expression of an understanding; and it was certainly most natural and convenient that there should be some such understanding between the parties. A contract of this kind is of course a very serious one, and it is very difficult to foresee what might be the extent of the furnishings likely to be required under the leading words of this contract. It is a very extensive and a very large contract, and of a most unusual and novel kind; and therefore in the course of the communings between the parties which must have preceded this very carefully expressed letter and answer, it would of course naturally come to be considered what about the expectation of quantities? The pursuers would naturally say—"We should like to have some idea of what you are likely to require;" and the answer to that is—"Well, 30,000 tons more or less." Does that limit the obligation in the principal part of the contract? I think not. I think these are mere words of expectation or understanding or estimate, but certainly do not limit the very emphatic words with which the contract begins. There is another reason why this expression was introduced in the place where it is, because it is immediately preceded by this condition—"The steel is to be manufactured at the works of the Steel Company, and deliveries are to be made at such times and in such quantities as we" [that is, Tancred, Arrol, & Company] "may from time to time require, and to extend over four years unless otherwise specially agreed, or unless the contract be cancelled as already provided, it being understood that we will furnish specifications so that deliveries shall be as nearly as possible made in equal monthly quantities over the period named." If these equally monthly quantities were to be supplied according to the demands of the defenders over a period of four years, it certainly was all the more necessary that the pursuers should have some notion of what kind of quantities were to be required each month, or what was likely to be the total quantity required to be delivered in equal portions over four years. If the parties had gone blindly into this not knowing whether the quantities ultimately to be required might be 30,000 or 300,000 tons, it would have been a very awkward position for both parties. And therefore it is that they come to an understanding as to what is probably to be required during that period. If the pursuers had not had this hint given them as to what they were to provide for, they would have been placed in the greatest possible difficulty in managing their works. Their works might require to be kept in more constant operation for the purpose of this contract than they would otherwise be if the quantity were larger or smaller; and very possibly, in order to fulfil their obligations under this contract they might require additional machinery in their works or even an extension of the works themselves if the quantities had been of such an amount as to require that that should be done. And therefore they naturally said, "What quantity is it that you expect us to deliver within these four years?" And the answer is, "The estimate, the understanding"—that is all, an estimate or an understanding—"is 30,000 tons."

I come without any hesitation to the conclusion that these words do not in any way limit the legal obligation in this contract, and that the pursuers are entitled to supply, and the defenders are bound to take, the whole quantity of steel required by the specification of the principal contract to be supplied for the purpose of constructing the Forth Bridge; but that is limited in the specification to the superstructure of the four main spans. Now, when the parties came into Court it seems to me that they were both in the wrong. The claim made by the pursuers was a great deal too large and quite unjustified by the contract as I have now construed it, because they came into Court demanding that they should have the right to supply under their contract not merely the steel which within the meaning of the contract was required by the specification of the principal contract for the construction of the Forth Bridge, but also all the steel which by subsequent alteration of the principal contract had come to be used for portions of the bridge other than the four main spans. And that, I think, was an entirely unfounded claim. The defenders, on the other hand, have maintained throughout that they are not bound to take from the pursuers the steel requisite for the four main spans of the bridge

as specified in the specification of the principal contract, and therein they were wrong.

There is only one part of the case remaining to be noticed, and that is, that the defenders contend that the pursuers have by their actings interpreted this contract in a sense different from that for which they now contend, and that their actings must be taken to override the terms of the contract, and to show that the true meaning of the parties, whatever the words used may be, was different from that which I have now explained. I think this attempt upon the part of the defenders has proved quite a failure. In the first place, in regard to the supplying of steel for other parts of the bridge, that would have been a very good answer if the true construction of the contract in itself had been that the pursuers were entitled to supply all the steel that might be required for any part of the bridge according to the altered contract afterwards made between the defenders and the Forth Bridge Company. But that not being the meaning of the contract as I construe it, and the meaning of the contract plainly being that the steel to be supplied is limited to that which is necessary for the superstructure of the four main spans, this fact of the defenders taking steel for the other parts of the bridge from other manufacturers, with the knowledge and without the objection of the pursuers, only shows that at that time the pursuers were construing their contract a great deal more correctly than they did when they afterwards came into Court. There was another matter regarding the steel for temporary purposes. I cannot conceive that that being supplied and taken by the defenders from other dealers than the pursuers could possibly have been objected to by the pursuers as being a departure from the contract which they had made as we now construe it, because they are not under any obligation to supply, and the defenders are not under any obligation to take under the contract before us, any steel for temporary purposes. There is another matter in which it is said the contract has been departed from as now construed by the pursuers, and that is in regard to rivet bars. Rivet bars was one of the things specially within the contract, and were to be supplied at £9, 10s. a ton. Now, it certainly is the case that the defenders were desirous, in place of receiving delivery of rivet bars, to purchase rivets in a manufactured state—not merely the materials for making rivets, but manufactured rivets ready to be used. There was a good deal of communing between the parties on this subject, and there is a good deal of conflicting evidence about it. I am disposed to take the view that the Lord Ordinary has done in preferring the evidence for the pursuers on this subject to that of the defenders. But really I do not think it of very much consequence to determine exactly which of them is giving the more precise and accurate account of the communings on this subject, because it is, to my mind, perfectly obvious that the pursuers were not disposed to press this matter, seeing that the defenders were very anxious to have their rivets direct from the rivet-maker instead of taking the rivet bars from the Steel Company. They say, and say most naturally—"It would not do for us to quarrel with the defenders on this matter; our interests are bound up with theirs in this great contract in such a way that nothing could be more inexpedient than that we should give them any cause of quarrel, and therefore by all means let us yield this point rather than have any question about it." It is impossible to say that that is an acting of the parties which is sufficient to take off the plain meaning of the contract itself, and to show that the words used are not used in their natural sense, but in some different sense altogether.

Lastly—for I think this is the last point—reference is made to certain minutes of the pursuers which seem to imply that they were not of the mind that they were entitled to supply the whole of the steel work of the bridge, and that they would like very much to have their contract so construed and extended as to include the whole. The minutes, so far as I see, were not communicated to the defenders, and therefore could not have misled them in any way, and the verbal communication which the pursuers say was made to the defenders on this subject, and which formed the subject of an agreement or arrangement, is entirely denied by the defenders. They deny that there was any such communication or any such arrangement. Now, is this an acting by which the contract can be construed? I think not. It is not an acting of the parties at all. I can quite understand what was in the minds of the pursuers, or some of the directors—that in consequence of that little controversy about the rivets and the rivet bars they would like to have had some very plain assurance that no other question of that kind should be raised. The cause—the beginning of the whole affair—was that the defenders had proposed an alteration on the terms of payment under the contract, that they were to give short bills instead of cash as stipulated in the contract, and the pursuers very naturally thought, "Well, this is a very good opportunity for requiring a little concession from the other side, and we should like to have a positive assurance that there is to be no more question about our right to deliver the whole of the steel required." That seems to have been the origin of the thing, but I really do not attach any importance to this point, for the reason I have already stated, that I think it is not an acting of the parties that can construe the contract.

The proof therefore, it appears to me, which was allowed, does not contribute to throw any material light on the question before us, and I think we are just driven back to the construction of the contract itself, coupled, however, with the specification of the principal contract, which is directly imported by reference into the contract between the pursuers and the defenders for the purpose of showing what are the obligations laid upon Tancred, Arrol, & Company as to the use of steel in the construction of the bridge, and upon that question I have already expressed an opinion and do not require to say anything further on the matter. I am for adhering to the Lord Ordinary's interlocutor, that is to say, to the interlocutor of 2nd March 1888, which of course was brought up along with the last interlocutor which is expressly reclaimed against, and if we adhere to the interlocutor of 2nd March 1888 it is quite unnecessary for us to consider anything further than that, because it is matter of arrangement between the parties by the

minute which is before us, that if that interlocutor of the 2nd March is well founded and is to stand, then the measure of the damage and the amount of damage is settled by agreement.

Lord Mure—I also concur in thinking that the Lord Ordinary has come to a sound conclusion upon the main question brought before him, and which he decided on 2nd March. I have very little to add to what your Lordship has so clearly stated as to the meaning of this contract. It appears to me that the words of the offer and acceptance are in themselves very clear and distinct. The steel to be furnished was the whole steel required for the Forth Bridge, and if these words had stood alone they could scarcely have given rise to any dispute. But it is said there are certain words in the latter part of the offer which qualify and control these expressions, and these are the words—"The estimated quantity of steel we understand to be 30,000 tons, more or less." It is said that by these words the leading provision of "the whole steel" is controlled. I cannot adopt that construction. Having regard to the nature of this contract, the very expensive character of the works that were to be put up, and the time that was required to carry the work to a conclusion, would naturally lead the parties who furnished so large a proportion of iron or steel to desire to have a general idea as to the quantity that might be required in order to enable the contractors to go on with the work, and that was merely put in as a statement of the general understanding of the parties as to the probable amount of steel that would be required for the bridge. "Thirty thousand tons more or less" evidently means that in this particular contract there might be less than 30,000 required, or there might be more than 30,000 required.

That is pretty clear reading these two passages alone, but when we come to look at the terms of the specification, it is made quite distinct that the whole steel required for the Forth Bridge meant the whole steel to be used in the formation of the four main spans of the bridge, because it is upon that part of the work alone that at that time steel was to be required. I agree therefore in the view which the Lord Ordinary has taken, and which the pursuers themselves have taken since the case was last before us, that the fair meaning of the contract was the whole steel required for the erection of the superstructure of these four main spans. On these general grounds I concur in what your Lordship has stated with reference to the effect of the proof upon the reading of the contract. The parties were allowed a proof that certain actings of the pursuers in this matter showed that they construed the contract differently. I have gone over the evidence carefully on the four points that the Lord Ordinary has dealt with, viz., the approaches to the four main spans, the caissons, the rivets, and the temporary purposes, and I think the Lord Ordinary has come to a right conclusion on all these four points, and I have nothing to add.

Lord Shand—The words of this contract which have raised any question of difficulty are contained in the conditions appended to the offer and acceptance respectively relating to the quantity of steel to be furnished by the Steel Company, the pursuers, to the defenders, and they are these—"The estimated quantity of steel we understand to be 30,000 tons, more or less." And upon the construction of the contract the question to be determined is, whether these are words of expectation and estimate only, or are words of contract which fix a quantity with a certain percentage up or down, "more or less," which of course could not be taken to be of unlimited amount. I had not the advantage of being present at the first discussion which took place on this case, when your Lordships had to consider the contract, and allowed a proof which has now been taken, and which has formed the subject of much of the debate, and I confess that throughout a considerable part of the argument, which has taken place under the present reclaiming-note, I was in considerable doubt as to the true effect to be given to the words I have quoted. I thought it a question of very considerable difficulty whether these words were not to be interpreted as words of contract, and the consideration which weighed with me in feeling that difficulty was this, that the contract was one involving very large liability upon the part of the contractors the Steel Company, who had agreed to supply the whole steel for this bridge. It seemed to me that it was not a likely thing that dealing with a great undertaking of this kind they would enter into a contract without any limit, which might be a protection to them against claims involving very serious liability. Of course in making a contract like this they had to buy the quantity of steel that was likely to be required so as to be ready to supply it, unless indeed they wanted to run the risk of a very speculative market—the iron market, which, as one knows, has fluctuations of very considerable amount. They had also to arrange for labour in connection with the large amount of work to be done. It might even be, as your Lordship has suggested, that they might have had to extend their works. If they had proceeded to purchase a very large quantity of material on a mere rough estimate of what might be required, and if afterwards a great deal of that material had been dispensed with, they might have suffered very serious loss. On the other hand, if they purchased a very limited quantity, and if a much larger quantity was afterwards demanded, they might have had to make large purchases of material at great loss after the market for iron had risen. This led me to think that it was a serious question to be determined, whether these words had been intended to express a matter of mere expectation or estimate, or were not rather really inserted as words of contract for the purpose of protection to the pursuers. But the result of the argument, and particularly the closing argument submitted on behalf of the respondents on the reclaiming-note, has satisfied me that the construction of the contract is as your Lordship has explained it.

In the first place, the offer itself is perfectly distinct apart from the conditions. It is an offer to supply the whole steel required for the bridge less a certain specified quantity, while what is said to have the effect of limiting that obligation occurs not in the body of the contract itself, where one would naturally expect it, but in one of the series of conditions appended to the con-

tract. The first of these conditions imports to a certain effect the specification attached to the contract for the construction of the bridge. In regard to that matter I am bound to say that looking at the reference to the specification in the conditions as a reference I think only in regard to the nature and quality of the "work and material" to be executed and supplied, I am not prepared to say that on the sound construction of the contract the Steel Company were not entitled to supply the steel for that part of the bridge which has been called the viaduct, and that part of the steel which was also required for the feet of the caissons for the support of the four spans to which your Lordship has referred. I think that was a question attended with considerable difficulty, and I am not satisfied that the reference to the general specification would have controlled the words "the Forth Bridge" in the earlier part of this contract so as to limit their meaning to the superstructure of the four spans. But I think it unnecessary to form any final opinion on that matter, because as parties proceeded it was made clear that they were both agreed in acting on the footing that the steel furnished, as falling under the contract, was the steel for the superstructure of the four spans alone. It has been made clear upon the proof that that was the view upon which the Steel Company at least were willing to act, and of course the defenders, with a falling market for iron, would be quite ready to close with that view, because it saved them a large sum of money.

I have only said this in passing, because I was considering the effect of the words of estimate or words of contract as to the quantity of the steel. Now, in regard to these words, it appears to me that we find in the other conditions of the contract a key to their presence where they are. It might very well be said that there is no need for putting in such words as these, "The estimated quantity of steel we understand to be 30,000 tons, more or less," in these documents, in framing a contract, if they are to be used as mere words of expectation or estimate of what would likely be required, for this might have been done as well in conversation between the parties, or in a separate letter after or about the time the contract was concluded. The strength of the defenders' argument lies in this, I think, that this estimate is not given in conversation or in a separate letter, but that it is in the contract. We have to find if we can a reason for these words being in the contract, and yet for not giving them the full force of words of contract fixing a contract quantity. Now, I think that looking at these conditions we have a sufficient explanation of the presence of these words there. One of the reasons your Lordship has fully dealt with, viz., that arising from the immediately preceding clause in regard to the deliveries under the contract. I think these words receive an appropriate meaning, and have an appropriate place in these conditions, because something had to be arranged in reference to the measure of the deliveries, and the company were fairly entitled to get an estimate which would guide them in their preparations as to what amount of deliveries would be required each year and each month. Having got this estimate they would be entitled, I think, to found upon it in the event of unreasonable demand for delivery having been made, by saying there must be some check on that, and we have that check in this clause. But, as was pointed out by the Dean of Faculty, there is a more important consideration to account for the words of quantity, and that is the earlier provision in the deed containing the clause that Tancred, Arrol, & Company should be entitled to cancel the contract in the event of their principal contract being cancelled. In that case there would have been a very grievous hardship on the Steel Company if they had made all their arrangements. The Steel Company provided that in that case the defenders should undertake to pay them the loss which might be sustained on materials which the company might have purchased before notice as against the contract. The purpose of putting in the estimated quantity was, as I take it, for the protection of the steel company, and I cannot doubt that if the company had purchased 30,000 tons of material under this contract, and if a month or two afterwards the contract had been brought to an end, they might have appealed to the clause of expectation or estimate, and said that before the notice they had purchased 30,000 tons of material, and they were entitled to do so because of that estimate. I think when we examine the contract as a whole this case is in a position which distinguishes it from the previous cases that have occurred in England or in America, because we have in the agreement itself a special reason which accounts for the words being inserted, and a special ground, therefore, for the presence of such words of estimate in the contract. They would have a clear bearing on any questions of damage which might arise, and on the claims in reference to the time of delivery under the contract. And so I have come to have a clear opinion that the sound construction of the contract is as I have stated.

I may add that this view is strongly corroborated and supported by the decisions to which reference was made in the law of England and of America. There were two classes of cases referred to. The first were cases entirely, I think, of contract of purchase and sale; and in all of these the view contended for by the pursuers received effect in these courts. The first of these was *Gwillim* v. *Daniel*. There the contract was for all the naphtha manufactured by A B, say from 1000 to 1200 gallons per month during two years. It was held that although the quantity supplied was much smaller than had been contemplated—there were 7000 gallons of a deficiency in nine months—yet as the manufacturer had supplied all the naphtha which he had made, that was sufficient, and that the words referring to quantity were mere words of expectation. So again in *M'Connel* v. *Murphy*, where the contract was all the spars manufactured by M'Connel, say about 600 of a certain size, it turned out that there were only 496; but there again the Court held that as all that had been manufactured were supplied, that was sufficient, and that the other words were words of expectation merely. The third case of the same class was the case of *Brawley*, in the American Court, and there the same principle received effect. The quantity of cords of wood expected to be supplied in that case was stated at 880 cords more or less, but it was qualified "as shall be determined to be necessary" by a third party named or pointed

out. The quantity ultimately ordered was only 40 cords or some small quantity. But there again the principle received effect that the quantity mentioned was to be regarded as a mere estimate, and the ruling words "the whole quantity manufactured" were held to be operative. So here we cannot hold that the words referring to quantity are to control the more important words "the whole of the steel required for the bridge," more particularly as we find in the contract a special explanation of the use of these words in the clause referred to. The cases quoted on the other side do not, I think, affect the authority of the three cases just noticed. They were special. One was the case of *Leeming*. The words there were that the party should take such a quantity, not less than say 100, and the only possible force that could be given to the words was that at least a 100 should be given. The only other case referred to was *Morris* v. *Levison*, and there there was this speciality, that an owner of a vessel stipulated for a full cargo at a foreign port, but he added the words, "say about 1100 tons," and the Court, proceeding upon the view that the owner of the vessel must be presumed to know the carrying capacity of his own vessel, and must be taken to have been contented with 1100 tons if he got that, when dealing with one who did not know the carrying capacity of the vessel, and who had to provide the cargo in ignorance. It was held that it would be unreasonable to require the party who was to present the cargo to have ready in a foreign port more than the quantity which the owner of the ship himself estimated as necessary. On these grounds I am of opinion that both on the special terms of the contract, and on the authorities, it must be construed in the way your Lordship proposes—that the Steel Company were entitled to provide the whole steel for this bridge, in the limited sense of the word bridge as applying to the superstructure of the four main spans.

As to the proof which has been taken, I agree with your Lordship in thinking that it can have no substantial effect on the question to be now decided. If the meaning of the contract be clear, any proof as to the actings of the parties could not have the effect of changing that meaning. If, however, it could be made out that though the meaning of the contract was clear, the actings of the parties showed unequivocally that they agreed to make a new contract in some particular, or to modify its original terms, then the actings might have that effect. The proof should no doubt receive effect to this extent, that if it appears that the Steel Company had agreed to abandon their right to supply steel for certain parts of the bridge which they had the right to supply, and Tancred, Arrol, & Company acquiesced in this, so far the contract would be modified; and if there be difficulty, as I think there is, in the question whether this contract would not, if strictly construed, include the steel for the whole bridge, the proof then is very material, because it shows that whatever might be the decision of the Court on that question both parties have by their actings agreed that the supply shall be limited to the superstructure of the four spans. I am not sure that the Steel Company in their actings have ever contended for anything more—that one can infer from their actings that they ever maintained that they had anything to do with the supply of steel for any part of the bridge except the superstructure of the four spans. I think the proof shows that they never said or maintained in their communings with the defenders in reference to the supplies—"We insist that we have right to supply the 3500 tons for the viaduct, or we are entitled to supply the steel plates or curb for the shoes of the caissons." I cannot say so much for their pleading in Court. I think they erred in their pleading, though their actings in regard to this matter seem to have been consistent throughout. In article 7 the defenders say—"The caissons for the Forth Bridge were originally intended to be made entirely of iron, but afterwards the engineer of the works requested, under the powers given him in the contract, that steel shoes should be used for these caissons. For this purpose 500 tons of steel were needed. The defenders gave this work to Arrol Brothers of Glasgow, who bought the steel from Neilson Brothers in Glasgow, who again bought it from the pursuers, who were well aware that it was required for the Forth Bridge." And what is the answer to that? "Admitted that the pursuers tested 500 tons of steel which was bought from them by Neilson Brothers of Glasgow. Explained that at the time they were not aware that the said steel was for work which fell under the contract, and that consequently they did not at that time raise action against the defenders." That means this—they never raised any question in point of fact about it. But now when they come to plead their case in order, I fancy, to support their view of the contract, and apparently in some dread lest if they made a concession that the contract was limited to the superstructure of the four spans it might hurt their cause otherwise, they now say what I have just quoted. The same observation may be made as to the approach viaduct to the bridge. In statement 8 the same statement is made, and the answer is—"Explained that at the time they were not aware that the said steel was for work which fell under the contract, and that consequently no action was taken by them." These answers and the proof satisfy me that in point of fact the Steel Company never claimed to supply either the 3500 tons of steel work for the viaduct nor the steel for the caissons, although they have pleaded that they were entitled to make such claims under the contract, and the conclusions of the summons indicate no limitation of the bridge to its four leading spans and to the superstructure of these spans only.

The next point in the proof was in regard to the rivet bars. I have a strong opinion that if the Steel Company had thought right to object to the proceeding about the rivets they were entitled to do so. They had undertaken to supply all the steel for the bridge, and as part of that steel rivet bars were specified. The view undoubtedly was that they should get the rivet bars ready, and Tancred, Arrol, & Company were to convert these steel bars into rivets. I do not think it was in Tancred, Arrol, & Company's power to say, "We will supply steel ourselves for part of the bridge, and not take any rivet bars from you, but make our own rivets even for the work on the four spans." But I agree with your Lordships in thinking that on this part of the case the proof shows that while the Steel Com-

pany thought this was an invasion of their contract they resolved that they would not make a question about it. They thought it was not a large enough matter to get into conflict with Tancred, Arrol, & Company about, and I attribute no importance to that point.

The only other point that remains is the matter of the minutes, and I agree with your Lordship in thinking that there was no acting of parties proved in reference to this subject. As to the second minute, I think nothing can be made of it. It is quite properly expressed with reference to the position in which the parties stood. It is dated 7th October 1885—"In consideration of this concession" (about taking bills instead of cash) "these gentlemen agree that our contract with their firm should be taken as covering the whole of the steel required for the completion of the Forth Bridge—that is to say, the question having been raised as to whether the contract did include the whole steel, the Steel Company maintaining that it did, and Tancred, Arrol, & Company maintaining that it did not, they agreed that the contract should be construed as the Steel Company construed it. There is nothing in that to show that the Steel Company construed the contract otherwise than in the manner to which effect will now be given. The earlier minute is more loosely expressed:—"23rd September 1885. —It was decided that Mr Riley wait on them and agree to do this, provided they agree to give us the order for any steel they may require over our contract quantity, and at our contract prices." Undoubtedly these words are quite fitted to bear the meaning that the Steel Company though there was a "contract quantity" only stipulated, and that they were asking a new and extended arrangement in this respect, but my opinion on the evidence as a whole is that the minute is not truly expressed so as to bear out what was in substance the controversy. I think the real question between the parties was not as to having a fixed contract quantity, but rather that the Steel Company were maintaining the view that they were entitled to supply the whole. But in any case it would be a novelty, if the contract be clear in itself, to say that if the defenders can find in the books or documents of the pursuers, recovered under a diligence, something that tends to show that the pursuers had a view of the contract differing from its legal meaning and effect, and was more favourable to the defenders, this should control or alter the contract. If these were very clear minutes—and a series of minutes —making it clear beyond all question that the pursuers took the same view as the defenders maintain, that the true contract was for a limited quantity, this might raise a question of difficulty as to whether the Court should not construe the contract as both parties by their actings declared they interpreted it. But there is no such state of the facts. I am of opinion that the solitary passage in a single minute can have no effect whatever in controlling the written contract of parties, constituted by letters which passed between them. And accordingly I think that in this matter of the minutes the proof gives no assistance in the determination of the case. It is a case which must be determined entirely on the contract. The parties are now agreed that the limit of the claim of the Steel Company shall be the steel for the superstructure of the four spans, and I am of opinion that on the contract the Steel Company clearly had right to supply and were bound to supply the whole steel required for that superstructure.

Lord Adam—I entirely concur with your Lordship, and wish to make only one observation, and that is that the reference in the contract between the Steel Company and Tancred, Arrol, & Company to the main specification is not limited to the material to be supplied. The reference is to the work to be executed by Tancred, Arrol, & Company "in strict accordance with the specification," and I think that being incorporated in the Steel Company's contract gave a right to the Steel Company to see what the work to be executed by Tancred, Arrol, & Company with reference to this steel was in that specification. It is in that view that I concur with your Lordship that we are entitled to look at the specification as to that matter, and to incorporate it in the Steel Company's contract with Tancred, Arrol, & Company. And if that is done we see quite plainly that the work required to be executed by Tancred, Arrol, & Company is the superstructure of the four main spans.

The Court varied the interlocutor of the Lord Ordinary of 2nd March 1888 by inserting the words "of the superstructure" after the word "construction," and before the words "of the four main spans;" and recalled the finding in the interlocutor of 13th June finding the defenders liable in expenses, and in place thereof found them liable in expenses with the exception of the expenses of the proof.

Counsel for the Pursuers (Respondents)—D.-F. Mackintosh—Sir C. Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders (Reclaimers)—Balfour, Q.C.—Jamieson. Agents—Millar, Robson, & Innes, S.S.C.

Saturday, February 2.

FIRST DIVISION.

CUNNINGHAM *v.* DUNCAN & JAMIESON.

Reparation—Slander—Issue—Diligence to Ascertain Authorship of Libel—Evidence in Aggravation of Damages.

In an action of damages brought against the publishers of a newspaper for alleged libels contained in an editorial article and a series of letters purporting to come from a number of independent writers, which had been published in the defenders' newspaper, the pursuer averred that the defenders were themselves the authors of both article and letters, and he lodged a specification craving diligence to recover the manuscripts of the article and letters and any books or writings relating to their authorship and composition. The issue taken by the pursuer related only to the publication of the alleged libels.

Held that the pursuer was entitled to the diligence craved, and to lead evidence in

support of his averment as to the authorship of the letters in aggravation of damages without putting the question of authorship in issue.

William Cunningham raised this action against Duncan & Jamieson, printers and publishers of the *Stirling Observer* and the *Stirling Saturday Observer*, for payment of £1000 as damages for alleged slanders on the pursuer published in these papers.

The alleged libels were contained in a series of letters and one article which appeared in the pages of the *Stirling Observer* and *Stirling Saturday Observer* between 6th September and 20th October 1888, and which charged the pursuer with corrupt conduct as a member of the Town Council of Stirling. The letters purported to be from a number of independent correspondents, and were variously signed "Trader," "Another Trader," "One More Trader," "A Baker Street Voter," "Another Baker Street Elector," and "Bow Street."

The pursuer averred—"(Cond. 14) The whole of the said letters and articles published by the defenders as aforesaid not only contain the false, calumnious, and malicious passages before cited, but, whether taken together or separately, were calculated to hold up and expose, and did calumniously and injuriously hold up and expose, the pursuer to public contempt and ridicule. They were part of a systematic plan to destroy or injure the pursuer's respectability, reputation, character, and usefulness as a public man; and they have had the effect of lowering and degrading the pursuer in the eyes of the public. (Cond. 16) . . . The pursuer believes and avers that the defenders either wrote the said letters or procured them to be written for publication in their said newspaper. The defenders have declined to give the pursuer any information or any satisfaction, and in these circumstances the present action has been rendered necessary. The sum sued for is reasonable reparation in the premises."

The defenders denied these averments.

The defender pleaded—"(2) The statements complained of being only fair comments on the public conduct of a public man, they do not form a ground of action. (3) The pursuer having suffered no damage, the defenders should be assoilzied."

On 15th December 1888 the Lord Ordinary (Fraser) approved of an issue for the trial of the cause, which was to the following effect—"It being admitted (1) that the defenders are the printers and publishers of the *Stirling Observer* and *Stirling Saturday Observer* newspapers, and (2) that the defenders published [then followed a reference to the letters and the article and the dates of publication]—Whether the said statements, letters, and article, printed in the appendix hereto, or any of them, or part of them, are of and concerning the pursuer, and falsely and calumniously represent that the pursuer being a member of the Town Council of Stirling took advantage of his position to make money to the town's great hurt, that he had been bribed by the Caledonian Railway Company to betray the interests of the burgh in favour of the said Caledonian Railway Company, that he was a two-faced man, and a Judas, and ought to be shunned; or make similar and calumnious representations of and regarding the pursuer, to his loss, injury, and damage?"

(Subjoined was an appendix in which the letters and article were set out at length).

The following specification of books and writings for the recovery of which a diligence was asked was thereafter lodged by the pursuer:—"1. The manuscripts of the various letters referred to in the 5th, 6th, 8th, 9th, 10th, 11th, and 12th articles of the condescendence, and the manuscript of the newspaper article mentioned in the 7th article of the condescendence, or the manuscripts of the writings or documents embodying the said letters or article. 2. The business books of the defenders for the period between 1st August and 5th November 1888—including diaries, journals, memoranda-books, note-books, letter-books and cash-books—that excerpts may be taken therefrom of all entries therein relating to the said letters or article, or any of them, or to the authorship, composition, or publication thereof, or to payments made by the defenders on account thereof, or in connection therewith. 3. All letters received by the defenders during the foresaid period relating to the letters or article in question, or to the authorship or publication thereof, and all receipts received by the defenders for payments by them on account of, or in connection with, the said letters or article. 4. All letters received by the defenders during the months of September and October 1888, from the pursuer and his law-agent regarding the publications in question. 5. Failing principals, drafts, scrolls, duplicates or copies of the foregoing."

On 9th January the Lord Ordinary granted diligence at the instance of the pursuer for the recovery of the books and writings mentioned in the specification with the exception of those mentioned under the first three heads thereof.

The pursuer reclaimed, and argued—He was entitled to obtain the diligence craved under these heads of the specification, for he had averred on record that the defenders were the authors as well as the publishers of the letters containing the libels. The fact of that averment having been made distinguished the case from *Lowe* v. *Taylor*. The diligence craved was necessary to enable the pursuer to meet a defence that the defenders had only published letters sent to them by various electors, and that, therefore, though there might be legal malice, there was no active malice. It was not necessary that the question of the authorship of the libels should be put in issue. If the defenders would be entitled to prove to the jury the state of mind with which they published the writings, with a view to mitigation of damages, the pursuer was entitled to enter upon a similar proof in aggravation of damages. The pursuer would therefore be entitled to prove to the jury that the defenders were themselves the authors of the writings they published, without putting that question in issue, in aggravation of damages—*Merivale* v. *Carson*, December 1, 1887, L.R., 20 Q.B. 275; *Brims* v. *Reid & Sons*, May 28, 1885, 12 R. 1016; *Pontifex and Wood* v. *Stevenson*, December 7, 1887, 15 R. 125; Odger on Slander (2nd ed.) 309; *Scotland* v. *Thomson*, August 8, 1776, F.C., and 2 Hailes 669; *Auld* v. *Shairp*, July 14, 1875, 2 R. 940, opinion *per* Lord Neaves, p. 950; *Cooley* v. *Edinburgh & Glasgow Railway Company*,

December 13, 1845, 8 D. 288.

Argued for the defenders and respondents—The publisher had taken the responsibility of the alleged libels which had appeared in his newspaper on himself, and the pursuer was not entitled to the inquiry he asked for, which might disclose the names of third parties not represented in the action—*Lowe* v. *Taylor*, June 24, 1843, 5 D. 1261; *Brims'* case, *per* Lord President, 1020. At all events, the question of authorship, if there was to be an inquiry into it, must be brought before the jury by being put in issue, and that being quite a distinct question from the question of publication should be brought before the jury in a separate issue.

At advising—

Lord President—This is a very important case in the view I take of it, and raises a question of some novelty. The series of letters, which appeared in the *Stirling Observer* in the months of September and October are certainly in the highest degree calumnious, especially as directed against the reputation of a man in a public position, and there is no defence of *veritas*, but the newspaper publisher proposes to take the whole responsibility upon himself, both of the editorial article complained of and also of that long series of letters, which *ex facie* appear to be written by different people. They are all pseudonymous, and bear to be coming from a variety of different persons interested in the public affairs of the town of Stirling, but the whole responsibility is assumed by the defenders. So far the matter is quite in a condition to go to trial; the issue which is taken by the pursuer is an issue directed against the defenders as printers and publishers of the newspaper, and he complains that in the various letters and in the leading article most calumnious statements are made concerning his conduct and reputation. Now, in the ordinary case I should certainly say that having the defenders as the responsible party to answer his claim of damages, the pursuer would not be entitled to make the claim which he does, namely, to ascertain by the execution of the diligence or by evidence who were the real writers of the letters in question. But this is not an ordinary case at all, because the pursuer has put upon record two very important averments regarding the authorship of those letters. In the first place, he says in the 14th article of his condescendence, "they were part of a systematic plan to destroy or injure the pursuer's respectability, reputation, character, and usefulness as a public man; and they have had the effect of lowering and degrading him in the eyes of the public." And in connection with this he avers in the 16th article that "the defenders either wrote the said letters or procured them to be written for publication in their said newspaper."

Now, if it be true that there was a systematic plan for the purpose of running down the character of the pursuer as a public man, and if, in prosecution of this systematic plan, the defenders wrote these different letters, as well as the leading article, and gave them the appearance of coming from distinct and independent sources, they certainly were taking means to deceive and mislead the public as to the actual facts that were taking place; because, as the publication stands, they naturally lead the readers of the newspapers, and the public of Stirling generally, to believe that there are a great many people who entertain a very bad opinion of this pursuer, and think that he has been guilty of corruption and malversation of his office as a public man, and that this opinion is by no means confined to the conductors of the *Stirling Observer*. I apprehend this is calculated to increase very much the damage done to the reputation of the pursuer, because if the opinion of the newspaper alone were concerned, independent persons might have thought—"This is a newspaper scandal, and we cannot take it as true unless we hear more about it." But if a number of independent persons appear all to be writing to the same effect, the slander becomes more serious in the eyes of the general public.

This aggravation of damage done to the pursuer is a thing which I think it is competent to prove at the trial of the case, and especially when it is averred very distinctly upon record that the damage thus produced arises entirely from the actings of the defenders themselves, the conductors of this newspaper, who falsely represent upon the face of their newspaper that other people, independent writers, agree with them in the view which they took of the pursuer's public conduct. The only difficulty raised on the part of the defenders, as I understand it now, is that if the pursuer means to prove that the newspaper publishers were really themselves the authors, directly or indirectly, of these letters, he must take an issue to that effect, and that the issue as it stands will not enable him to prove that, and therefore this inquiry ought not to be allowed. That is a technical objection, but at the same time it is an objection requiring fair consideration. I do not think it is necessary that the authorship should be put in issue—that is to say, I do not think the pursuer is bound, either in the issue which he has already got, to put authorship as well as publication in issue, or to take a separate issue to authorship. If he put both into one issue he would run this risk, that unless he proved both authorship and publication he could not get a verdict. That objection would not apply if he took a separate issue, but I cannot see the necessity of a separate issue at all, because the only purpose for which this evidence is sought is to show what was the state of mind of the writers of these letters, or what was the state of mind of the writer of the editorial article, who was himself, it is said, the author of the apparently independent letters which appeared in the newspapers.

I think if that is established it will go to aggravate damages considerably, and I think it is a legitimate ground of aggravation, just as it would be a very good ground for mitigation of damages if the defenders could show that the whole of these letters, or at all events the editorial article, was written under a very strong impression that there were good grounds for believing what was said. It would be very difficult to reconcile the rule which we have established regarding mitigation of damages by an examination of the whole circumstances surrounding the publication of the libel or the uttering of the slander, with a rule which would exclude, on the other side, circumstances tending to aggravate damages. You must admit circumstances, and this is just one of the cases in which, I think, the circumstances alleged may very fairly be put in evidence for the

purpose of aggravating the damages.

I was a little struck at first sight by the suggestion of Mr Thomson, that this diligence may disclose the authors of these letters to be third parties who are not here represented. It would not be desirable that that should be so, but at the same time I cannot say that I have much sympathy with writers of anonymous letters containing very calumnious statements, and I think they will have no very great reason to complain even although in furthering the ends of justice it becomes necessary to drag them from their lurking place, and therefore I dismiss this consideration altogether in disposing of the case. I am for granting the diligence in the terms asked.

Lord Mure—The only difficulty as to granting the diligence asked for arises from the use of the word "authorship" in articles 2 and 3 of the specification, because, generally speaking, when the editor of a newspaper takes upon himself the responsibility of alleged libellous matter it has been held that he is not bound to disclose the author. That is a good rule in an ordinary case, but the present is not an ordinary case, because the pursuer in articles 14 and 16 of the condescendence has made distinct allegations of a systematic plan to attack the character of the pursuer as a public man, and one of the allegations was that these letters professing to come from members of the public were written by the defenders themselves. I think it is competent to admit proof of that averment as evidence bearing on the question of damages. In the ordinary case proof of surrounding circumstances is applied in mitigation of damages, and evidence is admitted of the circumstances under which an article was written to show that the defender in writing it had no special malice towards the pursuer. That having been admitted without a special issue, I do not see how evidence of the description here asked can be excluded in aggravation of damages. I see no ground in law why the pursuer should be prevented from getting access to the documents themselves with a view to establishing if there is only one or four or five authors of these letters.

Lord Shand—If questions of this kind were to be determined on strictly logical principles I think there is much to be said for refusing to allow such an inquiry as the production of these letters will necessarily open up here. According to strict principle it appears to me, that assuming that a calumnious publication has been here made, and I think that may very fairly be assumed upon these articles with no issue to *veritas*, then the only question left is one of damages, and I think it may be fairly said that if it is merely a question of measuring the amount of damages, all that the jury require to have before them is the articles, the nature of the articles, and the publication of them. Members of the public reading these articles will see that they appear to be from a number of different quarters, and they are published as such. They have gone on for a considerable time, and contain very serious charges, and upon a strict view of the question, "What is the amount of damages?" what the jury have to look at is the amount of injury which the man received from the publication, and the amount of injury will not be affected by the state of mind of the writer. The measure of damage is the same, if you are looking strictly and purely to the question of the amount of damage—it will not be varied in its result by showing who wrote the article, nor by showing what was the state of mind of the writer of the article.

But while I feel the force of that very strongly, I am satisfied at the same time that our law has allowed evidence of this kind from the earliest date in which cases of this class have arisen. One element in the estimation of damages which a jury is fairly entitled to take into view is *solatium* for injured feelings. It may be that in estimating the injury in that respect—the *solatium* to be given for injured feelings—the amount may vary according to the malice of the libeller and of the circumstances in which the libel was written, and the law has, as I say, from the earliest times admitted proof of the state of mind of the libeller, whether he be the writer of the article or the publisher of the article, or both writer and publisher, as is alleged in this case. I think Mr Guthrie Smith was able to show us from the statement of Lord Hailes in the case of *Scotland* v. *Thomson* that so early as 1776 evidence of that kind was admitted in aggravation of damages, although it cannot be, as I have said, that the proper measure of damage would be affected by the state of mind of the writer. In the case of *Scotland* the illustration given was this, that "words faulty in themselves may be more easily excused when uttered of suddenty, or from provocation, than the same words will be when, after premeditation, they are printed or uttered from the pulpit." So, I take it, that we have again and again allowed evidence in trials of this kind as to whether the article was written in irritation or on provocation, or whether it had emanated purely from the imagination of the writer. Even in the very last case of this class — *Browne* v. *Macfarlane*, January 29, 1889, 26 S.L.R. 289—the ground of judgment was that the jury ought to have the surrounding circumstances before them, including the state of mind of the writer. I think that branch of the law is also illustrated in the case of *Coolley*. There a person was injured in a railway accident, and the proper question was as to the extent of injury, but the Court resisted the proposal on the part of the railway company to put that question simply into the issue. They held the jury should be in possession of the whole circumstances in which the injury arose, obviously in the view that the nature of the fault might to some extent affect the amount of damages. If it were one of these cases where an accident occurred though all ordinary precautions had been used, then they would be in favour of the company; if, on the other hand, it was a case of gross fault and neglect of duty, that might be an aggravation of damages. Whatever may be said as to the logical reasoning, it undoubtedly was so decided, and the principle has been followed since, for in no case has the question of fault been excluded.

Taking that to be the law and practice which has continued for so many years, the application of it to this case I think is quite clear. If we refuse to allow this evidence, then the publisher goes to the jury, saying—"You must assume that all these letters came from *bona fide* members of the public, who were heartily dis-

gusted with the conduct of the pursuer;" or the publisher might say—"I was unguarded in publishing these letters, but look at my position with so many of the public pressing me. I regret that I yielded, but you must make the damages very small." That surely would be unjust to the pursuer, if the fact be that these various letters were the production of the publisher of the paper himself, and that is the averment here. I am not prepared to say that I would admit this inquiry but for the special averment here, but with that averment, and as the fact may be so, it appears to me we are bound to admit the evidence.

I think the case is distinguishable from the case of *Lowe* v. *Taylor*, because in that case there was no suggestion that the letters were not letters from *bona fide* third parties. The argument was taken on the footing that they were from *bona fide* third parties, and it was held that as the editor chose to take the responsibility there could be no inquiry behind him. This case is different, because of the averment that the publisher himself was the author.

There remains only the question as to whether there should be a separate issue, and while I agree with your Lordship upon that point, I am of opinion that the issue proposed is quite sufficient. The issue puts it thus—these articles have appeared in the paper, and the question is whether they are of and concerning the pursuer, and calumniously represent what is there stated—that is, whether the publisher has so represented, for practically he takes the position of having published them. In that question it appears to me to be simply a point of more or less damages whether he wrote the letters as well as published them. If he published them only, and published them in circumstances that he got them from *bona fide* third parties, the damages would be smaller in amount than they would be if he wrote the articles himself, but that is merely a case of aggravated circumstances of publication, and I am of opinion that it could be proved in the issue we now have before us. On these grounds I think the diligence is not too sweeping, and I am of opinion that it ought to be granted.

Lord Adam — In actions of damages for libel I think it is competent by the law of Scotland to inquire into the state of mind of the publisher or writer of the libel as the case may be. I think that is a rule of the law of Scotland. I think in the case of a publisher the pursuer is entitled to show all the surrounding circumstances in which he made the publication. We had an example of that the other day in the case of *Browne* v. *Macfarlane*, in which the publisher proved that he had received the information through a correspondent in due course, and no doubt he might have gone on, if it had been the fact, to show that he had made due inquiry into the truth of the information as supplied to him. But I think it follows as a necessary consequence that if this is allowed in mitigation of damages, a similar inquiry must be allowed in aggravation of damages. I think the one is just a counterpart of the other, and it will not do for the defender to say—"As I do not propose to inquire into the surrounding circumstances, you, the pursuer, will not be allowed to do so." Upon these grounds I think it would be wrong to refuse this diligence, for it would lead to this, that the publisher of a newspaper would be put into a more privileged position than any other member of the public. According to this view, he has nothing to do but write any number of anonymous letters, and publish them in his newspaper, and then say—"I am publisher of the newspaper, and you cannot inquire into the circumstances." I am not very much influenced by the fact that this may lead to the disclosure of the names of the actual writers of the libels. I can quite understand, as was the case in *Lowe* v. *Taylor*, that where the pursuer can show no legitimate interest to have the names of the writers the Court will not assist him. But where, as here, the pursuer has a legitimate interest to know who wrote these letters, then I think we should not stand in the way of his getting the information.

The Court recalled the Lord Ordinary's interlocutor, and remitted the case back to him to grant the diligence as craved.

Counsel for the Pursuer—Guthrie Smith—Wilson. Agent—Andrew Newlands, S.S.C.

Counsel for the Defenders—Comrie Thomson—J. A. Reid. Agent—William Duncan, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COUPER'S TRUSTEES *v.* THE NATIONAL BANK OF SCOTLAND (LIMITED).

Agent and Principal — Bank — Bank Agent—Liability of Bank for Fraud of its Agent.

The agent of a branch bank in a country town was appointed factor of a trust-estate, and authorised to draw the dividends effeiring on the trust funds, and to operate on the trustees' account with the branch bank. He received various sums of trust money which he embezzled. He initialed the entries thereof in the bank pass-book of the trust, and on different occasions forged the initials of the bank accountant to such entries. He did not enter these sums in the bank ledger, and he wrote therein docquets showing a balance at the credit of the trust of much smaller amounts than appeared from the bank pass-book.

In an action at the instance of the trustees against the bank, *held* that although entries in the pass-book were *prima facie* evidence against the defenders, the money had never been paid into bank, and the defenders were not liable to refund the balance in favour of the pursuers as disclosed by the pass-book.

Richard Reid, writer, Kirkintilloch, was agent for the National Bank of Scotland (Limited) in that town. Upon 31st July 1876 he was appointed law-agent and factor upon a trust under the trust-disposition and settlement of the deceased Archibald Couper, manufacturer in Kirkintilloch, and as such was authorised to uplift

the interest upon the various securities held by the trust, and to operate upon the trust bank account. Reid acted in these capacities until about the end of October 1887, when he absconded from Kirkintilloch.

The trustees obtained possession of the bank pass-books which Reid had formerly kept in his own possession, and found that the balance due to the trust according to these books, as at 1st June 1887, was £218, 19s. 11d. The bank, however, declined to accept that balance as the correct state of account between the parties, and indeed claimed that the trust was in debt to them.

The trustees Mrs Helen Dollar or Couper, widow of the said Archibald Couper, and others, therefore brought an action to recover the sum of £86, 2s. 6d., which after examination of the whole transactions they claimed to be the balance due to them as disclosed by the pass-books.

The pursuers averred—"Up to the 1st of June 1887 the sums paid into the bank are regularly and formally entered in the pass-books, and are initialed by the bank agent. Such entries are the recognised acknowledgments by bankers for moneys paid into bank. From an examination of the pass-books, bank interest does not appear to have been allowed, nor charged on the sums standing at the credit or debit of the trust from 1st November 1883. The defenders having declined to complete the pursuers' pass-books, the pursuers have had the interest calculated otherwise to the best of their ability, and giving effect to their calculations they find that, as at 1st November 1887 (the date of the defenders' last annual balance), there is only a balance due to them of £86, 2s. 2d., which is the principal sum sued for. It was from the defenders the pursuers obtained possession of the pass-books, and any docquets made in the bank's ledger were not made by Richard Reid as factor for the pursuers. They were false and fraudulent, and at variance with the pass-books and the facts, and were made by him solely to conceal the manipulations on the account and his defalcations as bank agent. Richard Reid could not, as factor for the trustees, manipulate the bank's ledger so as to render it different from the pass-books. The docquet formed part of the manipulations of the bank's ledger by the said Richard Reid as bank agent."

The defenders averred — "Explained that Richard Reid, as is customary where factors operate on a bank account, had the custody of the pursuers' pass-book. Such a pass-book is not one of the books of the bank, and is never held by the bank, but always by the customer or some-one on his behalf. The entries in a pass-book are made by the customer, and not by the bank. Explained that on 1st June 1887 there was standing at the credit of the account kept for the pursuers in the bank books a sum of £19, 8s. 1d. If the pursuers' pass-book showed a different total at their credit such total was arrived at by means of false, fraudulent, or mistaken entries made by the said Richard Reid to conceal his defalcations as factor for the pursuers. The pass-books do not set forth the true state of the account; it is not the custom for such entries to be initialed by the bank agent. It is unusual for him to initial such entries, which are usually initialed by the teller or the ledger clerk, and sometimes by both. Explained further, that after crediting pursuers with all money paid into the bank, and with all sums drawn out, the balance at their credit on 1st June 1887 was £19, 8s. 1d. As factor for the pursuers, Reid from time to time docqueted the said account in the defenders' Kirkintilloch ledgers. On 1st November 1886 the said Richard Reid docqueted the said bank ledger in the following terms, viz.:—'The above account examined and found correct, the vouchers delivered up, and the balance, carried to credit in a new account, amounts to £1, 17s.—Richard Reid, factor.' The sum of £1, 17s. was carried to the credit of the new account, which was operated on by Reid as factor for the pursuers, with the result that on 1st November 1887 there was a sum of £98, 9s. 5d. at the debit of the account, for which the defenders reserve their claim."

The pursuers pleaded—"(2) The pursuers having paid into the defenders' branch at Kirkintilloch the sums entered in their pass-books, and said payments having been duly acknowledged by the initials of their agent, the defenders are liable for the balance due upon the entries in said pass-books, and the pursuers are entitled to decree as craved, with expenses. (4) The docquets founded on by the defenders not having been made by the said Richard Reid in his capacity of factor, but as part of a series of false and fraudulent manipulations by him, as bank agent, to deceive the defenders, the pursuers are not bound thereby. (5) The entries in the pass-books being the usual acknowledgments given by the banks for moneys paid to their officials, the defenders are bound thereby."

The defenders pleaded—"(2) Any loss the pursuers may have sustained having been caused by the malversations of the said Richard Reid in his character of factor to the pursuers, the defenders should be assoilzied. (4) In any view, the said Richard Reid having docqueted the pursuers' bank account on 1st November 1886, they are bound by the terms of that docquet."

At a proof before the Sheriff-Substitute (Lees) it appeared that it was the practice in all banks to require a paid-in slip along with money lodged. In large banks the receipt of money was acknowledged by the initials of the teller and the cheque clerk; in smaller banks by the initials of the official who acted as teller. Reid kept the pass-book of the trust in his own possession. The other bank officials, of whom there were five, were unaware of its existence. All the entries in it were initialed by him, although he seldom acted as teller, and there were no paid-in slips corresponding with these entries. Against two of the entries in the pass-book Reid had forged the initials of the ledger clerk of the bank. He had also from time to time docqueted the bank ledger in terms to those of the docquet mentioned above, in each case showing a different and smaller amount at the credit of the trustees than was shown by the entries in the pass-book.

Upon 30th October 1888 the Sheriff-Substitute pronounced this interlocutor, after finding the facts above narrated—". . . Finds that the bank did not receive the sums claimed by the pursuers which go to make the balance claimed by them: Finds in law (1) that in the circumstances above set forth the initialing of the bank pass-books by the said Richard Reid was not habile to constitute

a claim in the pursuers' favour in terms of the pass-books; and (2) that the sums claimed by the pursuers not having been paid to the defenders, or to anyone on their behalf, and the defenders not having received the same, they are not liable to make payment to the pursuers of the sums claimed: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable to them in expenses, &c.

"*Note.*—The parties are agreed that the sum in dispute between them is approximately represented by four cheques, which do not appear in the defenders' books. As regards the first few entries the pass-books are correct, and have been properly kept. The sums paid in and the dates of payment are correct, and have been initialed by the accountant of the bank. Thereafter the initialing was by Reid, and it is urged that it was improper for Reid to vouch payments by his initials. I should, however, have been quite prepared to hold that Reid's initials constituted a *prima facie* case against the bank. And if the question had turned solely upon the four inaccurate or false entries by Reid, not improbably the decision must have gone against the defenders. But the result of examination is to show that the pass-books after 1876 ceased to represent with even approximate accuracy the transactions that were being made on behalf of the pursuers. And I am afraid that there is really no room even for doubt that the defenders are right in asserting that after 1876 the pass-books were concocted by Reid merely as a blind to the pursuers in regard to what he was doing, and that his object was not to cheat the bank, but the pursuers. It was his position as the defenders' servant that enabled him to perpetrate the fraud, but if the fraud had been perpetrated on the defenders it would of course have been speedily found out. Now, the pass-books are the only case for the pursuers. It was as their servant, and in virtue of their mandate, that Reid received the moneys, but the mere passage of the moneys into his hands could not constitute responsibility for them against the defenders. I do not for a moment say that if it could be shown that the moneys passed into the coffers of the bank, or into the hands of anyone acting on its behalf, and authorised to do so, it would be materially adverse to the pursuers' case that the payments had not entered the bank ledger and were not accompanied with pay-slips. The ledger and pay-slips exist for the purposes of the bank, and though entries in it or payment made with them might constitute liability against the bank, their absence could not invalidate a claim otherwise good. But where that claim depends solely on manufactured entries in pass-books which were not held by the pursuers, I think they cannot succeed without fortifying these entries by proof of payment of the moneys to the bank. No doubt there were sums received on behalf of the pursuers of approximately the amount specified in the pass-books. But as I have already said, these sums did not pass into the hands of the bank in a manner even resembling the statements made in the pass-books, and I therefore cannot hold that these entries bind, or were even when made intended to bind, the bank in a question with the pursuers. The very fact that Reid forged the initials of the bank accountant shows that he regarded his own entries as not being made by him on the bank's behalf or as binding it. It is not everything that a bank agent writes that will bind his bank. There must be some basis for what he is doing, and this of course is only the more true in the case of a running account as compared with a fitted account or a formal receipt. I therefore come to think with some regret that in this question as to where the loss is to fall the pursuers must bear it. And it is more satisfactory to place the decision of the case, I think, on the grounds above stated than on the docquet signed by Reid in the bank ledger as if for the pursuers; probably that docquet would not protect the defenders if it was their only defence, but the pursuers' case seems to me to fail otherwise."

The pursuers appealed, and argued—(1) The question is, was the money of the trust duly received by the bank? The evidence showed that the usual course was followed in this case; the pass-book was initialed by the agent, who on these occasions acted as the teller; that was *prima facie* evidence that the money was paid into the bank, and embezzled by their agent, and therefore the bank was liable for the loss occasioned by the fraud—*Craw* v. *The Commercial Bank*, December 9, 1840, 3 D. 193; *Rhind* v. *The Commercial Bank*, February 24, 1857, 19 D. 519, and February 10, 1860, 22 D. (H. of L.) 2. The docquet founded on by the defenders could not bind the trustees in any way in their dealings with the bank. It was a gratuitous discharge by Reid of money which was owing to them as shown by the pass-book. Reid had no mandate from the trustees to sign such a docquet; it was a private matter between him and the bank—*Fell* v. *Rattray*, January 28, 1869, 41 Jur. 236.

Counsel for the defenders was not called upon.

At advising—

Lord Young—This case is of some interest, and it is a satisfaction to us that we have had the argument which was so fully and ably stated by Mr Balfour. I indicated in the course of the debate the questions upon which, I think, our decision must turn. That is, whether as a matter of fact the bank received the money which the pursuers seek to have paid to them? The entries in the pass-book are no doubt *prima facie* evidence that it did so receive the money, but they are not conclusive evidence against the bank, and we must determine upon consideration of the whole facts of the case whether the bank did really receive it. I have no doubt that here the entries in the pass-book are *prima facie* evidence against the bank, even as regards those items to which only the initials of the agent are attached. I think the public would be distressed and alarmed if it was held to be the law that when a customer paid money to the agent of a bank personally, and received an acknowledgment from him by his initialing the entry in the pass-book, that that was not *prima facie* evidence against the bank. I think the usual custom is that there should be two signatures to the entry—first, the initials of the teller who received the money, and then the initials of the cheque clerk. If the teller alone, or the agent alone, acknowledges the receipt of the money, he does so by affixing his initials to the entry. Such acknow-

ledgments constitute *prima facie* evidence against the bank. I think it is not doubtful that if a customer of the bank should pay money into the bank agent's hands, and that he instead of paying it into the bank puts it into his own pocket, he is a thief from the bank, and the bank is responsible for the money so paid in. In this case Mr Reid was agent and factor for these trustees, and he received trust funds and embezzled a certain portion of them. With respect to the items there seemed to be a certain confusion, but the parties have now reduced the sum to about £80. The question is, whether Reid embezzled this money as factor, or as agent for the bank? He filled both capacities, but he could not embezzle in both capacities; the money could not be embezzled twice; he must have embezzled it in one capacity or the other. If he embezzled it as a factor for the trustees, then the money was never paid into the bank, but the suggestion of the pursuers is that he passed it from himself as factor to himself as agent for the bank, and then embezzled it, so that the money was in the bank's hands, and they are now liable to repay it. Now, looking at it as a matter of fact, I do not think that that view has much to recommend it. I think the money had never been paid into the bank before it was embezzled, and therefore it never came into Reid's hands as bank agent. And I think the facts as they were told us as regards the latter two items which have two sets of initials to them point in the same direction, for while initialing the items himself he forged the initials of another official of the bank. If the sums of money had come into his hands as bank agent there would have been no necessity for his forging the name of the other official. When he made up his pass-book no one can tell, for he kept it in his own possession, and probably no eyes but his own ever saw it, but I think the conclusion to which the forgery points is that he never paid the money into the bank. The docquets in the bank ledger also are evidence that the money was never paid. I therefore agree with the finding of the Sheriff-Substitute, and hold it proved as matter of fact that the bank never received the sums claimed by the pursuers. That being so the *prima facie* evidence of the pass-book has been displaced by satisfactory evidence that the money was not paid in, and I would suggest to your Lordships that we should dismiss the appeal with expenses.

Lord Rutherfurd Clark and Lord Lee concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact that on 1st November 1886 the balance due by the defenders on the cash account with Richard Reid as agent and factor for the pursuers was £1, 17s., and that on 1st November 1887 there was a balance due to the defenders on said account, and that no sum is now due by the defenders to the pursuers: Therefore dismiss the appeal, and affirm the interlocutor of the Sheriff-Substitute appealed against: Find the defender entitled to expenses," &c.

Counsel for the Pursuers—Balfour, Q.C.—Murray. Agent—Donald Mackenzie, W.S.

Counsel for the Defenders—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, February 6.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MURDOCH & COMPANY, LIMITED *v.* GREIG.

Possession—Sale—Suspensive Condition—Hiring Agreement—Reputed Ownership.

A customer obtained a harmonium from a firm of music-sellers under a contract whereby she undertook "to pay to them a deposit of 30s. on delivery of the harmonium, and a further sum of £1 every four weeks thereafter as hire, until the full price shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever." It was further stipulated that until the full sum was paid "the hirer should have no property in the goods otherwise than as a hirer."

The sum stipulated was deposited on delivery, and one instalment of 20s. was paid; thereafter the customer left the country, and on her instructions her furniture, including the harmonium, was sold by public roup.

In an action by the music-sellers against the purchaser of the harmonium—*held* that the pursuers were entitled to delivery thereof, on the ground that the transaction between them and their customer was a sale under a suspensive condition, and that as she had not paid the full price, no right of property had passed to her, and therefore she was not in a position to give a good title to the defender.

On 11th December 1886 Mrs Taylor, 4 Bellgrove Street, Glasgow, obtained from John G. Murdoch & Company, Limited, pianoforte and harmonium dealers, 83 and 85 Union Street, Glasgow, a harmonium in terms of a signed agreement whereby she undertook, *inter alia*, "to pay to the owners the sum of 30s. on delivery of the said harmonium, as deposit, and a further sum of 20s. every four weeks thereafter as hire until the full amount of £15, 15s. (including the deposit) shall have been paid, when the goods shall be the property of the hirer without any further payment whatever; and she further undertook 'to keep the goods in the hirer's own custody;' further, that the hirer should 'have no property in the goods otherwise than as a hirer thereof only;' and said contract or agreement provided further, that 'should the hirer through change of circumstances be unable to continue such payments he may transfer his interests in the goods under this agreement to any responsible person (to be approved of by the owners in writing) who shall continue the payments in the stead of the hirer.'" The agreement contained, *inter alia*, the following condition—"2. The hirer agrees that until the said full sum be paid the hirer shall have no property in the goods otherwise than as a hirer thereof only, and that if the hirer

do not duly observe this agreement the owners may put an end to the hiring, and retake possession of the goods; and in case they do so, that all payments that may have been made shall be in respect of the use and tear and wear of the goods only, and not for the purchase of the same."

Mrs Taylor paid the deposit of 30s., and a further sum of 20s., being one month's hire of the said harmonium. She made no further payments in respect of the said harmonium.

On 19th April 1887 a public sale of furniture took place at No. 4 Bellgrove Street, Glasgow. It was conducted by Mr Tait, auctioneer, Glasgow, who acted under the instructions of the tenant of the house, the said Mrs Taylor, and ostensible proprietrix of the furniture. The furniture included the harmonium in question, which was purchased for £8 by John Greig, cooper, Glasgow, who on payment of the purchase price obtained delivery of the instrument.

Murdoch & Company raised an action against Greig in the Sheriff Court at Glasgow, concluding for delivery to them of the said harmonium. They averred that Mrs Taylor did not transfer her interest in the said harmonium to any person approved of by them, and that the purchaser Greig had no legal title to the instrument.

At a proof before the Sheriff-Substitute the defender deponed that he saw the sale of furniture advertised by bills in the street, and attended it in consequence; that among the furniture exposed was the harmonium in question, and that he secured it for £8. In cross-examination he deponed—"I had before that seen the hire-purchase system casually advertised. I did not see the makers' name on the harmonium."

The pursuers pleaded that as the harmonium was their property they were entitled to delivery thereof by the defender, in whose possession it was.

The defender pleaded, *inter alia*—"(1) The defender having in *bona fide* purchased the harmonium referred to at a public sale by an auctioneer, instructed by the ostensible owner of the instrument, and having paid the price thereof, he is not bound to deliver it to the pursuers as craved. (2) In any case, in the circumstances he is not obliged to deliver the instrument to them without being repaid the price thereof paid by him. (4) The pursuers having put the said Mrs Lister Elliot or Taylor in possession of the instrument referred to, the defender was entitled to rely upon her being owner."

On 4th July 1887 the Sheriff-Substitute (SPENS) sustained the first plea-in-law for the defender, and assoilzied the defender.

In a note he explained that his judgment was based on two grounds—"(1) Reputed ownership, and (2) that the transaction in question must be regarded as a sale to Mrs Taylor in a question with a *bona fide* purchaser from her."

The pursuer appealed to the Sheriff (BERRY), who on 31st May recalled the said interlocutor and ordained the defender to deliver the harmonium as craved.

"*Note.*—Two questions arise in this case—(1) whether the contract between the pursuers and Mrs Taylor was a contract of sale or of hire, and (2) whether the doctrine of reputed ownership applies to the case. In regard to the former question, namely, as to the nature of the contract, it is clear that the mere language which parties have used in describing their contract is not conclusive of its nature. It may be that the terms of their agreement are such as to show that it has been a contract of sale, although they may have given to it the name of a contract of hire. This is shown in particular by the case of *Cropper & Company* v. *Donaldson*, 7 R. 1108, where a transaction bearing to be a hire was held by the Court to be truly a sale. In the present case the contract bears to be one of hiring, and a consideration of its terms leads me to think that that is its true nature. The terms differ materially from those in *Cropper & Company's* case, where a bill at three months was at once granted for £58, which was the price of the instrument, and that amount was to be payable by instalments at intervals of three months, the bill being renewable in each case for the instalments still remaining due. In effect, the ground of judgment was that there was an attempt to create a security over a moveable subject belonging to the debtor. Here a certain sum was to be paid every four weeks as hire; and no doubt when the sums paid amounted to £15, 15s. the harmonium was to become the property of the hirer, but it seems to me that the transaction is to be regarded as substantially and in effect one of hire, and that the rights of the parties are to be governed by the rules applicable to that contract. If the case is treated as one of hire, it follows that the hirer had no power by a sale to confer a valid title on a third party, without at all events that party being approved by the pursuers, in terms of the third condition attached to the contract.

"The question then arises whether the doctrine of reputed ownership can avail the defender. I do not think that it can. On this point I may refer to the judgment of the Second Division in *Marston* v. *Kerr's Trustee*, 6 R. 898, where it was held that the principle of reputed ownership is not applicable where a subject is in the possession of a person on a limited title under a fair and ordinary contract; and again to the judgment of the same Division in *Hogarth* v. *Smart's Trustee*, 9 R. 964, where the Lord Justice-Clerk said—"The cases of hire and purchase have all proceeded on this, that the title of possession was good without attributing it to purchase, and no one is entitled to attribute possession to a title which would carry the property where there is a subordinate title to which it may be ascribed." Here, on the assumption that the contract was one of hiring, there was a subordinate title to which Mrs Taylor's possession was attributable, and it is material that the defender admits that he had seen the hire purchase system advertised. He was therefore not ignorant of the existence of such a right of possession as that of possession under a contract of hire and purchase, and he has the less ground for complaining of having been deceived. At the same time, his good faith is not disputed, and the question is, on which of two innocent parties, the pursuers or the defender, the loss can fall. It is said that *Brown* v *Marr and Others*, 7 R. 427, justifies the view that the loss must be thrown on the pursuers, who enabled the fraud to be committed. That case, however, was materially different, in respect that the goods were placed in the hands of a retail jeweller for the express purpose of his selling them. Here there was never any intention on the part of the

pursuers that Mrs Taylor should dispose of the goods in any way without their consent. The fact that the sale was by public auction does not seem to me to affect the rights of parties, inasmuch as it is not suggested that the pursuers were aware of the sale till afterwards. I regret in these circumstances to be obliged to take a different view of the case from that taken by the Sheriff-Substitute."

The defender appealed to the Court of Session, and argued — This was a case of sale, or of concurrent hire and sale; it could in no case be called a simple case of hire, as the monthly instalments were out of all proportion to what would in such a case have been paid. Besides, the so-called hirer had no right to terminate the contract, and might have been compelled to pay the agreed-upon monthly sum. The money paid was not hire, but was an instalment of the purchase price—*Cropper & Company* v. *Donaldson*, July 8, 1880, 7 R. 1108. Or it might be called a sale with a suspensive condition—*Marston* v. *Kerr's Trustee*, May 13, 1879, 6 R. 898; *Clark & Company* v. *Miller & Son's Trustee*, June 3, 1885, 12 R. 1035; Bell's Prin., sec. 109; Bell on Sale, 80, 110. Besides, the article was purchased at a public sale, and in such a case mere fraud by the hirer would not (as theft would) tell against the purchaser—Bell's Prin., sec. 1320; *Henderson* v. *Gibson*, M. *voce* "Moveables," App. 1; Broun on Sale, sec. 32. There could be no analogy drawn from the law of England, which on this matter materially differed from the law of Scotland, and to give effect to the pursuers' contention would be to allow the owner to retain a security over moveables — *Crawcour* v. *Salter*, 18 Ch. Div. 30; *Hattersby* v. *Blanshard*, 8 Ch. Div. 601; *ex parte Brock in re Fowler*, 23 Ch. Div. 261; *Cropper & Company* v. *Donaldson*, *supra*; *Marston* v. *Kerr's Trustee*, *supra*.

Argued for respondent—This was a contract of hire and purchase, but there was to be no completed sale until the last instalment of the price was paid. The conditions of the agreement between the parties made that clear. The possession of this harmonium by Mrs Taylor could quite well be explained by something short of sale, it was really a contract of hiring with an agreement for sale in a certain event; hire and sale were not necessarily incongruous, and this was a case in which in certain events the one was to grow into the other. *Cropper's* case was clearly distinguishable from the present, which much more closely resembled *Marston's* case (*supra*), because if this was to be viewed as really a contract of sale, then there was clearly a suspensive condition to which effect must be given —Stair, i. 14, 4; Ersk. iii. 3, 11; 1 Bell's Comm. 257. This was a suspensive sale, where in spite of delivery no property passed—Bell's Prin., sec. 1315; *ex parte Watkins*, L.R., 8 Ch. App. 520.

At advising —

Lord President—In this case a Mrs Taylor obtained possession of a harmonium from the pursuers under a contract, the precise terms of which must be carefully attended to. By the conditions of her agreement she, on getting possession of the instrument, made a deposit of 30s., and thereafter she paid a sum of 20s., which was the first of a series of periodical payments which she undertook to make to the pursuers. No further payments were, however, made by her, and shortly after she disappeared. Some time after her furniture was disposed of by public sale, and along with it the harmonium in question, which was purchased by the defender Greig for £8.

The pursuers now seek to have the harmonium restored to them, on the ground that it belongs to them, and that the property in it was never transferred to Mrs Taylor. They further say that the contract upon which delivery of the harmonium was made was one of hire, and never became anything else in consequence of Mrs Taylor not implementing her part of the bargain, but that it would undoubtedly have become sale had Mrs Taylor carried out her part of the agreement.

The defender, on the other hand, says that from beginning to end the contract was one of sale, and nothing else, and in that contention I entirely agree with him. No doubt the contract is called in the agreement one of hiring, but it is really sale. When we look at the conditions upon which delivery of this instrument was made to Mrs Taylor, as set out in article 2 of the condescendence, we see that the undertaking on the part of Mrs Taylor to deposit the sum of 30s., and to pay £1 per month thereafter for the time specified, is absolute, and that she cannot resile from the bargain and send back the harmonium. Now, how can this in any sense be called a contract of hiring, especially when it is kept in mind that the payment of fourteen monthly instalments would amount to the whole value of the instrument. No doubt these monthly payments are called hire, but they really are instalments of price, and this becomes the more apparent when, as I have remarked, we compare these monthly payments with the total value of the harmonium. Seeing, then, that the so-called hire has no proportion to the value of the instrument, these monthly payments can only be viewed as instalments of the price. Therefore the true construction of this agreement is, that it was a contract of sale, the purchase price of the article to be paid by monthly instalments until the whole was paid, and the other conditions contained in the agreement go, I think, to support this view. It appears to me that this case is much stronger than that of *Cropper*, to which we were referred in the course of the argument, and although I do not desire to throw any doubt on the decision in that case, I still think that this is in every way a much stronger case.

But a further point was raised by the pursuer, namely, that if this contract is to be viewed as one of sale, it yet has a suspensive condition, and if that condition is not performed the property of the article does not pass to the purchaser. Now, this is a much more difficult question, but in the present case the intention of the parties is, I think, made quite clear by article 2 of the conditions attached to the agreement— "The hirer agrees that until the said full sum be paid the hirer shall have no property in the goods otherwise than as a hirer thereof only, and that if the hirer do not duly observe this agreement the owners may put an end to the hiring, and retake possession of the goods, and in case they do so that all payments that may have been made

shall be in respect of the use and tear and wear of the goods only, and not for the purchase of the same."

Now, the terms of the agreement are very clearly expressed, that until the full price was paid no property in the article was to pass, and that, I think, is a suspensive condition in the fullest sense of the word. What effect, then, has a condition of this kind in a contract like the present.

Upon this matter Stair (i. 14, 2) says:—"Sale being perfected and the thing delivered, the property thereof became the buyer's if it was the seller's, and there is no dependence of it till the price be paid or secured, as was in the civil law, neither hypothecation for the price" Then in sec. 4, after dealing with pactions for reversions, he proceeds—"As to the pactions adjected to sale, sometimes they are so conceived and meant that thereby the bargain is truly conditional and pendent, and it is not a perfect bargain till the condition be existent; neither doth the property of the thing sold pass thereby, though possession follow, till it be performed, as if the bargain be conditional only upon payment of the price at such a time, till payment the property passeth not to the buyer."

Commenting on these passages, Elchies (notes on Stair, p. 80) states this further proposition, which is no more than a corollary from the text, that "if in bargains there be conditions or clauses suspensive of the bargain, till the existence or non-existence of which the property is not transmitted, no doubt such clauses will likways affect singular successors, for the buyer could not transmit the property which he had not."

Mr Mungo Brown, a high authority on this branch of the law, in his comprehensive and scientific treatise on the Law of Sale, after examining all the authorities and cases, sums up the matter thus—"When a sale is made under a suspensive condition, the contract is not complete till the accomplishment of the condition. It is not to be supposed from this, however, that the agreement of parties produced no effect in the intermediate period, or that no right whatever arises to either party from the imperfect contract. On the contrary, while the condition is yet pendent, neither party is at liberty to resile, any more than in the case of an unconditional bargain; and if the condition happens to be accomplished, the accomplishment of it had a retrospective effect to the date of the contract, so that if either party have died in the interim his right under the contract will pass to his heir."

Now, these are very clear expressions of the principle of a suspensive condition, and they have frequently received effect in a series of decisions. But in most of the cases their principles are covered up by specialties, and so we hardly find in the decisions so clear an enunciation of the principle of a suspensive condition as in the passages which I have just quoted. Here nothing is left to implication, for it expressly declared that until the full price is paid the hirer is to have no property in the goods otherwise than as a hirer only. Now, that condition being so distinctly expressed, I come to be of opinion that while I still hold this to be a contract of sale, yet I am for deciding in favour of the pursuers, on the ground that Mrs Taylor had no right of property in this instrument, and was not therefore in a position to sell it to another.

I am therefore for giving effect to the judgment of the Sheriff, though I base my decision of the case upon slightly different grounds.

Lord Mure concurred.

Lord Shand—I am of the same opinion, and I adopt all that your Lordship has said.

The appellant having purchased this harmonium at the sale of Mrs Taylor's effects, the question comes to be, whether she had the right to sell it? If she was the proprietor, then undoubtedly she was in a position to give a good title.

It does not appear to me that the circumstance of this instrument having been purchased at a public sale can have any bearing on the present question, because Mrs Taylor can give no higher title than she herself holds. She had not the property of the harmonium, because it was specially stipulated that there was to be a certain sum deposited, and a certain number of monthly payments, and that these were to go on until the full amount of £15, 15s. was paid, when, and not until then, the goods were to belong to her. That being so, the contract was to my mind undoubtedly one of sale. Had Mrs Taylor had the option of returning this instrument, then the contract would undoubtedly have been one not of sale, as there would not have been any obligation upon her to have continued making these periodical payments, and the sums that she had would have been accounted as hire for the use of the instrument.

But I see nothing in this contract to suggest any option on Mrs Taylor's part. She had to pay the full amount agreed upon, and she could have been compelled to continue making these monthly payments. The contract therefore was one of sale, but with a suspensive condition. There was delivery under the contract, but the suspensive condition was that the property of the instrument was not to pass until all the monthly instalments of the price had been paid.

Seeing, then, that the property of this instrument was not in Mrs Taylor, she certainly was not in a position to sell it.

Lord Adam—Whether this contract be viewed as one of hiring or of sale, it appears to me that the result must be the same. If the contract was one of hiring, then of course the property in this instrument never passed; but I agree with your Lordship in viewing this contract as one of sale under a suspensive condition that the harmonium was to become the property of Mrs Taylor whenever, but not before, all the instalments of price were paid. That was a proper suspensive condition, and the sale was not completed until all these instalments were paid. As this condition was never fulfilled, the property in this harmonium did not pass to Mrs Taylor, and the original owner accordingly is now entitled to recover it.

The Court adhered.

Counsel for the Pursuers—Strachan—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for the Defender—Guthrie—Wilson. Agent—L. M'Intosh, S.S.C.

Friday, February 8.

FIRST DIVISION.

[Sheriff of Argyllshire.

M'LAREN *v.* HILL.

Bankruptcy—Catholic Security—Assignation of Security by Prior to Postponed Creditor—Titles to Land Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 123.

A heritable subject was burdened with a first bond, and also with a second bond. The first bondholder executed a poinding of the ground, and thereafter the debtor became bankrupt. The first bondholder by his poinding of the ground obtained a preference to the extent of one year's unpaid interest. He sold the subjects under his bond, and took payment of his debt, both principal and all unpaid interest, out of the price. The second bondholder then obtained from him an assignation of the preference he had obtained by poinding the ground, and claimed for that sum in the sequestration. *Held* that the first bondholder having been bound in equity to communicate to the second the preference he had obtained to the second, the claim of the latter in the sequestration was good.

James Nicol, solicitor, Oban, was proprietor of certain heritable subjects there called Craigievar. In May 1883 Nicol borrowed on the security of these subjects from Thomas Syme, Edinburgh, £2500, and in November 1884 he borrowed, on a second bond on the same security, £500 from Francis Hill, Ardrishaig.

In 1887 Nicol's affairs became embarrassed, and on 10th June Syme executed a poinding of the ground, and on 10th June obtained decree thereunder. On 21st June Nicol was sequestrated, and John F. M'Laren, solicitor, Oban, was appointed trustee.

On 18th October Hill served a petition of poinding the ground upon the said trustee, but this action was not persevered in. The amount of moveables attached by Syme's poinding of the ground was £122, 16s. 1d., being the amount of one year's unpaid interest on the bond.

Section 123 of the Titles to Land Act 1868 (31 and 32 Vict. c. 101) provides—"Upon a sale being carried through in terms of this Act, and upon consignation of the surplus of the price, if any be, it, as aforesaid" [sec. 122], "the disposition by the creditor to the purchaser, shall have the effect of completely disencumbering the lands and others sold of all securities and diligences posterior to the security of such creditor, as well as of the security and diligence of such creditor himself."

In October 1887 Syme sold the said heritable subjects for £2900. Out of the sum of £2900 obtained for the subjects Syme paid himself both the amount of his debt and also all the interest due to him.

Thereafter on 26th January 1888, at the request of Hill, as second bondholder, Syme assigned to him the preference to the extent of £122, which he had acquired by his poinding of the ground. The assignation was on 13th February intimated to the trustee.

Hill then lodged a claim in the sequestration for the sum of £122, 16s. 1d., as the amount carried by the assignation, but this claim was rejected by the trustee.

Hill appealed against this deliverance, and averred that the effect of Syme's poinding of the ground was to give him (Syme) a preference over the moveables on the ground for one and a-half years' interest; that as a postponed creditor he was prejudiced by the first bondholder paying himself interest as well as capital out of the price of the heritable subjects, and that he only consented to this being done on his obtaining the assignation to the preference created in Syme's favour by his poinding of the ground.

The trustee averred that when the first bondholder sold the heritable subjects under the powers in his bond, and secured payment of his principal and interest, his decree of poinding of the ground became inoperative, and was extinguished at common law and under the provisions of section 123 of the Titles to Land Consolidation (Scotland) Act 1868, quoted *supra*.

Hill pleaded that he was entitled to decree as he was in right of the preference acquired by the first bondholder.

The trustee pleaded, *inter alia*—"(1) The assignation founded on is of no effect, in respect, first, that the decree assigned was previously extinguished, and second, that no value was given for the same (2) The sum claimed having already been paid out of the bankrupt estate, the present is a claim for a double ranking. (3) After a sale of the heritable subjects, the first bondholder could not put the said decree in force, and his assignee is in no better position than his cedent."

On 31st October 1888 the Sheriff-Substitute (MacLachlan) pronounced the following interlocutor:—". . . Finds that the holder of the first bond and disposition in security executed a poinding of the ground, whereby he secured a preference over the moveables on the ground to the extent of £122, 16s. 1d. sterling, being one year's interest, less tax; that the said heritable subjects were sold in October 1887 by the first bondholder at a price more than sufficient to pay his debt and interest, and thereafter, by assignation dated 28th January and intimated 13th February 1888, he assigned to the appellant, as the postponed bondholder, the security created by the said poinding of the ground: Finds in law that the said assignation was valid and effectual to convey said security to the appellant: Therefore recals the trustee's deliverance, and ordains the respondent to rank the appellant as a creditor on the sequestrated estates of the said James Nicol in terms of his claim, with the interest that has accrued on the dividend set apart for the appellant, &c.

"*Note.*—In this case the trustee seems to be under a misapprehension as to the meaning of section 123 of the Titles to Land Consolidation (Scotland) Act 1868. He holds that upon a sale being carried through in terms of that Act the security and diligence of the selling creditor are extinguished. But this is only in regard to the subjects actually sold, and in a question with the purchaser. The provision in the section is that the disposition to the purchaser shall have the effect of disencumbering the lands and others sold—that is to say, the purchaser is entitled to receive the lands and others freed and disen-

cumbered of the burdens therein referred to, but the creditor is not freed of the obligation contained in the previous section (122) of holding count and reckoning with the debtor and the postponed creditor. When the sale to which this action refers took place the selling creditor's debt consisted of the principal sum of £2500 and £122, 16s. 1d., being one year's interest, less tax, and his security consisted of the bond, along with the preference created by his poinding of the ground. In the circumstances it was unnecessary for him to realise the security created by his poinding of the ground, seeing that his principal debt and interest were paid out of the proceeds of the sale of the heritable subjects. But there still remained the obligation in section 122 of holding count and reckoning with the postponed creditor, and this obligation he fulfils by paying over the balance of the price, and assigning his diligence of poinding of the ground, being the unrealised portion of his security.

"The appellant, by withdrawing the poinding of the ground executed by him, gave up the security thereby created over the moveables, and his security was thus confined to the heritable subjects, and I hold that the first bondholder, seeing that his security extended over the moveables as well as over the heritable subjects, was not entitled to defeat the second bondholder's claims by selling only that portion of the property which formed the latter's sole security, and paying himself in full out of the proceeds, leaving the other portion untouched."

The pursuer appealed to the Court of Session, and argued—The Sheriff-Substitute had taken an entirely wrong view of the provisions of the Titles to Land Act, and the language of section 123 had no application to an assignation of a decree of poinding of the ground. This decree created no preference in Syme. It merely put a *nexus* on the moveables, and to have had any practical effect it would have been necessary that it be followed out. This was not a case of a catholic creditor, for here there was only one subject of security, as the sale of the lands of the first bondholder disencumbered them from all diligences. If Hill was entitled to any preference whatever it ought to be limited to £22, the restricted amount allowed by the Bankruptcy Act on his own bond, and not to the £122, 16s. 1d. as assigned by the first bondholder. This assignation was quite invalid, and no effect could be given to it, for at the date of assignation the debt had been paid, and there was no grounds upon which it should be paid twice—*Urquhart* v. *M'Leod's Trustees*, June 16, 1883, 10 R. 991; *Boswell* v. *Ayr Banking Company*, January 15, 1841, 3 D. 352.

Argued for Hill—This was a case of catholic and secondary creditors, and the first bondholder, who held a security over both subjects, was not entitled capriciously to injure the second bondholder's interests, but was bound to assign to him any right which he had (after he had paid himself) over the subjects over which he alone held a security, *i.e.*, over the moveables. This was a case of an assignation of a diligence, and the rights of parties must be settled as at the date of the sequestration. On catholic and postponed creditors, see 2 Bell's Comm. 418; *Littlejohn* v. *Black*, December 13, 1855, 18 D. 207; *Goldie* v. *Bank of Scotland*, February 27, 1834, 12 S. 498. The interests of the postponed bondholder had been seriously prejudiced by what the first bondholder had done, and his security had been diminished, and the first bondholder was legally bound to assign to the second bondholder any preference that he had over the moveables. Even though the moveables had been sold, the second bondholder was not too late to obtain a ranking for the sum assigned to him by the first bondholder—*Lyons* v. *Anderson*, October 21, 1880, 8 R. 24; *Athole Hydropathic Company* v. *The Scottish Provincial Assurance Company*, March 19, 1886, 13 R. 818.

At advising—

Lord President—The present question arises in course of the sequestration of a certain James Nicol, a solicitor in Oban, whose estates were sequestrated on 21st June 1887. There were two heritable securities held over this estate, the first created in 1883 for £2500 by a Mr Syme, and a second by Mr Hill, the respondent in this appeal, for £500. Hill's position was therefore that of a second bondholder, while Syme was a first bondholder.

Both creditors executed poindings of the ground. That by Syme was executed on 10th June 1887, while the other by Hill was executed on the 18th of October of the same year. These poindings of the ground were of course restricted by the provisions of sec. 118 of the Bankruptcy Act, which denies all effect to poindings of the ground after sequestration, or within sixty days of bankruptcy, except to a limited extent, namely, to interest on the debt for the current half-yearly term, and for the arrears of interest for one year before the commencement of such term. The extent of the first bondholder's interest in the moveables as thus restricted was £122, 16s. 1d.

The first bondholder availed himself of his powers under the bond, and sold the estate in October 1887 for £2900, and out of this sum he not only paid himself in full with interest, but there was in addition a surplus left over for the second bondholder, which surplus of course the first bondholder is liable to account for to the second bondholder. The first bondholder proposes to hand over this sum to the second bondholder, who objects to what the first bondholder has done, because he has taken full payment of his bond and interest from the price of the subjects sold, whereas he avers that he ought to have taken the interest of his bond out of the moveables which he had poinded. The second bondholder maintains that as the first bondholder held two securities he ought to have divided the burden of his bond and the interest between these two securities. That proceeds just upon this principle, that the prior bondholder held a catholic security over the heritable and moveable estate, and was therefore bound so to realise the securities as to leave as large a surplus as possible for the second bondholder. In answer to this Syme assigned to Hill the £122, 16s. 1d., the security created by the said poinding of the ground, and Hill now claims to be ranked preferably for that sum in the sequestration on the principle of the equity applicable to catholic securities, and the question comes to be, whether that equity is admissible in the pre-

sent case. This equity is well established in our law, but I may just advert to what Mr Bell says on this subject, carrying out the doctrine as he finds it laid down by Lord Kames in his remarkable work (2 Bell's Comm. 411)—"Where two estates of the same debtors are covered by a security for the debt, and there is no third party interested in either of the estates, the operation of the principle is obscured by the identity of interest in the proprietor, the creditor may of course take his payment from either estate, and there can be no room for assignation, the debt being to all purposes extinguished. But if a separation of interests in the two estates takes place (*e.g.*, if the debtor dies, and is succeeded by two heirs in different lines of succession) the same rule must of course be applied as if the estates had belonged originally to two several debtors. They must pay the debt rateably in proportion to the value of the estates, and if the proprietor of one pay the whole, he is entitled to an assignation that he may recover the share belonging to the other," and then follows a passage which is specially applicable—"Where there are secondary creditors on the two estates the right of the catholic creditor to demand his debt must suffer the same qualification as if the estate belonged to several proprietors. Thus, if A have an heritable bond over two estates belonging to B, and C have an heritable security over the one estate, and D an heritable security over the other, A cannot capriciously prefer the one to the other by claiming his debt from one of the estates, leaving the other free, but must in equity assign his security."

Now, the question comes to be, Is that doctrine applicable in the present case? The peculiarity is that we are dealing here with heritage and moveables as separate subjects of security. Both creditors have a separate security over both estates—that is to say, each creditor has a security over the real estate, and to a limited extent over the moveables also, and the moveable estate is sufficient to pay these limited claims, and that is the peculiarity of the present case which distinguishes it from any of the previous cases.

There can of course be no doubt that if the first bondholder had taken his £122 out of his debtor's moveable estate he would have left just this amount more of the heritage available for the second bondholder. But he has elected to take all of his debt and interest out of the heritage, and has therefore diminished to this extent the heritable security. It is just in circumstances such as these that the equity applies, because when the first bondholder has made good his security in such a way as to damage the second bondholder, then he is bound to grant to him an assignation of his security so that the second bondholder may make what he can out of it. The first bondholder has the alternative of apportioning his debt between the two securities or of going entirely against one of these securities, and of assigning his right to the other security to the second bondholder.

But it is urged that to apply this doctrine here would be to benefit the second bondholder at the expense of the general body of creditors. But that is just the effect of the application of this doctrine of catholic security in any case, for whatever confers upon a second bondholder more than he would otherwise have got must have the effect of damaging more or less the interests of the other unsecured creditors. I see no reason here for the exclusion of this equity, and I therefore think that the Sheriff-Substitute has acted quite rightly in what he has done.

Lord Mure—I quite agree with what your Lordship has said in this case, and think that the Sheriff-Substitute has done rightly in the course which he has adopted.

Your Lordship, in the passages read from Mr Bell's Commentaries, has laid down the principle upon which this case must be decided, and these principles were given effect to by the Court in the case of *Littlejohn*, which was referred to in the course of the discussion.

There can be no doubt that the second bondholder was prejudiced by the actings of the first bondholder, who, however, was in no way to blame in what he did. He has assigned his interest in the moveables to the second bondholder, who is undoubtedly preferable to the general body of creditors, and he having done so, the Sheriff has merely given effect to that assignation.

Lord Shand—In this case each of the creditors had a bond and disposition in security from the bankrupt over the heritable estate, and also a security over the moveables to the extent of one year's interest. The first bondholder exercised his diligence over the moveables, and then fell back on the heritage, but he has assigned his interest in the moveables to the second bondholder, who now seeks to obtain the benefit of that assignation. I think that the principle laid down in the passages in Bell referred to by your Lordship fully sanction what has been done here, and that this principle was given effect to in the case of *Littlejohn*, which I consider to be *a fortiori* of the present case. The second bondholder must not be prejudiced by the actings of the first bondholder, and in giving effect to this assignation the Sheriff-Substitute has, I think, acted rightly.

Lord Adam—I am clear that if the second bondholder Hill had held no security over the debtor's moveable estate then this would have been an ordinary case of catholic and postponed creditor, and in such a case the equity which has been referred to would have directly applied. Does it then make any difference that Hill has a security over the moveables? I do not think it does. In the ordinary case where there are prior and postponed creditors it little matters out of which security the prior creditor takes payment of his debt, because he leaves so much more to the postponed creditor from the untouched security. But here each creditor has a limited right to both securities, and neither creditor can exhaust the moveables. That, to my mind, is just a case for the application of the equity. The prior bondholder was bound to realise his security in such a way as to be as little injurious as possible to the interests of the second bondholder. In these circumstances Syme ought to have paid himself the £122 out of the moveables, and if he had done so the heritable security would have been so much the larger to pay Hill's debts. But Syme did not do so; he paid himself capital and interest out of the heritage, and has assigned his security over the moveables to the

second bondholder Hill, who is entitled, I think, to have effect given to this assignation.

I think therefore that the Sheriff-Substitute has acted rightly.

The Court refused the appeal.

Counsel for the Appellant—Guthrie—Craigie. Agents—Welsh & Forbes, S.S.C.

Counsel for the Respondent—Strachan—Patten. Agents—M'Neill & Sime, W.S.

Friday, February 8.

FIRST DIVISION.

[Exchequer Cause.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY AND OTHERS, AND THE NORTHERN ASSURANCE COMPANY AND OTHERS *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Income-Tax—Property and Income-Tax Act 1842 (*Act 5 and 6 Vict. cap.* 35), *Schedule D, First Case—Insurance Company, Fire and Life—Profits or Gains.*

The Income-Tax Act 1842, Schedule D, Case 1, Rule 1, provides—"The duty to be charged in respect of" (trades, &c., not embraced in any other schedule) "shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade . . . upon a fair and just average of 3 years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade . . . shall have been usually made up."

A company carried on the business of fire and life insurance, including the sale of annuities, and from time to time realised its investments when an opportunity offered of its doing so at a profit. *Held*, in assessing to income-tax, (1) that the nett profits and gains from the two branches of the business were to be massed as one undivided income, assessable according to the rules applicable to Case I. Schedule D; (2) that in estimating the profits and gains of the company, interest on investments which had not suffered deduction of income-tax at its source must be taken into account, as also fire insurance premiums for the year of assessment, or an average of 3 years (less losses by fire in that period, and ordinary expenses), and gains made on investments realised during either of these periods; (3) that the profits and gains of the company on its life business could only be ascertained by actuarial calculation, proceeding upon the result of the statutory quinquennial investigation, or of the usual periodical investigation in companies established before the statute, or of the triennial investigation prescribed by Schedule D of the Income-Tax Acts

The Income-Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, Case 1, provides—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act." Rule First provides—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade . . . upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade . . . shall have been usually made up." . . .

At a meeting of the Commissioners of Income-Tax for the County of Midlothian for hearing and determining appeals, held at Edinburgh on 27th October 1886, the general manager of the Scottish Union and National Insurance Company appealed against an assessment made on the company under Schedule D of the Income-Tax Acts for the year 1885-86. The assessment was appealed against by the company, *inter alia*, on the ground of the decisions of the English Courts on the appeal case of *Last* v. *The London Assurance Corporation*, 14th July 1885, L.R., H. of L. App., vol. x. p. 438, it being contended that according to such decisions, after taking into account the income-tax paid by way of deduction from interests and dividends on the company's invested funds, there remained no balance of profit for direct assessment.

The following were the facts:—1. The appellants were incorporated under a special Act of Parliament, 41 Vict. cap. 53, and they carried on the business of fire and life insurance, including the sale of annuities and other ordinary branches of the said businesses within the limits defined by the said special Act. The results of their business in all departments, so far as their shareholders were concerned, were thrown together into one account, called the profit and loss account, and dividends to the shareholders were declared out of the balance of profit shown upon this account, and not out of profits made in any particular department. 2. The profits of the appellants' fire insurance business were ascertained from year to year. In respect of the premiums in hand at the end of each year, risks were still running under existing policies, which risks might be taken as equivalent on an average to one-third of the premiums received during the preceding year. It had been the custom for many years to reckon the profits of fire insurance business with reference to income-tax upon a seven years' average, but the appellants were satisfied to accept the ruling of the Commissioners, and reckon these profits upon a three years' average. 3. The whole interest, dividends, rents, and other revenue from invested funds received by the appellants were divided into two portions, one of which, being the proportion of the whole which was earned from the investment of the paid-up capital and reserves belonging to the shareholders, passed to the credit of their profit and loss account, and formed a portion of their yearly profits. The remainder of the interest, dividends, and other revenue from invested funds was earned from the investment of the accumulated life and annuity premiums, and went to provide for the company's obligations under its life assurance and annuity policies. 4.

In carrying on the business of life insurance the appellants issued policies upon lives in return for payment of a premium or premiums. Such payments were made in one sum, or in sums spread over a few years, or in sums spread over a whole lifetime, and by the said policies the appellants undertook to pay certain sums upon the death of the person assured, or on his attaining a certain age, or on the happening of other contingencies connected with human life. 5. The liabilities of the appellants to the holders of their life and annuity policies were discharged partly out of the premiums received and partly out of the interest or other annual returns arising from the investment of the premiums. These liabilities embraced an obligation not only to pay the specific sums named in the policies but to account to the policy-holders for any surplus that might arise in the business, and to appropriate nine-tenths of that surplus by way of bonus to the policy-holders. This surplus was popularly known as "profits," but as regarded the application of nine-tenths of it, it formed, so far as the appellants were concerned, a debt due by the company to its policy-holders equally with the sums named in their policies. The appellants, however, admitted, for the purposes of this case, that income-tax fell to be calculated on all such "profits."

The Commissioners, on 1st February 1887, issued the following deliverance—"The Commissioners having considered the arguments adduced at last meeting are of opinion that the insurance companies should be assessed on their nett revenue, including therein premiums, untaxed interests, and profit from investments, and giving credit for all payments under policies, expenses, and losses, such revenue to be determined on the average of three years, if that be the only legal course, but the Commissioners would suggest that the parties and the Crown should arrange that the average should be determined by the number of years adopted by each respective office as the period of its investigation, and they remit to the surveyors and insurance companies to adjust the figures on this basis. The result to be reported to the Commissioners. In the event of its being found that the profits of life assurance companies must be determined by actuarial valuation, the Commissioners are of opinion that the Crown ought not to be bound by the rate of interest or other elements arbitrarily adopted by the companies themselves to the effect of reserving profits for future distribution."

Additional information was supplied to the Commissioners, who cited the Company to attend at an adjourned diet, when it was contended for the company—1st. That they were only liable to pay income-tax under Schedule D on the actual gains and profits arising to them from the whole departments of their business, including therein their life business, their fire business, and the interest on invested funds so far as belonging to shareholders. 2nd. That the amount of said profits fell to be calculated and ascertained—(*a*) As regarded interest, by taking the average of the amount of interest belonging to the shareholders on capital and reserve as appearing in the appellants' profit and loss account for the three years immediately preceding the year for which the assessment for income-tax was to be imposed; (*b*) As regarded fire business, by taking the average of the fire profits for the three years immediately preceding the year in which the assessment for income-tax was to be imposed; (*c*) As regarded life business, by taking the proportion applicable to one year of the amount of life profits as ascertained at the last periodical investigation into the company's life business made in terms of the statutes. These statutory investigations were made on well recognised principles, under competent scientific advice, and with a view to ascertain what surplus or profit might be reckoned on as having already been realised, as distinguished from any profits which might or might not arise in the future working of the business. Before any realised profit could be reckoned on, provision had to be made for the whole liabilities of the company, on certain assumptions as to the rate of mortality, the rate of interest, and the amount of expenses likely to be experienced in the future. These assumptions were made by all the insurance offices which had regard to their future solvency, not on the principle suggested by the Commissioners, that the business of insurance was a system of wagering—a suggestion which the appellants regarded as unfounded and mischievous—but with the express view to the certainty that they would be realised. The importance of these estimates could not be exaggerated, as it depended on their soundness whether the company would be in a position in the future to meet its obligations, or whether the expectations of its policyholders would be disappointed, as it was impossible to predict with certainty what the future rates of mortality or of interest would be; and as the rate of interest in particular was likely to be much lower in the future than it had been in the past, it was necessary to make assumptions on these subjects within the limits of safety; but if, as might be hoped, the experience of a company proved more favourable than had been assumed, the surplus or profits thence arising would, at future investigations, come into account, and be assessable for income-tax. 3rd. That calculating the amount on which income-tax fell to be assessed for the year 1885-86 on the principles above contended for, the assessable income of the appellants, under Schedule D, for that year amounted to £94,134, but that, as the appellants had already paid income-tax for that year (calculated upon an average of the three immediately preceding years) on a sum of £105,409, they ought not to be assessed for any further payment. 4th. That the principle introduced for the first time into the mode of assessment of insurance companies by the Commissioners' deliverances of 1st February 1887 and 20th May 1887 was erroneous. That principle appeared to be that the appellants were assessable for income-tax under Schedule D, not on their gains and profits, but on their gross revenue for an average of three years, subject to deduction of their gross outgoing for the same three years. An account of profits could not be made out on this principle without leading to erroneous and absurd results. Thus the returns made by the Board of Trade to Parliament for 1885 showed that the premium income of the whole life assurance companies of the United Kingdom for that

year was £12,555,797
While the amount paid for claims, cash bonuses, surrenders, commission, and expenses of management was 13,919,792
Showing a deficiency for the year of £1,363,995

which was only provided for out of interest received, which amounted to £5,918,058. Thus if income-tax were charged against the whole life offices together, upon the principle laid down by the Commissioners, there would be no balance of profit which could be assessed, whereas there could be no doubt that a large amount of aggregate profit was earned by these companies during that year. The appellants therefore submitted that by this method it was impossible to arrive at the profits truly made by the appellants in their business, more particularly in connection with their life business and the funds appropriated thereto. Their annual gross revenue, so far as their life business was concerned, consisted partly of life assurance premiums and partly of interest arising on their life fund. Life assurance premiums were in no sense a gain or profit either to the company which receives them or to the policyholders. So far as the company was concerned each premium carried with it a corresponding obligation of a postponed and contingent character, but quite definite and capable of scientific measurement. So far as the policy-holders were concerned the premiums paid by them were in effect an investment out of their savings, to be repaid to them or their heirs on the emergence of whatever contingency was stipulated in the policy. The individual insurer, or his heirs, might receive more or less than he had paid according as he lives a shorter or longer time, but the policyholders, as a body, practically received back what they had paid, with the interest of it. Under the Income-Tax Acts persons were under certain conditions not liable to be charged with income-tax upon the amount of such premiums, but if the principle contended for by the Commissioners was sound one of the purposes of these Acts would be defeated, for all insurers of lives would practically be compelled to pay income-tax on their premiums of life insurance.

It was contended for the Surveyor of Taxes—1. That if the company invested their accumulated funds from premiums, &c., in heritable property, or in the acquisition of mortgages by taking transfers to them, or otherwise, income-tax would be assessed under Schedule A on the heritable property. It would be deducted in the payment of the interest on the mortgages. These were tradings with the money, and the profits arising would bear the income-tax according to their nature and amount. If the company entered with the accumulation of premiums, &c., into other trades, if profits were made such would be assessed to income-tax. 2. That interest on foreign securities was liable to assessment to income-tax, Schedule D, No. 4. This was trading also, and the profit received in this country was liable to assessment without deduction. 3. That bank interest on the company's current account and other interest received, where the income-tax was deducted, was also assessable to income-tax, Schedule D, No. 3. 4. That the profits of the fire and life assurance business were chargeable under Schedule D, No. 1. The income-tax was assessed in respect of the profits of the year of assessment. The year of the assessment in the present case is the year 1885–86. The profits of the year of assessment are ascertained by estimate—Trade Schedule D, No. 1; Profession Schedule D, No. 2, on an average of three years. (Professions, 16 and 17 Vict. c. 34, sec. 48). Profits of uncertain amount, such as interest not being annual interest, Schedule D, No. 3, on the preceding year. Foreign securities, on the amount which had been or would be received in the current year, Schedule D, No. 4. The income-tax on annuities and yearly interest of money was paid by way of deduction from the payments by the person making the payments, if such person's income, out of which the payments are made, has been assessed. By section 102 provision was made for the case where the income was not assessed from which the payments were made. Section 52 provided that the income-tax return or statement, which all persons were required to make, should be exclusive of the profits and gains from annual interest of money, &c. That it was the profits in the year of assessment which were in question was evident from section 133. By that section, if the actual profits fell short of the computation, provision for relief was made. There was no provision for correction if the profits turned out to be more than computed. The same company or person might have these various descriptions of profits, and have to pay tax upon each of them. The payment of the tax upon one could not be set against the other. By the statutes there was a grant of duty on each of them, and the payment of the duty on one was no reason why it should not be paid on the others. In this case there was sufficient income in each of the three years upon which the assessment for the year 1885–86 was based to pay all the claims and expenses of management, and leave profit from the premiums and bank interest without the application of any part of the accumulated or invested funds to such purpose. The materials for assessment on the company for 1885–86 were made up on the principle of leaving altogether out of the reckoning the accumulated or invested funds or the income from them. This was in accordance with the Statute 5 and 6 Vict. cap. 35, sec. 52. The result brought out was the same as the finding of the General Commissioners. The Commissioners took in the income from investments on one side, but they deducted it on the other. The contention of the company was that they had right to place against the tax on, for instance, the profits from the fire insurance business, the tax they had paid by way of deduction on the income from investments.

On 20th May 1887 the Commissioners pronounced the following deliverance:—"Find that on the average of the three years 1882, 1883, and 1884 the total annual incomings of the appellants' business in the two departments of fire and life insurance have amounted to £598,356, and that the total annual outgoings of these departments on the average of the same period have amounted to £452,743, the surplus of the annual incomings therefore over the outgoings of the business has on the average of the same period been £145,613. The Commissioners further find that the appellants have paid income-tax by way of retention thereof from interest or dividends received by them, amounting on the average of the same three

years to £105,682, so that there remains a balance of annual incomings over annual outgoings still assessable to income-tax amounting to £39,931. To this there falls to be added the balance of annuities payable by the appellants, from which they have retained income-tax, amounting to £7290. The Commissioners therefore find that the sum assessable to income-tax for the year 1885–86 was £47,221, and they assess accordingly."

The Commissioners had assessed the company on the balance of profit arising from their incomings and outgoings on the average of three years under the rules contained in Schedule D of the Act 5 and 6 Vict. c. 35.

The company and the Surveyor of Taxes both intimated their dissatisfaction with the finding of the Commissioners, and desired them to state a Case for the opinion of the Court of Exchequer.

The preceding narrative is taken from the Case so stated, and the questions which the Court were asked to determine were—"On what principle life assurance companies were to be assessed? and on what amount the assessment appealed against was to be made?"

The argument submitted to the Court applied also to the case of the North British and Mercantile Insurance Company, with whom and the Commissioners questions as to the principle and amount of assessment had arisen.

Argued for the company—The company treated its whole business as a unit, and for the purposes of assessment the fire and life business ought to be taken as one, the profits, if any, massed, the losses deducted, and tax paid on the balance; no good reason had been suggested by the Crown for separating the two businesses; the tax was on profits and gains, and the proper mode for ascertaining the gains and profits of an office such as this, was to take the profits as brought out at the quinquennial investigation, and apportion them to each year of the period. The company was a corporation, and it was, for the purposes of assessment, to be treated as an individual. The mode in which it was now sought to assess the company was a novelty, and when examined was absurd, and would lead to most fallacious results. What the Court were asked to determine was the principle of assessment, as that upon which the Commissioners had proceeded was unjust—*Lant* v. *London Assurance Company*, L.R., 12 Q.B. Div. 389, 14 Q.B. Div. 239, and 10 App. Cas. (H of L.) 438; *Carter* v. *The Clerical Assurance Company*, L.R., 21 Q.B. Div. 359; Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100; *The Scottish Mortgage Company of New Mexico* v. *The Commissioners of Inland Revenue*, November 19, 1886, 14 R. 98; *Smiles* v. *Australasian Mortgage Company*, July 12, 1888, 15 R. 872; Life Assurance Companies Act 1870 (33 and 34 Vict. cap. 61).

Argued for the Surveyor of Taxes—The principle of assessment fixed upon by the Commissioners was right, though the figure result was wrong. The Crown were entitled to tax interest which has escaped taxation at its source, as, for example, foreign securities, also profits arising from the realisation of investments at an advance over the purchase price. It was undesirable to mass fire and life profits, and the mode adopted by the Commissioners was not only simple, but more fair for the company. If the Court were of opinion that the Commissioners had proceeded upon a wrong mode of assessment, the only satisfactory method would be to set aside their finding, and remit to them to make a new assessment—Cases cited *supra*; *Brown* v. *Watt*, February 20, 1886, 13 R. 590; *Imperial Fire Assurance Company*, 35 Law Times, 271; Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D.

The Northern Assurance Company, Aberdeen, appealed to the Commissioners of Income-Tax for the county of Aberdeen against an assessment made upon the company under Schedule D of the Income-Tax Acts. The principle of assessment was the same which had been adopted in the case of the Scottish Union and National Insurance Company, and the contentions of the company against, and of the Surveyor of Taxes in favour of, the mode of assessment, were substantially as above narrated. In the case of the Northern Assurance Company, the Crown, in estimating their liability for assessment to income-tax, assessed the company on, *inter alia*, investments realised. The company in their appeal maintained that profits upon investments realised were capital and not income; that their business was not that of buying and selling shares of other companies, but of fire and life insurance; that when they sold an investment at an enhanced price from that at which it was bought, this was not a transaction in the nature of their own business, but a capital transaction, and therefore that it did not come within the scope of the Income-Tax Act.

The Surveyor of Taxes contended that the company in their accounts treated profits on realised investments as income, that they brought the amount of such into their "profit and loss account" out of which they paid their dividends, and that it was thus income assessable to income-tax.

Argued for the company—The legitimate business of the company was that of fire and life insurance; that was their trade, and accordingly any profits which they realised from the sale of investments were not trade profits, and so were not liable for income-tax under Schedule D of 5 and 6 Vict. cap. 35, sec. 100.

Argued for the Surveyor of Taxes—Counsel adopted the argument submitted in the case of the Scottish Union and National Insurance Company. It was stated that the judgment in this case would be held to rule the case of the Scottish Provincial Assurance Company between whom and the Crown a similar question had arisen.

At advising—

Lord President—The Court are of opinion that the assessment as originally imposed cannot be sustained. But the mode of ascertaining the profits and gain of the company in the department of the life business adopted by the Commissioners is fundamentally wrong and quite inadmissible.

We shall therefore reverse the determination of the Commissioners, and remit the case to them with the following instructions, which sufficiently embody our reasons for differing both from the assessor and from the Commissioners, and may at the same time form a useful guide to revenue officers and the General Com-

missioners of Income-Tax in dealing with cases of this description.

1. In assessing to the income-tax the profits and gains of a company carrying on the businesses both of fire insurance and life insurance, the nett profits and gains from the two branches of the business must be massed together as one undivided income assessable according to the rules applicable to the first case under Schedule D — *Smiles* v. *The Australasian Mortgage Company*, 15 R. 872, as contrasted with *The Scottish Mortgage Company of New Mexico* v. *Inland Revenue*, 14 R. 98.

2. Interest on investments which has not suffered deduction of income-tax at its source, must be taken into account in ascertaining the assessable amount of profits and gains of the company.

3. Seeing that fire insurance policies are contracts for one year only, the premiums received for the year of assessment, or on an average of three years, deducting losses by fire during the same period, and ordinary expenses, may be fairly taken as the profits and gains of the company, without taking into account or making any allowance for the balance of annual risks unexpired at the end of the financial year of the company — *The Imperial Fire Insurance Company* v. *Wilson*.

4. That this rule is not applicable to the ascertainment of profits and gains on the life business. That life policies are contracts of most variable endurance, and the premiums are in many cases not annual payments. The contract may endure for the policy-holder's life, or for a certain number of years stated, or till the holder attains a certain age, and the company may be bound, on the expiry of the fixed number of years, or on the attainment of a certain age by the policy holder, either to pay a lump sum or an annuity for the remainder of the policy-holder's life.

The premiums paid for such insurance may be paid all in one sum or by instalments within a fixed number of years or annually during the holder's life, or during the subsistence of the policy. The premiums therefore do in no sense represent the annual profits and gains of the company. In like manner the amount of claims in any one year arising on the death of persons insured, or otherwise, as a deduction from the company's receipts for the year cannot afford any criterion for ascertainment of profits. A recently established company will receive a large amount of premiums, and have few or no claims to meet. The profits and gains can be ascertained only by actuarial calculation, and this actuarial calculation may be obtained by taking the result of the quinquennial investigation prescribed by statute of the periodical investigation in use in companies established before the statute, or by an investigation covering the three years prescribed by Schedule D of the Income-Tax Acts.

In the case of the Northern Insurance Company—(5) Where a gain is made by the company (within the year of assessment or the three years prescribed by the Income-Tax Act, Sched. D) by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company.

The Court reversed the determination of the Commissioners, and remitted the case to them with instructions.

Counsel for the Scottish Union and National Insurance Company — Balfour, Q.C.—Jameson. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Commissioners of Inland Revenue—Lord Adv. Robertson, Q.C.—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Saturday, February 9.

SECOND DIVISION.

[Exchequer Cause.

MACGREGOR *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Property and Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 60, *Schedule A, Rules* 9, 10, *and* 14 *of No* 4—*Taxes Management Act* 1882 (43 *and* 44 *Vict. cap.* 19), *sec.* 60—*Assessment Doubly Charged—Superior and Vassal—Casualty—Composition.*

A vassal paid a casualty of composition to his superior, who made a return thereof and was assessed upon the same. The vassal claimed exemption from an assessment of the annual rent of his lands, on the ground that it had already been charged with duty in the hands of the superior. *Held* that as the composition was paid to the superior not as rent, but as the price payable for entry, the vassal was the proprietor of the rent for the year, and was liable to assessment thereof.

The Taxes Management Act 1880 (43 and 44 Vict. cap. 19), by section 60 provides—"*Double Assessments.*—Whenever it appears to the satisfaction of the Board that a person has been assessed more than once to the duties for the same cause and for the same year, they shall direct the whole or such part of such one or more of the assessments as appears to be an overcharge to be vacated, and thereupon the same shall be by such order vacated accordingly."

At a meeting of the Commissioners for the general purposes of the Income-Tax Acts, and for executing the Acts relating to Inhabited House Duties for the Cowal district of the county of Argyll, held at Dunoon on the 5th day of November 1888, Donald Macgregor of Ardgartan appealed against and claimed relief from an assessment of £659, duty £16, 9s. 6d., under Schedule A of the Property and Income-Tax Acts, made upon him for the year 1888-89, being the annual value of the lands of Ardgartan and others belonging to the said Donald Macgregor, and situated in the said district of Cowal, on the ground of having been called upon to pay and having paid to his Grace the Duke of Argyll, as superior of the lands, on 30th May 1888, a casualty of superiority amounting to a full year's rental of the lands, which he claimed to have deducted from or set against the assessment appealed against.

The appellant contended that he had derived

no income for the year from the estate; that payment of the casualty was made by the appellant to the Duke without deduction of income-tax, because his Grace refused to allow deduction thereof, in respect that, as was admitted by the Surveyor, he was required by the Commissioners to make a special return of, and pay income-tax directly upon, all casualties received by him, and that had he allowed the appellant to retain tax in the manner provided by rules 9 and 10 of No. 4 of the general rules enacted under Schedule A of 5 and 6 Vict. cap. 35, sec. 60, he would have been submitting to a double charge. The said Duke had since made his special return, and been assessed upon the casualty. The assessment sought to be imposed upon the appellant was thus doubly charged, and as an overcharge fell to be vacated in manner provided by the Taxes Management Act 1880, section 60. The appellant therefore claimed relief from the assessment made upon him.

The Surveyor of Taxes maintained that the casualty of superiority paid by the appellant in the circumstances set forth was of the nature of a capital payment; the statute contained no provision for allowing such a payment to be deducted from or set against the rent or yearly value in assessing lands and heritages to property and income-tax, and that it was incompetent to make any such allowance. He referred to the deductions and allowances detailed in No. 5 of Schedule A of 5 and 6 Vict. cap. 35, sec. 60, also to rule 14 of No. 4 of the said section, and section 159 of the said Act, providing that no other deductions are to be allowed than such as are expressly enumerated in the Act.

The Commissioners found that the statute contained no provision authorising any allowance from an assessment under Schedule A in respect of the payment of a casualty of superiority, and therefore refused the appeal.

The appellant took a case, and argued—What was demanded was not a deduction of an assessment; it was the vacating of an assessment which was not chargeable. The rent for the year was not income or profit in the hands of the appellant, because he had been obliged to pay it all to the superior. The superior under the former law could have entered into possession to recover the amount—*Hill* v. *Caledonian Railway Company*, Dec. 21, 1877, 5 R. 86, *per* Lord Deas, 390; *Allan's Trustees* v. *Duke of Hamilton*, Jan. 12, 1858, 5 R. 510, where the Lord Justice-Clerk pointed out that where lands were in non-entry the superior is presumed to be in possession, and what the singular successor must render for his entry is the value of the beneficial enjoyment or income of the lands. See also *Sharpe* v. *Parochial Board of Latheron*, July 12, 1883, 10 R. 1163, where subjects being twice entered in a valuation-roll did not warrant the collection of poor-rate in assessing twice for them. He paid the whole rent of the lands for the year to the superior, he himself derived no benefit from them. The superior paid income-tax upon the sum so paid to him, and if the vassal was required to pay income-tax he not only paid upon value he did not receive, but the Commissioners exacted the duty twice upon the same sum, which was contrary to the terms of the Taxes Management Act 1882, sec. 60.

The respondents argued—A composition was not payment to the landlord of the rent actually drawn from the lands for that year, it was the price paid for the entry. It was a mere accident that the two sums corresponded in amount. They were two different subjects. The superior was therefore not the proprietor of the rent as contended by the appellant. The superior could only uplift the rents by virtue of legal proceedings.

At advising—

Lord Lee—This is an appeal from the decision of the Income-tax Commissioners by which the appellant was found liable to pay income-tax upon the annual value of certain lands in Argyllshire. The objection of the appellant is that the effect of the assessment imposed upon him is to charge doubly the rent for the year 1888-9—that is, to charge it with duty firstly in his hands, and again in the hands of his superior the Duke of Argyll.

This view is founded on the idea that a composition paid to a superior by a singular successor for his entry makes the superior the proprietor in right of the rents for the year in which the entry is obtained.

My opinion is that this is a fallacious view. I think that the composition is exigible not as rent, but as the price payable for the entry, and that it is a mere accident that in some cases the amount of the price is measured by a year's rent.

The vassal's right to the rents remains unimpaired so long as the superior is not in possession, and the superior could not uplift the rents without legal proceedings equivalent to declarator of non-entry. I therefore think that the determination of the Commissioners was right, and should be affirmed with expenses.

The Lord Justice-Clerk and Lord Rutherfurd Clark concurred.

Lord Young was absent.

The Court held that the decision of the Commissioners was right.

Counsel for the Appellant—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Sol.-Gen. Darling—A. J. Young. Agent—David Crole, Solicitor for the Inland Revenue.

Saturday, February 9.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACRAE *v.* SUTHERLAND.

Process—Caution for Expenses—Pursuer Living in England—Notour Bankruptcy—Debtors Scotland Act 1880 (43 *and* 44 *Vict. c.* 34).

Held that the pursuer of an action of damages for slander, who was living in England, and was notour bankrupt in the sense of the Debtors (Scotland) Act 1880, was not bound to find caution for expenses.

Reparation — Written Slander — Issue — Innuendo.

The owner of a house wrote to the agent of his tenant—"Thanks for your attention. That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods." . . .

In an action of damages for slander at the instance of the tenant, he averred that these statements meant that he was of fraudulent and dishonourable character, and that he had been guilty of falsehood. *Held* that the statements would bear this innuendo.

Donald Macrae, M.D., late of Strathpeffer, and thereafter of 75 Greenwood Road, Dalston, London, raised the present action of damages for written slander against Angus Sutherland, Little Ferry Cottage, Golspie, concluding for payment of £1000.

Dr Macrae was tenant of a farm in Strathpeffer belonging to Sutherland under a lease for ten years from 1886 at a rent of £100 per annum. In November 1887 Macrae ceased to occupy the premises, alleging that they were uninhabitable. Sutherland afterwards brought an action against Macrae for the rent, and obtained a warrant for his ejection from the Sheriff on 10th July 1888. The pursuer appealed from this judgment to the Second Division of the Court of Session, but he failed to print and lodge the appeal as required by statute, and the same was accordingly held to be abandoned. On 12th October 1888 decree was granted against the pursuer for the sum of £20, 13s. 6d., expenses of said process and appeal. The decree was extracted on 15th October, and on the 17th of that month the pursuer was charged to pay the sums contained therein. The days of charge expired without payment, and the pursuer therefore became notour bankrupt within the meaning of the Debtors (Scotland) Act 1880.

Macrae removed to London, and while negotiating for the lease of a house there the landlord thereof received this anonymous letter—"Sir,—I think it my duty to inform you that Dr Macrae, who is in negotiation with you about your house, has left Strathpeffer very much in debt; his landlord there will give you his true character. I enclose his address. Dr Macrae has been followed to Dalston and his movements watched; he is a man of *no means*, and has swindled *many*. Such a man ought not to be allowed to take honest people in. From one who has suffered. Late landlord's address—Mr Sutherland, Little Ferry, Golspie, Scotland, N.B."

On 21st June 1888 the defender wrote to Robert Munro, writer, Tain, a letter in the following terms—"Dear Sir,—Thanks for your attention. That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods. He must try some other Court. My son is a lawyer in London, and he will put him right there.—Yours truly, A. SUTHERLAND."

Macrae raised this action. He alleged that both letters had been writen by Sutherland, and that the statements made were false and calumnious. With regard to the letter of 21st June 1888 he alleged as follows—"The statements here made are of and concerning the pursuer, and are false and calumnious and malicious. They were intended to mean and do mean that the pursuer is of fraudulent and dishonourable character, and that in consequence thereof if he visited Strathpeffer he would be mobbed by the people in that locality. Further, they were intended to mean and do mean that he had been guilty of falsehood."

The defender denied the anonymous letter, and also the innuendo which the pursuer put upon the defender's letter of 21st June 1888.

The defender pleaded, *inter alia*—"(1) The pursuer having left the country and being notour bankrupt, the defender is entitled in the circumstances to have him ordained *ante omnia* to find caution for expenses. The letter of 21st June 1888 not being slanderous the defender ought to be assoilzied."

The following issues were adjusted for the trial of the cause—"1. Whether on or about 7th May 1888 the defender caused to be written and sent to Mr Bidgood, 117 Osbaldiston Road, Stokenewinton Common, Clapton, a letter in the terms set forth in the appendix hereto, marked A, which letter was received by the said Mr Bidgood? Whether the same is of and concerning the pursuer, and is false and calumnious, to the loss, injury, and damage of the pursuer? 2. It being admitted that on or about the 21st June 1888 the defender wrote and sent to Robert Munro, writer, Tain, a letter in the terms set forth in the appendix hereto annexed, marked B, and received by the said Robert Munro, Whether the same is of and concerning the pursuer, and whether the words—'I do believe that he would be mobbed if he was appearing in the Strath,' were intended to mean, and do mean that the pursuer is of fraudulent and dishonourable character, and that, in consequence thereof, if he visited Strathpeffer he would be mobbed by the people in that locality, and are false and calumnious, to the loss, injury, and damage of the pursuer?"

The two letters above quoted formed an appendix to the issues. By interlocutor of 16th January 1889 the Lord Ordinary (WELLWOOD) repelled the first plea-in-law for the defender, and approved of the issue as amended.

The defender reclaimed, and argued—This was a case in which the pursuer was bound to find caution—*Maxwell* v. *Maxwell*, March 3, 1847, 9 D. 797. He was notour bankrupt within the meaning of the Debtors (Scotland) Act 1880—*Samuel* v. *Greig*, July 12, 1844, 6 D. 1259; besides, he had now left Scotland and was permanently resident in London. The mere circumstance that the present action was one for the vindication of character was not *per se* sufficient to obviate the rule that the pursuer should find caution—*Clark* v. *Muller*, January 16, 1884, 11 R. 418. In order that a pursuer

should be liable to find caution it was not essential that he should be divested of his estate. The innuendo proposed was unfair as being too remote and too strained—*Broomfield* v. *Greig*, March 10, 1868, 6 Macph. 563; *Phosphate Sewage Company* v. *Molleson*, March 18, 1874, 1 R. 840; *Brydone* v. *Brechin*, May 17, 1881, 8 R. 697; *Fraser* v. *Morris*, February 24, 1888, 15 R. 454; *The Capital and Counties Bank* v. *Henty*, 1882, L.R., 7 App. Cas. 741.

Argued for respondent—The distinction between the present case and that of *Clark*, *supra*, was that here there was no divestiture. If the pursuer was successful in his action he would get the sum recovered in name of damages paid to himself. He was notour bankrupt and that was all, and in no case had it ever been held that any one in such a condition was bound to find caution but the reverse had been held—*Scott* v. *Johnston*, June 2, 1885, 12 R. 1022. The question of caution was one entirely for the discretion of the Court, and looking to the provisions of the Judgments Extension Act 1868, this was not a case in which caution was necessary. The defender's statements in the letter of 21st June 1888 would bear the innuendo proposed—Cases cited above; Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), sec. 6.

The pursuer subsequently amended his issues at the bar as follows:—"(1) Whether on or about 7th May 1888 the defender caused to be written and sent to Mr Bidgood, 117 Osbaldiston Road, Stokenewinton Common, Clapton, a letter in the terms set forth in the appendix hereto marked A, which letter was received by the said Mr Bidgood. Whether the same is of and concerning the pursuer, and is false and calumnious, to the loss injury and damage of the pursuer. (2) It being admitted that on or about the 21st June 1888 the defender wrote and sent to Robert Munro, writer, Tain, a letter in the terms set forth in the appendix hereto annexed marked B, and received by the said Robert Munro, Whether the same is of and concerning the pursuer, and was intended to mean and does mean that the pursuer is of dishonourable character, and is false and calumnious, to the loss injury and damage of the pursuer. Damage laid at £1000."

At advising—

Lord President—I agree with the Lord Ordinary in repelling the first plea for the defender. The circumstances under which this plea is repelled are to be found in the answer to the third article of the condescendence in which the defender alleges that on 12th October 1888 decree was granted against the pursuer for £20, 17s. 6d.; that on 15th October the decree was extracted, and on 17th October the pursuer was charged to pay. It is then stated that "the days of charge have expired without payment, and the pursuer is therefore notour bankrupt within the meaning of the Debtors (Scotland) Act 1880." It is conceded that the definition of the term "notour bankrupt" in the 7th section of the Bankruptcy Act 1856 does not cover such a case as the present. That action does not apply to sequestration proceedings alone, but it is a general provision as to the circumstances which are to be deemed as constituting notour bankruptcy. Section 6 of the Debtors Act 1880, to which the defender refers, was introduced in consequence of the abolition of imprisonment for debt except in certain special cases, and so it was necessary that the modes of constituting any one notour bankrupt should be enlarged because the constitution of notour bankruptcy by imprisonment had been abolished.

The Debtors Act of 1880, by section 6 provides that—"In any case in which under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or when a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made." I think the provisions of this section were intended solely for the purposes of the Act in which they occur. It is such notour bankruptcy as will enable a debtor or creditor to sue out a *cessio*, and I do not think the law relating to notour bankruptcy was intended to be altered for any other object. There is not therefore, in my opinion, any notour bankruptcy in the present case, and that is sufficient for the disposal of the defender's first plea-in-law, for the idea that a person must find caution because he lives in another part of the kingdom can receive no countenance, since the Judgments Extension Act 1868 allows of the enforcement of a Scotch decree for expenses in any part of the United Kingdom.

As to the second issue, it is, I think, objectionable as it stands, but the objection can be removed if it is altered as Mr M'Kechnie proposes.

The letter which has been put in issue and which is printed, is as follows—"*Little Ferry, Golspie, 21st June* 1888.—Dear Sir,—Thanks for your attention. That horrid man Macrae will never get a penny from me, and you know that as long as he keeps the key he is liable for the rent. There were several applicants for the place at a reduced rent on account of its being occupied by him. I do believe that he would be mobbed if he was appearing in the Strath. His statement of facts were a tissue of falsehoods. We must try some other Court. My son is a lawyer in London, and he will put him right there.—Yours truly, A. Sutherland."

It is not very easy to see what is the real meaning of this letter, and various interpretations may be put upon it. It may have been intended to mean that Dr Macrae was a horrid man in the sense that he was disagreeable, and upon that account that he would be mobbed as being unpopular, and that his statements of fact were not consistent with truth as it afterwards appeared. If that is the meaning of the words, then they are not actionable. But they may also mean, and the pursuer says that he can prove that they did mean, that he was also dishonest. That is a possible, and perhaps not a forced meaning to put upon these words. The case is not like any which have been cited where the innuendo put upon the language was so forced and unnatural that the pursuer was held not entitled to go before a jury. I propose to allow the second issue provided the alterations suggested are made upon it.

Lord Mure concurred.

Lord Shand—On the question of the pursuer being called upon in a case like the present to find caution for expense, I think this matter is one very much for the discretion of the Court. Here, no doubt there are circumstances which must be taken into account in considering the matter. The pursuer has left the country He has not paid his debts and he is notour bankrupt within the meaning of the Debtors Act 1880. If the action had been an ordinary one for the recovery of money, it might have been different. It is, however, an action to vindicate character, and the letters which have been laid before us disclose a case of deliberate written slander. In such a case I do not think that anyone in the circumstances of the pursuer ought to be required to find caution.

As regards the second issue, now that the pursuer is willing to take it as amended I have no objection to offer.

Lord Adam concurred.

The Court adhered to the interlocutor in so far as it repelled the first plea-in-law for the defender; *quoad ultra* recalled the interlocutor: Approved of the issues as adjusted at the bar, appointed the same to be the issues for the trial of the cause, reserved all questions of expenses, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuer—M'Kechnie—Forsyth. Agent—D. Barclay, Solicitor.

Counsel for the Defender—Comrie Thomson—Rhind. Agent—Thos. Dalgleish, S.S.C.

Friday, February 8.

FIRST DIVISION.

[Lord Trayner, Ordinary.

KENNEDY *v.* STEWART.

Entail—Entailed Estate—Contract to Sell—Ratification of Court—Specific Implement—Entail Act 16 *and* 17 *Vict. cap.* 94, *sec.* 5; 38 *and* 39 *Vict. cap.* 61, *secs.* 5 *and* 6; 45 *and* 46 *Vict. cap.* 53, *secs.* 13, 19, 21, *and* 22.

An heir of entail in possession by holograph letter offered to sell an entailed estate at a certain price, under the condition that the sale was made "subject to the ratification of the Court." The offer having been accepted the heir of entail presented a petition to the Court under the 19th and following sections of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), craving the Court to ratify and confirm the contract of sale, and to grant an order of sale of the estate. To this application the next heir lodged answers, objecting to a sale by private bargain.

In an action by the purchaser against the heir of entail for implement of the contract, the Court *held* that the latter was under a legal obligation to apply to the Court for authority to sell and dispone the estate, under 16 and 17 Vict. cap. 94, sec. 5; 38 and 39 Vict. cap. 61, secs. 5 and 6; 45 and 46 Vict. cap. 53, sec. 13; and the Court appointed the pursuer to lodge in process the draft of a disposition by the defender of the estate in favour of the pursuer in fulfilment of the contract of sale.

Sir Archibald Douglas Stewart was the heir of entail in possession of the entailed estates of Grandtully, Murtly, Strathbraan, and others, in the county of Perth.

In the summer of 1888 he received certain communications on the subject of a proposed sale of the estate from Mr Peter Glendinning, acting on behalf of an intending purchaser, whose name was not at first disclosed, but who was afterwards ascertained to be John Stewart Kennedy, banker in New York. On the 18th of September 1888 Mr Kennedy and Mr Glendinning went to Murtly, and saw Sir Archibald Douglas Stewart, and were shown over the castle and grounds, and other portions of the estate.

On 19th September 1888 Sir Archibald Douglas Stewart wrote the following holograph letter to Mr Kennedy:—"Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation, of the nett rental thereof, as may be ascertained by an agreed appraisement, you appointing one and me the other, and if the two cannot agree a third party to be chosen by the two. Payment to be made in cash, unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time, it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court.—Yours truly, A. D. Stewart."

On 20th September Mr Kennedy sent the following holograph letter in reply:—"Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto.—Yours faithfully, John S. Kennedy."

On 5th October Sir Archibald wrote to Mr Kennedy as follows:—"My dear Sir,—Since I wrote to you on the 19th ulto. I have thought a good deal, as you may suppose, about the important transaction which in that letter I proposed to enter into with you. I am quite satisfied on reflection that my offer was a very foolish one, and I should never have made it if I had not been hurried and pressed, or if I had taken proper legal advice, as I certainly should have done. I am told now that there are legal difficulties in the way, of which I was not then aware, and it

appears that it is by no means matter of certainty that the Court will agree to ratify the proposed arrangement. That may involve unpleasant publicity and the interference of the next heir of entail. I should be well pleased if you see your way to release me altogether from it. I repent it both on my wife's account and my own, as well as on account of the heir of entail entitled to succeed me, who is even now more interested than I am. If, however, you insist upon it, I am ready to endeavour to obtain the ratification of the Court, which I am advised can only be done for an order or authority to sell in terms of our contract. I shall be glad to hear from you at your earliest convenience.—Believe me, yours sincerely, A. D. STEWART."

Mr Kennedy, however, declined to cancel the transaction, and on 23rd October the agents of the parties fixed the price of the estate at twenty-five years' purchase, according to an adjusted rental, to be £372,983, 10s. 10d.

Sir Archibald Douglas Stewart had already in 1885 presented a petition (referred to below) to the Court under the Entail (Scotland) Act of 1882 for an order of sale of the estates of Grantully, Murtly, Strathbraan, and others, and certain procedure had followed thereon. The petition, however, was not carried to a conclusion, but on the motion of the petitioner was dismissed on 26th October 1888.

On 6th November 1888 Sir Archibald Douglas Stewart presented another petition under the Act of 1882 craving the Court "to ratify and confirm the contract constituted by the missives of sale set forth in the petition" (being the letters of 19th and 20th September quoted above); and to grant an order of sale of the estates of Grantully, &c., in favour of John Stewart Kennedy at the price of £372,982, 10s. 10d., in terms of the said missives. The petitioner set forth that he was upwards of 21 years of age and subject to no legal incapacity, and that Walter Thomas James Scrymsoure Fothringham of Pourie and Tealing was the only existing heir of entail under the destinations contained in the deeds of entail affecting the estate.

Mr Fothringham lodged answers to the petition, in which, referring to the former petition presented by Sir Archibald Douglas Stewart, he stated:—"The present alleged sale by private bargain purports to be dated 19th and 20th September 1888, when the petition of 9th April 1885 was still depending before the Court, and to be a private agreement to sell the estates at twenty-five years' purchase, which the petitioner in the present petition states has, by agreement between him and Mr Kennedy, been fixed at the sum of £372,983, 10s. 10d. sterling. The nett rental of the estates, as agreed to between the petitioner and Mr Kennedy for the purpose of the present application, is not admitted. In the procedure authorised by the Entail (Scotland) Act 1882, the respondent, as next heir, has right, by intimating within one month after an order for sale that he desires the sale to be by public auction, to prevent any sale by private bargain. No notice was given, either to the Court before which the petition of 9th April 1885 was depending or to the respondent, of the alleged sale by private bargain to Mr Kennedy. On 26th October 1888 the petition of 9th April 1885 was dismissed by the Junior Lord Ordinary, on the motion of the petitioner and in the absence of the respondent. A sale in the manner and at the price proposed would very injuriously affect the patrimonial interests of the respondent. . . . . The respondent submits that the petition should be dismissed as incompetent, and that he should be found entitled to the expenses of his appearance."

On the 6th November 1888, the same day as Sir Archibald Douglas Stewart presented to the Court the second petition above mentioned, Mr Kennedy raised an action against him concluding that it should be found and declared "that by a holograph letter, dated 19th September 1888, by which the defender offered to sell the entire estate of Murtly, &c., to the pursuer, the said John Stewart Kennedy, on the basis of twenty-five years' purchase of the present or even an appraised valuation of the nett rental, and holograph acceptance thereof by the said pursuer, dated Edinburgh the 20th September 1888, a valid contract was entered into between the said pursuer and the defender for the sale by the defender to the said pursuer of the estate of Murtly, including the lands and estates of Grantully, Murtly, Strathbraan, and others, situated in the county of Perth, belonging to the defender as heir of entail in possession thereof; and that in respect of the said contract the defender is under legal obligation to apply to our said Lords for authority and power under the Entail Amendment Acts to sell and dispone the said estate; and the defender ought and should be decerned and ordained, by decree foresaid, to implement the said contract, and forthwith to present a summary application to our said Lords, under and in terms of the Entail Acts, and specially the following sections thereof, viz., the 4th section of the Act of the 11th and 12th of our reign, cap. 36, the 5th and 6th sections of the Act of 38th and 39th of our reign, cap. 61, and the 13th section of the Act of 45th and 46th of our reign, cap. 53, or otherwise in terms of other sections of the said Acts, all as the said petition or application may be adjusted at the sight of a person to be appointed by our said Lords in the process to follow hereon, for authority to sell and dispone the said lands and estates to the said pursuer, and to adopt and carry out with all due speed the procedure prescribed by the said Acts, including, if necessary, the compensating of the next heirs for obtaining such authority; and thereupon, after having obtained such authority, to make, execute, and deliver, at the sight of our Lords, a formal disposition of the said lands and estates to the pursuer, the said John Stewart Kennedy, containing all usual and necessary clauses, and to make and execute such other deeds of conveyance, and other deeds as may be necessary for giving effect to the said contract of sale, the defender duly making payment of the price as the same is or may be fixed in terms of the letters above mentioned; or otherwise, the defender ought and should be decerned and ordained to make such application, in terms of said Entail Acts, as shall entitle him to carry out and implement his said contract or agreement with the said pursuer; and failing implement of the foresaid contract, the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuers of the sum of £50,000 sterling in name of damages."

The pursuer was subsequently allowed to amend his summons, when he inserted the following conclusion—"Or otherwise, the defenders ought and should be decerned and ordained by decree foresaid forthwith to implement the said contract, and to execute a formal disposition of the said lands and estates by the defender to the pursuer, the said John Stewart Kennedy, containing all usual and necessary clauses as the same shall be adjusted at the sight of our said Lords, and to make and to prosecute to a conclusion an application to the Court for the sanction and approval of the said sale and disposition, all in terms of the Acts 11 and 12 Vict. c. 36; 16 and 17 Vict. c. 94; 38 and 39 Vict. c. 61; 45 and 46 Vict. c. 53, or any of them, and upon the Court sanctioning and approving as aforesaid to deliver the said disposition to the said pursuer."

The pursuer founded on the holograph letters of 19th and 20th September 1888 above quoted and averred—(Cond. 12) "The defender now declines or delays to implement the contract libelled, and to take the appropriate steps for securing the authority of the Court to the foresaid sale, and in these circumstances the present action is necessary. With reference to the statements in answer it is explained as follows—When the agreement was entered into the petition referred to in condescendence 2 was still pending (*i.e.*, the petition presented in 1885), the defender first offered to proceed with it, and to get the transaction ratified in that petition. Instead, however, of proceeding therewith the defender at his own hand, and without any notice to the pursuer, on 26th October enrolled the said petition, and obtained an interlocutor dismissing it. Thereafter the defender presented the petition referred to after the present action was raised, and he did so not for the purpose of enabling him to carry out the contract, but in order to secure that the contract should not be carried out. For this purpose he has been and is in communication with the next heir of entail so as to prevent any sale by private bargain, or any approval of the sale to the pursuer. Further, the next heir has lodged answers to the petition by the defender, in which, *inter alia*, he founds upon section 22 of the Entail (Scotland) Act 1882, which provides that a sale under the procedure adopted by the defender shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction, and the next heir asks the Court to dismiss the petition as incompetent. A copy of the said answers is produced and referred to. The first interlocutor in said petition was obtained on 7th November, but nothing further has been done since as regards the said petition by the defender."

The defender answered—"Admitted that the petition referred to in condescendence 2 was on 26th October 1888 dismissed on the motion of the petitioner, and without notice to the pursuer, who was no party thereto. Thereafter the defender proceeded without the smallest delay to apply to the Court for ratification of the contract constituted by the missives of sale set forth on record; on 6th November 1888 he accordingly presented a petition to the junior Lord Ordinary for the purpose of enabling him to carry out the contract setting forth the said missives, and craving ratification thereof, and an order of sale of the said estates in terms thereof, and authority to execute a disposition in favour of the pursuer. That application is in dependence before the said Lord Ordinary, and the defender is willing to proceed with it with all reasonable dispatch. He has thus implemented so far as has been possible the terms of his agreement with the pursuer. A print of said petition is produced herewith. It is denied that it was presented in order that the said contract should not be carried out, or that the defender has been or is in communication with the next heir of entail, so as to prevent any sale by private bargain or any approval of the sale to the pursuer. The answers to the said petition are referred to. The pursuer's agents were made aware that the said petition was being prepared, and that it had been lodged before they sent the summons in the present action to the defender's agents to accept service. In these circumstances the action is unnecessary or at all events premature."

The pursuer pleaded—"(1) In respect of the letters condescended on, the pursuer is entitled to decree of declarator and implement as concluded for. (2) Failing implement of the said contract the pursuer is entitled to damages as concluded for. (4) In respect the defender has not presented, and is not prosecuting any petition in *bona fide* in order to carry out the sale, but, on the contrary, the only petition presented by him being for the purpose of securing, if possible, that the sale should not be carried out, the defences and pleas founded on the said petition should be repelled. (5) The pursuer being entitled to have the authority of the Court so far as necessary for having the said sale carried out, obtained in any competent form, the decree to that effect should be granted."

The defender pleaded—"(1) The action should be dismissed in respect that it is unnecessary, *et separatim*, that it is premature. (2) The pursuer's averments are irrelevant. (3) The defender not being bound to implement the said missives in the manner specified in the summons, should be assoilzied. (4) The defender should be assoilzied in respect that he has not failed to implement the terms of the said missives. (5) In the event of it being held that the said letter and acceptance import a finally concluded obligation on the defender to sell the said estates and make compensation to the next heir as set forth in the summons, he is entitled to have the said transaction reduced and set aside on the ground that it was obtained from him under essential error, fraudulently induced by the pursuer or his representatives. (6) The defender, not being liable in damages to the pursuer, should be assoilzied from the conclusion for payment of £50,000."

The Lord Ordinary (Trayner) on 21st December 1888 pronounced the following interlocutor:—"Repels the 1st, 2nd, and 3rd pleas-in-law for the defender: Finds, decerns, and declares in terms of the declaratory conclusions of the summons: Ordains the defender to implement the contract referred to in said conclusions, and forthwith to present a summary application to the Court as concluded for in the first petitory conclusion of the summons, or otherwise to make such application to the Court, in terms of the Entail Acts, as shall entitle him

to carry out and implement the said contract; *quoad ultra* continues the cause, and grants leave to reclaim.

"*Opinion.*—Had it not been for the concluding paragraph of the defender's letter of 19th September 1888, I suppose it is not open to doubt that that letter, and the pursuer's letter in reply, dated 20th September (if not reduced), would have constituted a valid and binding contract of sale between the parties of the Murtly estates. It is the meaning and effect of that paragraph, therefore, which has to be considered. The paragraph is as follows—'In the event of your acceptance the sale is made subject to the ratification of the Court.'

"It is said by the defender that what he had in view when he conditioned for the 'ratification of the Court' was a proceeding under the Act of 1882, and not a disentail under the Rutherfurd Act and amending Acts. I hesitate to accept that statement on the evidence referred to in support of it, consisting chiefly of statements made in letters by the defender to the pursuer, when asking that he might be relieved of the bargain he had made. But, however that may be, it is not so material to inquire what the defender meant or intended; the question rather is, what he said, and what meaning the pursuer, in considering the defender's offer, might fairly put upon the language used? The circumstances surrounding the transaction, as known to both parties, afford some aid in the solution of these questions. The parties were dealing with an entailed estate, and knew that some proceeding before the Court was necessary to enable the heir of entail in possession to sell the property to a stranger. But what the precise form of the proceeding should be, and on what statute the application to the Court should be based, were matters on which neither of the parties could be supposed to have correct information, or be able to form an opinion. These were matters of detail requiring professional assistance which the parties would leave to their professional advisers. But it needed no professional knowledge or skill for the defender to make, and the pursuer to accept, such an offer as this—I will sell you the entailed estates of Murtly at a specified price, provided the Court will pronounce such an order as will enable me to carry out the sale and give you a valid title. And that, I think, is the offer which the defender made and the pursuer accepted.

"The defender, however, says that his offer was one dependent on the 'ratification' of the Court, and that the Rutherfurd Act and Acts amending the same, make no provision in terms for such a ratification. But neither does the Act of 1882; for while that Act prescribes (sec. 19, *et seq.*) certain procedure under which an order for the sale of an entailed estate may be obtained, it does not provide at all for the case of the Court being asked to ratify or approve of a sale already made—or made provisionally on the Court's approval being obtained. The Court cannot, under the Act of 1882, at any time or under any form of procedure, ratify the sale by the defender to the pursuer. It could only authorise the estates to be sold publicly (for the next heir does not consent to a private sale), and at that sale the pursuer might not be the successful offerer. In short, the Act of 1882 refers to and provides for a sale yet to be effected—not to a sale already made.

"The defender pleads that this action is premature, because he has presented an application under the Act of 1882 asking the Court to ratify the sale to the pursuer. I repel that plea, because if I am right in the view I have taken of that statute the application is inappropriate; and equally so, as it appears from the answers lodged to that application by the next heir of entail, that he does not consent to a private sale; and the Court could not authorise anything but a public sale if the next heir insists upon it.

"The defender having sold the estate in question to the pursuer subject to the ratification or approval of the Court, he is bound to adopt all proper means to obtain such an approval or ratification. By disentailing, or by obtaining the consent of the next heir to a private sale to the pursuer at the price and under the conditions already fixed, he will be able to carry through the transaction with the 'ratification' of the Court, in the sense in which (according to my view) that word is used in his offer to the pursuer."

By section 4 of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) it is enacted that "it shall be lawful for any heir of entail, being of full age and in possession of an entailed estate in Scotland, with such and the like consents as by this Act would enable him to disentail such estate, to sell, alienate, dispone, charge with debts or incumbrances, lease or feu such estate in whole or in part, and that unconditionally, or subject to conditions, restrictions, and limitations, according to the tenor of such consents, the authority of the Court of Session being always obtained thereto in the form and manner hereinafter provided," &c.

By the 5th section of the Act 16 and 17 Vict. cap. 94, entituled "an Act to extend the benefits of the Act of the eleventh and twelfth years of Her present Majesty for the amendment of the law of entail in Scotland," it is provided as follows—"It shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispone, charge with debts or incumbrances, lease, feu, or excamb his entailed estate, in whole or in part, under the provisions of the said recited Act, to execute without the previous sanction of the Court a deed of conveyance or contract of excambion, or other deed for giving effect to such sale, disposition, charge, lease, feu, or excambion, and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit or when such production shall be ordered by the Court; and on such application being presented, and such consents, if any, as are required by the said recited Act being obtained, containing express consent to and approval of such deed of conveyance, or contract of excambion, or other deed executed as aforesaid, and on the Court being satisfied that the procedure is regular and in conformity with the provisions of the said recited Act and of this Act, the Court shall pronounce an interlocutor approving of such sale, disposition, charge, lease, feu, or excambion, as the case may be, and of the deed executed as aforesaid for carrying the same into effect, and thereupon such deed shall have the

same force and effect in every respect as if the same had been made and executed at the sight of the Court in terms of the said recited Act."

Section 5 of the Entail Amendment Act 1875 (38 and 39 Vict. cap. 61), contains the following provisions—"Whereas it is expedient that section 3 of the Act of the eleventh and twelfth years of Her Majesty, chapter 36, should be amended: Be it enacted as follows—(1) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the first day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may competently be given after such application has been presented to the Court, and in the course of the same: (2) And in the event of any of the foresaid heirs, except the nearest heir for the time, whether an heir-apparent or not, entitled to succeed declining or refusing to give, or being legally incapable of giving, his consent, the Court may dispense with such consent in terms of the provisions following."

Then follow provisions for ascertaining the money value of the expectancy of such heirs, for having the amount lodged in bank or secured over the estate for their behoof, and for dispensing with their consents.

Section 6 of the same Act provides—"The provisions of the preceding section with reference to applications for authority to disentail shall apply also where an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to 1st August 1848, applies for power to sell, alienate, dispone, charge with debts or incumbrances, lease or feu, or excamb such estate in whole or in part; provided always that nothing contained in this Act shall render it necessary in any application with reference to an entailed estate to obtain the consent (or the dispensing with the consent) of any heir of entail whose consent would not have been necessary before the passing of this Act."

By the 13th section of the Entail Act of 1882 (45 and 46 Vict. cap. 53), it is enacted as follows—"In any application under the Entail Acts to which the consent of the heir-apparent or other nearest heir is required, and such heir . . . shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir with reference to such application, and shall direct the sum so ascertained to be paid into bank in the name of the said heir, or that proper security therefor shall be given over the estate, and shall thereafter dispense with the consent of the said heir and shall proceed as if such consent had been obtained, and the provisions of sections 5 and 6 of the Entail Amendment (Scotland) Act 1875 shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the first day of August 1848 as well as to entails dated prior to that date." "Provided that if the application is opposed by any creditor of such heir who shall prove that prior to the passing of this Act he has lent money to such heir on the security of his right of succession to or interest in the entailed estate, or by the wife or children of such heir in whose favour he shall have granted provisions under the Entail Acts, the consent of the heir shall not be dispensed with until arrangements have been made for the payment or security of the creditor or wife or children to the satisfaction of the Court," &c.

Section 19 of the same Act provides—"It shall be lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person who if the land had been entailed would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate, or part of it."

Section 21 provides—"The Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as they think proper: Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it will be for the benefit of the applicant."

Section 22 provides—"The Court shall fix the time and place and manner of sale, and may authorise the sale of the estate, or such part of it, in whole or in lots, and either by public auction at such upset price, or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and if more advantageous to the parties, may direct the sale to be for a feu-duty, instead of a price to be immediately paid, or partly for a feu-duty and partly for a price." "Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction." "When the estate is sold by public auction any creditor or person interested other than the applicant may be the purchaser."

The defender reclaimed, and argued—The offer contained in the defender's letter of 19th September was made "subject to the ratification of the Court." The defender had all along been quite willing to implement the bargain as he understood it, and the petition of 6th November 1888 had been presented for that purpose. He had a material interest to proceed under the Act of 1882 for an order of sale, because in that case he would still have the estate by him in money, if not in land, and thus would retain the benefit arising from his chance of surviving the next and only other heir. He had also reason to have that Act in his mind because of the previous application he had made under it. On a fair construction of the concluding words of the defender's offer they referred to proceedings for an order of sale under the Act of 1882. The word "ratification" was applicable to proceedings taken under that Act, and not to proceedings under the Act of 1848, sec. 4. Under the Act of 1848 a sale was just a disentail followed by a sale by the heir of entail as fee-simple proprietor. In no sense was there a "ratification" of the sale by the Court under that Act, as the Court had not to apply its mind to the question of the value of the estate, but was bound to approve of the application, provided the interests of creditors

and heirs were safeguarded. The Act of 1882, on the other hand, implied a judicial approval of the sale after inquiry into the value of the estate. Under the Act of 1848 the consents were antecedent to the presenting of the application, so that no difficulty could thereafter arise as to the amount of compensation payable. The pursuer's argument with regard to an application under the 5th section of the 1853 Act was ill-founded. The defender could not obtain the "ratification" of the Court under that section unless he obtained the consent of the next heirs to the transaction into which he had entered, for the dispensation of consents contained in the Act of 1875 and 1882 did not apply to an application under that section, as it was not an application to sell, alienate, or dispone, but for approval of a transaction already entered into. Section 5 of the Act of 1875 was also in express terms stated to be an amendment of section 8 of the Act of 1848. There was no doubt that the heir might under the 1882 Act come forward and insist on a public sale. That was, however, just a difficulty to which the agreement was subject. If no "ratification" were possible under any Act the result would be that the bargain would fall as involving an impossible condition. Further, specific implement was impossible, as the approval of the Court could not be given without the voluntary consent of the next heirs in the case of a completed transaction such as this was on the pursuer's contention. The objection here taken was never raised in the case of *Merry & Cuninghame* v. *Lord Glasgow's Trustees*, and so that case could not be cited as an authority here. There was no case in which decree had been given for specific implement where what was to be done was not a single act but a course of conduct. This was not a case in which the Court would do anything more than find the defender due a sum in name of damages—*Moore* v. *Paterson*, Dec. 16, 1881, 9 R. 337; *Winans* v. *Mackenzie*, June 8, 1883, 10 R. 941; *Hendry* v. *Marshall*, Feb. 27, 1878, 5 R. 687. The result of this bargain might be grossly unfair to the defender, who might be entirely stripped of his property if the compensation payable to the next heir were fixed at a high rate. The fact that the pursuer measured the damage for non-implement at £50,000 implied that this was a very imprudent contract on the defender's part. It was also clear that if the pursuer's construction of the bargain were right there had been great misunderstanding on the part of the defender. In England the Court would not interfere to enforce specific performance where that would either result in gross unfairness to one of the parties to a contract, or where there would be great difficulty in working out the contract—Fry on Specific Performance, pp. 36–37, 167 *et seq.*; *Thomas* v. *Dering*, 1 Ke. 729; *Wycombe Railway Company* v. *Donnington Hospital*, 1 Ch. App. 268.

The pursuer argued—There were two reasons against carrying out the contract as the defender proposed. 1. The Act of 1882 did not contemplate the interposition of the authority of the Court to a bargain already made. 2. Under that Act the next heir might come in and defeat the contract by insisting on a sale by public roup. The bargain meant no more than that the seller undertook to apply to the Court for ratification of his offer. Parties need not have had in view any particular statute at all. No doubt under section 4 of the Act of 1848 it was necessary to go to the Court *ab ante*, whether the application was to sell or to disentail, but that was not so under section 5 of the Act of 1853, under which an already executed deed might be produced for the sanction of the Court. "Ratification" was a very appropriate word in view of the Act of 1853. To "ratify" meant to "approve" or "sanction," as defined by Webster, and these were the very words used in the Act of 1853. The characteristic of that Act was that it assumed the bargain made, and dealt with it *ex post facto*. The defender had it in his power to obtain the ratification of the Court by the payment of the amount of money necessary to secure the rights of creditors and compensate the next heir. The dispensation of consents introduced by the Acts of 1875 and 1882 applied by the express provision of the latter Act to all applications to which consents were required, and necessarily therefore to an application under the Act of 1853. The defender's interests were amply safeguarded in the bargain. In the event of a disentail, the value of the estate being calculated at twenty-five years' purchase, the next heir would get £257,000, and the defender £115,000, which, deducting a sum to meet the widow's jointure, would leave him a very handsome annuity, larger indeed than the rental he at present enjoyed. It was therefore quite reasonable for the defender to have entered into a bargain of that kind. Suppose the word "ratification" were ambiguous, the meaning to be given to it would surely be that which made it possible to give effect to the contract, and not that which destroyed the contract. Dubious clauses in a contract were to be read against the granter. Where a contract were impossible of fulfilment, the Court had even corrected it to the extent of altering a term—Bell's Prin. sec. 524; Ersk. Inst. iii. 3, 87; *Coutts & Company* v. *Allan & Company*, January 9, 1758, M. 11,519. With regard to the question of specific implement, the cases of *Paterson* and *Winans* had no application to the present case. In *Paterson's* case the Court treated the price demanded from the party called upon to implement the contract as prohibitory, and yet before that party could implement the contract he had to acquire the subject for which the price was demanded. In *Winans'* case the merits were not considered; the cottars were not called, and they were the parties most interested. It was not a sufficient objection against specific implement for the defender to say that he had arranged the price without calculating all the burdens, and that he found it inadequate, and must therefore be off with the bargain. Inadequacy of price might be an element to be considered in an action of reduction. The principle on which the Scottish Courts proceeded was that they would not pronounce an order when they had no means of giving practical effect to it. Here there was nothing out of the way in what the defender would have to do. There was nothing against specific implement in the nature of the acts required—*M'Arthur* v. *Lawson*, July 19, 1877; *Mackenzie* v. *Balerno Paper Mill Company*, July 12, 1883, 10 R. 1147; Fraser on Master and Servant (3rd ed.), 101. In the case of *Merry & Cuninghame* v. *Lord Glasgow's Trustees* specific

implement had been ordered of acts of the very same nature as the defender was here called upon to perform, the Court having found Lord Glasgow under a legal obligation to grant the lease. In another class of cases where the act required could be done by some other person specific implement would not be ordered, as not being necessary. Here, if the defender refused to authorise a petition to be presented, the Court would probably allow one to be presented in his name. The English cases founded on by the defender arose out of a doctrine of the Equity Courts, which was a refinement not accepted in Scottish Courts. The Court of Chancery went a much greater length in reforming contracts than the Scottish Courts would do—*Stewart* v. *Harcourt*, December 2, 1875, 3 R. 192. In England the Court would have had no difficulty in reforming the contract, and would have admitted parole evidence of the intention of parties. Error on the part of one of the parties with reference to a term used in a contract was never recognised in Scotland as a ground for annulling the contract.

At advising—

LORD PRESIDENT—The conclusion of this summons is for declarator that by certain missives a valid contract was entered into between the pursuer and defender for the sale by the defender to the pursuer of the estate of Murtly, "including the lands and estates of Grantully, Murtly, Strathbraan, and others situated in the county of Perth belonging to the defender as heir of entail in possession thereof, and that in respect of the said contract the defender is under a legal obligation to apply to our said Lords for authority and power under the Entail Amendment Acts to sell and dispone said estate." The Lord Ordinary has decerned in terms of that declarator. He has gone further and pronounced a decerniture, of which I shall have something to say hereafter. But the question really at issue between the parties is raised completely by that declaratory conclusion. Now, the missives which are said to constitute this contract of sale are dated on 19th and 20th September of last year. The defender writes in these terms—"*Murtly Castle, 19th September* 1888—Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof forever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation of the nett rental thereof as may be ascertained by an agreed appraisement, you appointing one and me the other, and if the two cannot agree a third party to be chosen by the two. Payment to be made in cash, unless it can be otherwise agreed as to any part, and possession to be given not later than the 15th May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court."

The answer of the pursuer is this—"*Edinburgh, 20th September* 1888—Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto."

The defender shortly thereafter was desirous of repudiating this bargain, but the pursuer declined to accede to the proposal, and brought this action for the purpose of enforcing it. I see that on the same date on which the principal summons was signeted the defender presented a petition to the Lord Ordinary apparently for the purpose of carrying out his obligation in terms of the conclusion of the summons. The date is in both cases 6th November 1888. Now, that was a petition presented under the authority of certain sections of the Entail Act of 1882, beginning with the 19th section, which confers a new power entirely upon heirs of entail to convert the entailed land into entailed money, and the conditions prescribed as applicable to the exercise of that power are somewhat peculiar, and require a very strict attention. The 19th section provides that "it shall be lawful for the heir of entail in possession of any entailed estate, or where an entailed estate consists of land held in trust for the purpose of being entailed for the person, who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person to apply to the Court for an order of sale of the estate, or part of it."

The 21st section provides that "the Court shall procure a report as to the value of the estate, and as to the rights and charges affecting it, and shall, unless it appear that any patrimonial interest would be injuriously affected thereby, order the estate, or a part of it, to be sold in such manner as they think proper: Provided that in the case of any such application by or on behalf of a married woman, minor, pupil, or other person under disability, the Court shall not make the order unless they are satisfied that it shall be for the benefit of the applicant."

Then by the 22nd section it is provided that "the Court shall fix the time and place and manner of sale, and may authorise the sale of the estate, or such part of it, in whole or in lots, and either by public auction at such upset price or by private bargain at such price as the Court may direct, or partly by public auction and partly by private bargain, and if more advantageous to the parties, may direct the sale to be for a feu-duty instead of a price to be immediately paid, or partly for a feu-duty and partly for a price: Provided that the sale shall not be by private bargain if either the applicant or the next heir shall intimate within one month after the order for sale that he desires the sale to be by public auction."

Upon the recital of this statute and of the missives which passed between the parties, what the defender prayed the Court to do was this, to ratify and confirm the contract constituted by the missives of sale set forth in the peti-

tion, and to grant an order of sale of said estate at the said price of £372,982, 10s. 10d., which is the rental of the estate at twenty-five years' purchase in terms of the said missives. This petition was presented apparently for the purpose of carrying out that clause in the missives which is the concluding clause of the defender's letter of 19th September—"In the event of your acceptance the sale is made subject to the ratification of the Court." Now, it appears to me that the procedure taken by the defender under the Act of 1882 is not a proceeding for the purpose of obtaining the ratification of a sale already made, except in so far as that professes to be done by the terms of the prayer, because with reference to the sections of the statutes which are quoted in the petition it is very plain that the Court could not ratify in any sense of the word a sale already completed. And accordingly the next heir of entail appeared in answer to this petition, and he stated in the first place that the petition was incompetent, that it was not in conformity with or warranted by any of the Entail Statutes. And he said further, that a sale in the manner and at the price proposed would very injuriously affect the patrimonial interests of the heir, which, I think, in other words means as plainly as if he had used those other words—"I will object to a private sale." In these circumstances it must be perfectly obvious, I think, that that petition is an extremely incompetent proceeding. It is clearly not competent, because the prayer of the petition is not only unwarranted by the clause of the statute, but is in direct contradiction with the provisions of the statute; and in the second place, because the petitioner has not obtained, and apparently never will obtain, the consent of the next heir to a private sale at the price fixed by the missives. Therefore it comes to be considered what the defender is bound to do in execution of his contract of sale—what he is bound to do for the purpose of obtaining the Court's ratification of that sale.

I think there are means under the Entail Acts of obtaining such a ratification of this concluded sale, not under the clauses referred to in the petition and founded on by the defender, but upon other clauses, and particularly under the authority granted by the Act of 1853. The first section of any statute authorising a sale of entailed estates is the 4th section of the Act of 1848, the original Entail Amendment Act. It contains power to any heir of entail who was in the same position as an heir of entail who could disentail the estate, to sell the estate with the same consents and subject to the same conditions as he required to have under the clauses which enabled him to disentail. But the Act of 1853 introduces an amendment upon that 4th section. It is the 16th and 17th Vict. c. 94, and it is entitled "An Act to extend the benefits of the Act of 11th and 12th years of Her present Majesty for the amendment of the law of Entail in Scotland." It provides by section 5 that "it shall be lawful for any heir of entail who is or shall be in a position to sell, alienate, dispone, charge with debts or incumbrances, lease, fee, or excamb his entailed estate, in whole or in part, under the provisions of the said recited Act, to execute without the previous sanction of the Court a deed of conveyance or contract of excambion, or other deed for giving effect to such sale, disposition, charge, lease, feu, or excambion; and to produce such executed deed either along with an application to the Court for its sanction thereto, or at any time in the course of the proceedings under such application when he shall think fit, or when such production shall be ordered by the Court; and on such application being presented, and such consents, if any, as are required by the said recited Acts being obtained, containing express consent to and approval of such deed of conveyance or contract of excambion, or other deed executed as aforesaid, the Court shall pronounce an interlocutor approving of such sale, disposition, charge, lease, feu, or excambion, as the case may be, and of the deed executed as aforesaid for carrying the same into effect, and thereupon such deed shall have the same force and effect in every respect as if the same had been made and executed at the sight of the Court in terms of the said recited Act."

The peculiarities introduced by this Statute of 1853 are these—that an heir of entail is entitled to come to the Court after having made a contract of sale at a specified price, and to lay before the Court the disposition which he proposes to execute giving effect to such sale, and if the Court are satisfied that due provision has been made for the interests of heirs of entail and creditors, then it is imperative upon the Court to approve of the sale. The words are, "the Court shall pronounce an interlocutor approving of such sale." But no doubt under this clause the Court must be satisfied that the proper consents have been given by the heirs of entail interested, and also that all the burdens upon the estate have been duly provided for. Now, if there had been no subsequent statutes, of course the defender here could not have proceeded with the petition under that statute without the consent of the next heir of entail, the only existing heir of entail, as it happens in this case, and he must have obtained his consent to the application and to the proposed deed of conveyance. But then there are other sections which require to be attended to before we arrive at the full effect, as the law now stands, of a petition presented under this Act of 1853. In the first place by the Act of 1875 (38 and 39 Vict. c. 61) there is a very important provision in the 5th section—"(1) In any application to the Court of Session for authority to disentail an entailed estate in Scotland, holden by virtue of any tailzie dated prior to the 1st day of August 1848, the consent of any of the heirs of entail mentioned in the recited section entitled to succeed to such estate may be competently given after such application has been presented to the Court, and in the course of the same. (2) In the event of any of the foresaid heirs, except the nearest for the time, whether an heir-apparent or not, entitled to succeed, declining, or refusing to give or being legally incapable of giving his consent, the Court may dispense with such consent, in terms of the provisions following."

Then there follows a provision for ascertaining the money value of the expectancy of such heirs, and upon such money value being ascertained the Court shall direct the amount to be lodged in bank for the benefit of the heirs whose consents would have been required under the previous Act; and then they shall dispense with the consent of such heirs. Now, under the statute there still remains the necessity

for the consent of the nearest heir, and this section is also confined to the case of disentail only, and further it is confined to the case of tailzies executed before 1848. But the immediately following section of the same Act introduced another provision in these terms:—"The provisions of the preceding section with reference to application for authority to disentail shall apply also where an heir of entail in possession of an entailed estate in Scotland, holden by virtue of any tailzie dated prior to 1st August 1848, applies for power to sell, alienate, dispone, charge with debts or incumbrances, lease or feu, or excamb such estate in whole or in part: Provided always that nothing contained in this Act shall render it necessary in any application with reference to an entailed estate to obtain the consent (or the dispensing with the consent) of any heir of entail whose consent would not have been necessary before the passing of this Act."

Now that makes the provision of the Act of 1875—the 5th section of the Act of 1875—applicable to cases of application to sell as well as to disentail. And lastly, we come to the 13th section of the Act of 1882, which introduced still further innovations. The 13th section of the Act of 1882 is an amendment of the previous Act in those particulars, and is not in any way connected with the clauses of that Act of 1882 which I have already read, for the purpose of enabling an heir of entail to convert an entailed estate from land into money. There is no connection between those two parts of the statute at all. This 13th section has reference entirely to applications authorised by the previous statute, whereas the 19th and following sections introduced a new form of application for a new purpose. The 13th section was this—"In any application under the Entail Acts, to which the consent of the heir-apparent or other nearest heir is required, and such heir or the curator *ad litem* appointed to him in the terms of this Act shall refuse or fail to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, with reference to such application, and shall direct the sum so ascertained to be paid into bank in name of the said heir, and shall proceed as if such consent had been obtained, and the provisions of section 5 and 6 of the Entail Amendment (Scotland) Act 1875 shall apply to the nearest heir as well as to other heirs, and shall apply to all applications to which consents are required, and to entails dated on or after the 1st day of August 1848, as well as to entails dated prior to that date."

This is a very comprehensive section. It dispenses with all consents whatever, and in place of consent introduces a rule of buying off those whose consents were previously required, including the next heir as well as more remote heirs; and it makes the provisions of the Act of 1875 applicable to all applications to which consents are required, and to all entails whatever, no matter what their date may be. What is the result? It comes to this, that under the Act of 1853, as amended by these subsequent Acts, an heir of entail in possession is entitled to come to the Court and state to the Court that he has sold the entailed estate, and to produce a disposition for the purpose of giving effect to that sale. He requires no consents to enable him to do so, but the Court of course still require to see that the expectancy of the succeeding heir or heirs of entail is valued and money secured, and the burdens on the estate duly provided for before they will sanction and approve of the sale already made. But if they are satisfied upon these two points that the expectancies are duly valued and provided for, and that the burdens upon the estate are all provided for, then it is imperative upon the Court to sanction the sale, and the sale shall have the same effect, as the Act of 1853 provides "it shall have the same force and effect as if the same had been executed at the sight of the Court in terms of the said recited Act." Now, it appears to me that when an heir of entail has carried through an application under the Act of 1853 in the manner which I have now detailed he has obtained the ratification of the Court to a sale already made, and thus has fulfilled the very words of that clause in the missives which provided that the sale shall be ratified by the Court.

I am therefore of opinion that it is the duty and obligation of the defender in this case to apply to the Court under the statutes which I have thus enumerated; that he is bound to produce to the Court a disposition of the estate in terms of the missives, and to pray the Court to approve of that, and to give it their sanction—that that is the only way in which he can fulfil the obligation imposed upon him by the contract with the pursuer into which he entered in the month of September last. Therefore, while agreeing with the Lord Ordinary to decern in terms of the declaratory conclusions of the summons, it rather appears to me that the next step to be taken is to have a disposition of the estate executed by the defender in favour of the pursuer, and I think we should take the course which we did in the *Earl of Glasgow's* case, and appoint that disposition to be prepared at the sight of the Court by some conveyancer to whom we may remit for the purpose. And when that disposition comes before us we can then decern further in terms of the petitory conclusions of the summons as to the presenting by the defender of the requisite application to the Court for carrying that sale into effect.

Lord Mure—The main question we have now to decide, dealing with the reclaiming-note from the Lord Ordinary's interlocutor, is, what is the meaning of that passage in Sir Douglas Stewart's letter in which he says—"In the event of your acceptance the sale is made subject to the ratification of the Court." It is contended by the defender that this is to be done by means of a petition which I understand he presented under the Act of 1882. But I think we must take it that the ordinary meaning of the words "ratification of the Court," and what must have been in the minds of the parties, was that they should apply to the Court to get under some of the Acts of Parliament applicable to entails, by which the Court had power given to them to sanction such a step as that which was proposed when the offer was made and accepted. Now, I quite agree with your Lordship that the only Act of Parliament which appears to point at proceedings of the nature which would come up to the expression "ratification of the Court" are proceedings taken under the Act of 1853, dealing with the case

where an heir of entail is authorised to sell an estate and make a disposition of it, and then come to the Court for ratification. I understand your Lordship's opinion to be that that is the course which the heir of entail ought to take, and I concur in your Lordship's view. Your Lordship has made a clear exposition of the statutes, and I concur in the course which your Lordship suggests should be adopted.

Lord Shand—I concur with Lord Mure in thinking that the only question to be determined in this case is in regard to the meaning of the words—"In the event of your acceptance the sale is made subject to the ratification of the Court," and I think in determining the meaning of these words we must have regard to what the purchaser was entitled to take to be their meaning. It is not a question entirely of what was in the mind of the seller when these words were used, but the question is, how was the purchaser entitled to read these words when he gave a written acceptance of the offer? Now, I think the word "ratification," as used here, simply means confirmation or approval. Both parties knew the estate was entailed, and of course before the Court can either confirm or approve of the sale of an entailed estate, it must be shown to the satisfaction of the Court that the interests of the heirs of entail entitled to compensation have been protected, and that creditors who may have claims against the estate have also had their debts provided for. It is essential that in every proceeding by which there is to be a dealing with an entailed estate it shall be under the statutes subject to the approval of the Court. Now, looking at the contract in that aspect of it, and without going over the various provisions of the statutes to which your Lordship has referred, it is quite plain that on the one hand there is a mode of proceeding by which the seller of this estate is in a position of exercising a right to get the approval or confirmation of the Court. He may, under the section of the Act of 1853, to which your Lordship referred, execute a deed of conveyance, he may present it to the Court, and ask for the confirmation or approval of it, and the Court, if satisfied that the interest of the heirs of entail and creditors have been provided for, will grant approval accordingly. There would have been a block in the way of a proceeding of that kind if this contract had been entered into in 1853 or immediately afterwards, because the next heirs of entail who had a material interest might then have refused their consent. But in 1875 there was a statute passed which enabled the heir in possession to compel the consents of the second and third heirs next entitled to succeed, and under the Act of 1882 the heir in possession can equally compel the next heir to himself to give his consent. It is important to observe that such next heir is not entitled to enforce such a payment for his interest as shall amount to a prohibitory price for it, for the statute contains provisions declaring that a reluctant heir may be compelled to give his consent upon reasonable terms. If the consent be refused the Court are in a position to make such inquiry as will enable them to ascertain the true value of the heir's consent, which being ascertained, the value of it is fixed, the money is consigned, and the Court has thereupon power to dispense with the consent altogether. And so it is quite clear that in that view of the case there is no difficulty whatever in this contract being carried out to the very letter of it according to the view which I think any buyer of this estate upon that letter was entitled to entertain.

The proposal that is made in defence to this action is—not to adopt a proceeding under the Entail Acts which will secure the end which the seller of the estate became bound to secure if he could—the proposal is to present an application to the Court in such a form that the approval of the Court cannot be obtained. The proposal is, as I understand, to apply to the Court for authority to have the estate sold at the price agreed on to the present pursuer for the purpose of substituting entailed money in room of the estate. But one condition of carrying out a proposal of that kind is that you must carry the next heir with you in some respects, and if he refuses to give his consent to the arrangement he can block the proceedings entirely. Your Lordship has read the section which provides that in an application of that kind to convert an entailed estate into entailed money, the next heir has nothing to do but appear and say, "I object to a private sale, and insist on a sale by auction." In this way he can absolutely prevent a private sale. And if he takes up that position, what is the effect upon a bargain of this kind? Why, it destroys the bargain, because it is a sale by private bargain, and if a public sale were ordered, Mr Kennedy would have to appear in the market as a competitor with any others who might come forward for the estate. In point of fact, as I read the answers which Mr Fothringham, the next heir, has lodged in the application by Sir Douglas Stewart, in which he says he declined to consent to a sale "in the manner proposed," I understand he means that if a sale were to take place under that petition, he would insist that it should be a sale by public auction.

Now, I think in that aspect of the case the question is quite simple. On the one hand the seller, who has stipulated for a ratification or approval of the sale, proposes to adopt a proceeding under the Entail Acts under which he cannot obtain the approval of the Court, because the next heir, having the power under the statute to do so, has interposed a block which will absolutely prevent that. On the other hand, the seller has it in his power to carry out the sale by taking a proceeding, not for selling this estate with a view to substituting entailed money, but for selling the estate so that he shall himself get the reversion of the price. He can have the interest of the next heir valued, and so he can carry out his contract of sale in that way. I am clearly of opinion that upon the question of construction of this contract and obligation the defender is bound to adopt a proceeding which will enable him to fulfil the contract, which it is clear he can fulfil, the matter being absolutely within his power, and that it is no implement of that contract to offer to take proceedings of another nature which a third party has power to frustrate, and with reference to which in this particular case the next heir of entail intimates that he will exercise his power, and so frustrate and prevent the sale being carried out. I am therefore of opinion with your Lordships that, following out the proceedings which are autho-

rised by the Statute of 1853 and subsequent Acts, the defender should be ordained to execute a deed as your Lordship proposes, and that the terms of this deed in the meantime should be adjusted by a man of business.

It is right to notice that when the point as to the mode of working out the different stages of the case with the materials for so doing was argued before the Lord Ordinary when the case was before him, the conclusions of the summons did not describe the proper course to be adopted, but there has been an amendment made on the conclusions to the effect that the defender should be decerned and ordained to execute a disposition of the estate, and thereafter to take and follow out proceedings to have the sale and disposition approved of, and I think that alternative conclusion enables the Court to deal practically with the case as your Lordship proposes.

Lord Adam—In my opinion if this had not been an entailed estate and missives in the terms of the offer and acceptance had been exchanged, in that case there would have been a completed contract of sale, and that would be all that was required. But this was an entailed estate, and therefore such a contract of sale could not be carried out without the use of statutory words, the "approval" or, as it is sometimes called, the "sanction" of the Court, because an application must be presented to the Court to obtain approval in respect of the interests of the heirs of entail and creditors upon the estate. Therefore we find that the concluding words of the offer here are—"In the event of your acceptance the sale is made subject to the ratification of the Court." As I read that, it means this—subject to the sanction or approval of the Court. I think that is the only sensible meaning that can be given to the word ratification there. Well, then, if that be so, so far as I am aware or know, there is only one way in which the approval or sanction or ratification of the Court can be obtained, and that is by a proceeding under the 5th section of the Act of 1853, because that gives authority to the heir of entail to execute and produce, either during or before he presents an application, a disposition of the estate. Now, it is quite true, as Lord Shand pointed out, that if the entail legislation had stopped with the Act of 1853 this sale could not have been carried out, and the sanction or approval or ratification of the Court could not have been obtained, because at that date the consent of the heir or heirs of entail was requisite and there would have been a bar, just as there is a bar to any other proceedings under the Act of 1882 here, because the consent in this case clearly would not have been given. But then have come the subsequent Entail Statutes, which I think it would be a waste of time, after your Lordship's exposition of them, to go over again; but the result of them is just this—that under the Act of 1882 there is a means by which the consent of the heir of entail, which was necessary under the Act of 1853, may be dispensed with by ascertaining the money value of his expectancy or interest in the entailed estate. That is entirely a matter which can be done, and done as a matter of certainty. The Court, if it be done, cannot say anything against the sale; it must just give its sanction and approval of the sale if all the statutory formalities are carried out. There is no difficulty here, it appears to me, therefore in Sir Douglas Stewart doing what he is bound to do, I think, by the offer and acceptance, viz., in the first place, to execute a disposition of this entailed estate, and after having done that to proceed under the 5th section of the Act of 1853 and the subsequent Entailed Statutes, and get the sanction and approval of the Court, which will follow as a matter of course if the statutory requisites are all attended to. Therefore I agree with your Lordship that the first thing is to ordain Sir Douglas Stewart to execute a disposition of this estate.

The Court adhered to the interlocutor of the Lord Ordinary in so far as it repelled the first, second, and third pleas-in-law for the defender, and found, decerned, and declared in terms of the declaratory conclusions of the summons: *Quoad ultra* recalled the interlocutor *in hoc statu*, and appointed the pursuer to lodge in process within fourteen days the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer in fulfilment of the contract of sale constituted by the missives of sale dated 19th and 20th September 1888 founded on by the pursuer.

Counsel for the Pursuer (Respondent)—Lord Adv. Robertson, Q.C.—D.-F. Mackintosh, Q.C.—C. S. Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender (Reclaimer)—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Saturday, February 9.

FIRST DIVISION.

[Lord Trayner, Ordinary.

THE DISTILLERS COMPANY (LIMITED) *v.* DAWSON (W. & J. RUSSELL'S TRUSTEE).

Sale—Constructive Delivery—Undivested Owner—Bankruptcy.

A company of distillers sold to a customer certain parcels of whisky lying in their bonded warehouse, and received payment of the price. The warehouse was only used for the storage of whisky made by the company on which duty had not been paid. The purchaser sub-sold the whisky, and granted a delivery-order to the vendor, which was duly intimated to the company, and an entry notifying the sale was made by them in their books, but no delivery of the whisky ever took place. The vendor became bankrupt. In an adjustment of accounts between the trustee on his sequestrated estate and the company, *held* (*per* the Lord President, Lord Adam, and Lord Kinnear, *rev.* Lord Trayner) that there had been no delivery of the whisky actual or constructive, and that the company therefore remained the undivested owners, and were not bound to deliver it to the trustee as a condition of their obtaining a ranking in the sequestration (*diss.* Lord Mure and Lord

Shand, who held that the circumstances disclosed a case of constructive delivery).

On 15th October 1887 the estates of the firm of W. & J. Russell, wine merchants in Edinburgh, were sequestrated, and Adam Dawson, Edinburgh, was appointed trustee thereon.

The Distillers Company, Limited, 12 Torphichen Street, Edinburgh, and who carried on business at Cambus, Cameron Bridge, Carsebridge, and elsewhere, were creditors of the said firm, and they lodged a claim in the sequestration, in which, after making certain deductions, they showed a balance as due to them of £993, 1s. 7d., and they claimed to be ranked therefor. The trustee admitted the claimants to an ordinary ranking for the sum of £246, 4s. 2d., but only upon the condition that before drawing a dividend the claimants should deliver up to him certain whiskies purchased by the bankrupts from third parties, and lying with the claimants in their capacity as warehouse-keepers, or to pay him the value thereof, amounting to £224, 4s. 4d. The Distillers Company appealed against this qualification in the trustee's deliverance.

The facts were ascertained to be as follows:—The appellants sold the quantities or parcels of whisky above specified to certain third parties, and received payment therefor. The whisky was not delivered to the buyers, but remained in the custody of the appellants in a bonded store belonging to them at their distilleries of Cambus, Cameron Bridge, and Carsebridge. It was admitted that the whisky sold was easily identified and distinguished from the other goods in the appellants' bonded stores. The buyers of the whisky sub-sold it to W. & J. Russell, who paid the price, and received in return a delivery-order addressed to the appellants, which intimated to them the sub-sale to W. & J. Russell. The whisky continued to lie in the stores at the date of the sub-sale and of the bankruptcy of W. & J. Russell. The delivery-orders were duly intimated to the appellants, who acknowledged their receipt, and in consequence thereof transferred the said whisky in their books from the name of the original purchasers to that of the bankrupts. The whisky accordingly stood at the date of the bankruptcy in the name of the bankrupts, who were entitled to demand and obtain delivery thereof on payment of any warehouse rent or other charges due in connection therewith. At the date of the bankruptcy the bankrupts were indebted to the appellants in the sum for which a ranking had been allowed by the trustee. In these circumstances the appellants claimed a right of retention over the whisky in question, not merely for warehouse charges, but also for the debt due by the bankrupts to them. The trustee disputed this right, and claimed delivery of the whisky, subject to payment of warehouse charges only.

In a joint minute of admissions it was stated, *inter alia*, that said warehouses were occupied solely by the appellants, but were subject to the surveillance of the officers of Excise for payment of the Excise duties, and were known in Excise law as "distillers' bonded warehouses;" that the appellants did not keep, and under the Excise rules it is not lawful for them to keep, any whisky in the said "bonded warehouses" but such as was manufactured by themselves, but that they owned and occupied a general bonded warehouse at Queensferry in which they kept whiskies purchased by themselves for the purpose of blending, and which were there blended; that the appellants did not store any whisky except what had been, as above mentioned, either manufactured by them or purchased by them for blending.

The appellants averred, *inter alia*—"Although intimation of their having acquired said stocks was made by W. & J. Russell to the appellants by transmission of delivery-orders in their favour (except in the case of the 20 quarters Carsebridge whisky, of which the delivery-order was in favour of the respondent), and although acknowledgment of said intimation was made by appellants' representatives, transferring said stocks in the appellants' books to the name of the said firm, yet said stocks were never removed out of appellants' possession, but continued all along to lie in their bonded warehouses, and delivery thereof was never demanded prior to the sequestration." They further averred, that though the prices of the said stocks of whisky were paid to them by the original purchasers or their assignees, they were yet entitled to retain and sell them off against the general debt due to them by W. & J. Russell, and that the trustee's deliverance, so far as it negatived this right, was unwarranted.

The respondent (the trustee) averred that "after receiving the said delivery-orders the appellants entered the bankrupts in their books as the owners of the said whisky, and the persons to whose orders it was deliverable, and for whose behoof it was held. Explained that by the custom and practice of the whisky trade throughout Scotland, as well as at common law, delivery-orders such as those above referred to, followed by acknowledgments thereof by warehouse-keepers, constitute an absolute conveyance of the property of the whisky therein mentioned (which is specified and distinguished by the Excise numbers of the casks) from the person in whose name the whisky formerly stood in the bonded warehouse to the person in whose favour the delivery-order is granted, and that after the intimation of said delivery-order the distiller or other warehouseman in whose warehouse the whisky may be deposited holds the whisky for the person in whose favour the delivery-order is granted, as warehouseman for him."

The respondent further founded on the following facts which were thus set forth in the minute of admissions—"The books of the said warehouses are kept by the company's clerks as a part of their office work, and the Excise authorities have a clerk of their own at the several warehouses for the purpose of making out and granting warrants for removal of spirits; that the appellants' clerks keep a warehouse ledger, in which is entered in separate columns the whiskies sold (described by separate numbers, indicating the quality and amount in gallons), the name and residence of the purchaser, the date of the sale and the date from which warehouse rent is charged (it being explained that the appellants do not as a rule charge any warehouse rent for whisky unless it lies for more than six months), the date of delivery, any transfer or transfers which may take place, with the date of the transfer, and the date from which warehouse rent is charged against the transferee—these last-mentioned entries being

made upon presentation by purchasers of delivery-orders by sellers in their favour. The said delivery-orders are in the following or similar terms :—

"*Messrs The Distillers Company, Limited,* 188 .

"*Distillery,*

"Please deliver to the order of the under-mentioned butts, hhds. qrs. whisky,

Numbers.	Date of Bonding.

And oblige,
Yours truly,

"The acknowledgments by the appellants of the receipt of said delivery-orders are in the following or similar terms :—

"*No.* . *Distillery,* 18 .

"Dear Sir—We beg to acknowledge receipt of delivery-order dated 18 granted by in your favour, and we have to intimate that rent on the casks therein specified will be charged to you from .—We are, Dear Sir, yours obediently,

"The Distillers Coy. (Ld.)
per

"*For terms see over.*

"Conditions of Sale.

"*Spirits in Transit.*—Buyers will please see whether casks have been tampered with before signing carriers' delivery-book. If signed for 'in good order,' no claim can afterwards be entertained.

"*Spirits in Bond.*—All spirits sold and stored in the company's bonded warehouses are subject to the following conditions :—

"1. The spirits lie insured by the company, against fire, to the amount of the original invoice.

"2. The spirits will be subject to a rent-charge as follows :—

For casks 80 gallons and upwards, 2d. a-week ; and for smaller cask, 1d. a-week, payable on demand.

"3. The company reserves power to order removal of spirits from their warehouses when from want of room or other cause they find it necessary to do so.

"*Casks.*—Casks charged if not returned within three months.

"When returning casks take receipt from railway company or other carrier, and advise the distillery to which they belong. If this is neglected, and the casks lost, the sender will be held liable for their value."

The appellants pleaded, *inter alia*—"(1) The appellants having a right of retention over the said stocks of whisky specified in the part of the trustee's deliverance quoted in condescendence 3, are entitled to hold the same in security of W. & J. Russell's general debt, subject to their deducting the value thereof in ranking. (2) The said stocks of whisky being the undelivered property of the appellants, they are entitled to retain it against the sub-purchasers' trustee for any debts due to them by the sub-purchasers on general account."

The respondent pleaded, *inter alia*—"(2) The appellants having been paid the price of said whisky by the original purchasers thereof, and granted a discharge therefor, and having accepted delivery-orders regarding said whisky, and granted acknowledgments thereof, and transferred the said whisky in their books to the name of the bankrupts or their trustee, and agreed to hold it for them, all claims at their instance as original proprietors and sellers of the said whisky were extinguished, and their subsequent possession of the said whisky was solely as warehousemen for the bankrupts. (3) Constructive delivery of the said whisky to the bankrupts having taken place by means of the intimated delivery-orders and acknowledgments and entries following thereon, and the appellants' former possession of said whisky having been converted into possession for the bankrupts, or their trustee, the appellants have no lien or right of retention over said whisky for general account."

On 4th July 1888 the Lord Ordinary (Trayner) dismissed the appeal and sustained the deliverance appealed against.

"*Opinion.*—The trustee in this sequestration has admitted the appellants' claim to a ranking, but 'before drawing a dividend the trustee calls on the claimants to deliver to him' certain specified 'goods purchased by the bankrupts from third parties, and lying with the claimants in their capacity as warehouse-keepers.' The appellants appeal against this restriction or condition placed on their right to draw a dividend.

After a statement of the facts above set forth his Lordship continued:—"The ground on which the appellants maintain that they have a right of retention for the debt due by the bankrupts is, that they were not merely warehousemen or custodiers of the whisky, but were at the date of the bankruptcy the undivested owners of the same. Never having delivered the whisky to the original purchasers the property in the whisky did not pass to them, and they could not confer on the bankrupts a higher right than they had themselves, namely, a right to demand delivery. Therefore, as owners of the whisky, they plead the right to retain it on account of debt due to them by the person demanding delivery, on the authority of *Melrose* v. *Hastie*, 13 D. 880; *Harvey* v. *Wyper*, 23 D. 606, and other cases. I am of opinion that the right of retention claimed by the appellants cannot be sustained.

"It is undoubtedly still the law of Scotland (notwithstanding the provisions of the Mercantile Law Amendment (Scotland) Act 1856) that the property in moveables does not pass to a purchaser without delivery, and if the appellants were here in a question with the original purchasers of the whisky the doctrines laid down in *Melrose* v. *Hastie* and other cases would fall to be applied. But these doctrines are plainly inapplicable to a case where delivery has taken place, and I think, in the present case, that there was delivery of the whisky to the bankrupts. The intimation of the delivery-order to the appellants, and the consequent transfer in their books of the whisky to the name of the bankrupts operated, in my opinion, constructive delivery. 'When a delivery-order in absolute terms is presented to a warehouse-keeper, and given effect to by him in the warehouse books, that makes a complete transfer of the goods sold from the previous owner to the possessor of the delivery-order, and puts the possessor of the delivery-order in possession of the goods to the

same effect as if he had bought the goods and obtained actual delivery on a contract of sale'—*per* Lord Justice-Clerk Inglis in *Anderson* v. *M'Call*, 4 Macph. 768. The case I have just quoted from was cited to me as an authority, showing that an intimated delivery-order was insufficient to pass the property, for in that case the delivery-order was not held to have that effect. But *Anderson* v. *M'Call* differs materially from the present case. In that case there was no sale at all; what was really attempted was to effect a security over moveables *retenta possessione*. Dealing with it, however, as a case of sale, it was held that the delivery-order was insufficient to pass the property, because it was a delivery-order by the seller, intimated to the seller himself, in whose custody the goods were. There was no more effected towards passing the property by entering the delivery-order in the seller's books than was effected by the entry in the seller's books, debiting the purchaser with the price of the goods. The judgment in that case proceeded on the identity of the seller with the warehouseman, and in reference to that fact in its legal consequences the Lord Justice-Clerk observed—'In order to operate constructive delivery by means of a delivery-order there must be three independent persons—the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor, there ceases to be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order.' I think the conditions thus stated as necessary to constructive delivery are fulfilled here. There were three independent persons—Watters the vendor, the bankrupts vendees, and the appellants warehousemen. The appellants were not both sellers and warehousemen *quoad* the bankrupts. They had sold to Watters, and been warehousemen for Watters, but the only relation in which they ever stood to the bankrupts was that of warehousemen or custodiers of the goods. Whatever right remained in the appellants, arising from non-delivery to the original purchaser, was surrendered or lost when they delivered the goods constructively to a third and independent party who had no connection with the original sale. I am of opinion, therefore, that constructive delivery of the whisky was given to the bankrupts when it was transferred in respect of the delivery-order, to their name in the appellants' books. It follows that the appellants have no right to retain the whisky, their only right is the warehousemen's lien for warehouse charges connected therewith."

The Distillers' Company reclaimed, and argued—The property of these goods remained with the sellers as there had been no delivery, and nothing but delivery, actual or constructive, could pass the property. Admittedly there had been no actual delivery, for the goods were still in the cellars of the company; nor had there been constructive delivery as occurred where the goods were committed to the care of (1) a neutral carrier, and (2) a neutral custodier, with an entry in their books. Sometimes also goods might remain in the possession of the seller, and yet be held as constructively delivered as in the case when the purchaser leased it to the seller, who then held it under a new and lower title of hire—Bell's Com. vol. i. 5th ed. p. 180, and case there cited—*Gibson* v. *Forbes*, July 9, 1833, 11 Sh. 916; *Smith* v. *M'Ewen*, January 14, 1847, 9 D. 434, 6 Bell's Apps. 340; *Melrose* v. *Hastie*, March 7, 1851, 13 D. 880; *Mathieson* v. *Alison*, December 23, 1854, 17 D. 274; *Wyper* v. *Harvey*, February 27, 1861, 23 D. 606; *Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765. But there was nothing in the present case to transform the vendors into mere neutral custodiers of the goods. The sub-sales could not do this, as the purchasers could not give a better or higher title than they themselves had; the goods belonged to the undivested owner, and all that the original purchaser could give the sub-vendee was a personal right to demand delivery—a *jus ad rem*, not a *jus in re*. Letters by the seller to the original owner which had not the effect of divesting him of possession, did not carry possession to the vendee—*Pochin* v. *Marjoribanks*, March 11, 1869, 7 Macph. 622.

Argued for the respondent—This was a case of constructive delivery. There was here an intimation of the delivery-order, and effect was given to that order, and the assent of the custodier was obtained by the transfer in his books from the name of the vendor to that of the vendee. A bonded warehouse was in a peculiar position; it was under Revenue supervision, and so, though belonging to the vendor, goods stored in it were really in neutral custody. There were thus three independent parties, the vendor Watters, the custodier the company, and the vendee the bankrupt. There were thus the conditions necessary for constructive delivery. The company held two distinct and different positions, manufacturers and sellers, and also warehousemen for rent. They might have had a right of retention against Watters, but that ceased when he sold to W. & J. Russell. If the argument of the other side was correct, then but for the Mercantile Law Amendment Act the company could have retained the whisky against the last purchaser for a debt due to them by any of the intermediate purchasers—*Hamilton* v. *Western Bank*, December 13, 1856, 19 D. 152; *Orr* v. *Tullis*, July 2, 1870, 8 Macph. 936; Mercantile Law Amendment Act 1856; *Mein* v. *Bogle*, January 17, 1828, 6 Sh. 360; *Duncanson* v. *Jefferies' Trustees*, March 4, 1881, 8 R. 563; *Robertson* v. *M'Intyre*, March 17, 1882, 9 R. 772. There was in the present case a new contract of warehousing. If this was established, then the authorities cited by the other side were not in point. The original seller *quoad* the last purchaser was only a warehouseman, though at one time he might have held a higher title.

The case was finally re-heard before their Lordships of the First Division along with Lord Kinnear.

At advising—

Lord President — The question we have to decide in this case arises upon a balancing of accounts in bankruptcy, and of course what is to be done in a case of that kind is to state both sides of the account as they stood at the date of the sequestration, and to strike a balance accordingly. The trustee in the sequestration and the appellants (the Distillers' Company) have adjusted the accounts so far

between them with one exception. The bankrupts were owing the appellants considerable sums of money, and the appellants held in their hands parcels of whisky which had been bought by the bankrupts from them, but the price of which had not been paid, and in regard to these there is no question at all.

But there were other whiskies in the hands of the appellants which stood in a different position, and with reference to which this question has arisen. These parcels of whisky were sold some time ago by the appellants to a person in the trade, and the price was paid, but the goods remained in the hands of the appellants, the sellers. There are certain very important admissions in regard to this matter which it is necessary to keep in view at the outset.

In the joint minute of admissions for the parties it is stated "that the parcels of whisky in question were at the date of the original sale by the appellants lying stored in bonded warehouses which belong to the appellants at their distilleries of Cambus, Cameron Bridge, and Carsebridge; that said parcels of whisky continued to lie in said warehouses at the dates of the several sub-sales, and of the bankruptcy of Messrs W. & J. Russell, and are still there lying; that said warehouses are occupied solely by the appellants, but are subject to the surveillance of the officers of Excise for payment of the Excise duties, and are known in Excise law as 'distillers' bonded warehouses;' that the appellants do not keep—and under the Excise rules it is not lawful for them to keep—any whisky in the said bonded warehouses but such as is manufactured by themselves, but that they own and occupy a general bonded warehouse at Queensferry in which they keep whiskies purchased by themselves for the purpose of blending, and which are there blended; that the appellants do not store any whisky except what has been, as above mentioned, either manufactured by them or purchased by them for blending."

Now, with regard to the bonded warehouses at the appellants' distilleries, it is necessary to keep in view that these are, in a question like the present, simply the premises of the sellers. They are "bonded warehouses" in this sense, that the goods have not paid duty, and they are therefore under the control of the officers of Excise in this sense, that the appellants cannot deliver goods out of the warehouses except upon payment of the Excise duties. That is the single particular in which a warehouse of this description differs from the premises of an ordinary dealer in spirits. In the next place, this admission establishes one very important fact—that from the date of the original sale no delivery of these goods had been made in any sense whatever. The goods were lying at the date of the original sale in the very same warehouse in which they are now. This warehouse is not a warehouse in any other sense than this, that it is a place of custody for the use of the appellants, and of no one else. It is not a warehouse in the sense that the appellants store the goods of other people in it. That is very distinctly admitted in the passage I have just read from the joint minute. Therefore it seems to me that the state of the fact as regards the original sale is just this, that the goods were sold but not delivered.

But the party who originally purchased the goods re-sold them, and the question comes to be, what is the condition and what are the rights of the sub-vendee in such a case? The original purchaser cannot sell the goods in any proper sense, because they do not belong to him. They belong to the undivested owner, and therefore the only thing which the original purchaser can give to the sub-vendee is a personal right to demand delivery of the goods—that is to say, a *jus ad rem*—but the original purchaser having no *jus in re* he cannot give anything more, so that the goods still remain the property of the original seller. No doubt the sub-vendee, having received a delivery-order from the original purchaser, intimated that delivery-order to the original seller in whose hands the goods were. What is the effect of that? Nothing but this, so far as I can see, that it is an intimation to the original seller that the original purchaser has parted with the right he had to demand delivery. He could give no more to the sub-vendee than he had himself. If he himself had only a *jus ad rem*, he could not convey to the sub-vendee a *jus in re*. The delivery-order was intimated to the original seller, and the intimation was acknowledged, and a note was made in the original seller's books that the right to ask for delivery of the goods had passed from the original purchaser to the sub-vendee. It is plain that that cannot operate constructive delivery, because the goods were not in the custody of a third party, but were still in the hands of the original owner of the goods, who remained undivested. Suppose that process of sub-vendition were repeated seven or even twenty times over, the effect would have been just the same in each case. What was passed in each sub-sale was just the same right that the original vendee had, and nothing more—that is to say, the *jus ad rem*, the right to ask for delivery. While the goods remained undelivered they could not pass by constructive delivery, because they remained in the possession and control of the original seller.

The Lord Ordinary has, I think, somewhat misunderstood the position of the case in this respect. His Lordship quotes an observation which I made in the case of *Anderson* v. *M'Call*, 4 Macph. 760, to this effect—"In order to operate constructive delivery by means of a delivery-order, there must be three independent persons, the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor, there ceases to be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order." His Lordship then goes on to say—"I think the conditions thus stated as necessary to constructive delivery are fulfilled here. There were three independent persons—Watters the vendor, the bankrupts vendees, and the appellants warehousemen. The appellants were not both sellers and warehousemen *quoad* the bankrupts. They had sold to Watters and been warehousemen for Watters, but the only relation in which they ever stood to the bankrupts was that of warehousemen or custodiers of the goods." Now, there I think the Lord Ordinary is in error. There are not three independent persons in this case, but only two, because the vendor and the custodier of the goods are identical, and while that continues to be the case

there cannot be three independent persons. There are only two—the vendor and the vendee or his representative the sub-vendee, for the sub-vendee is only the representative of the original vendee, and comes precisely into his shoes.

Upon these grounds it appears to me that the Lord Ordinary is in error, and I think the goods in this case, according to all the authorities, remain the property of the original vendor. Therefore in balancing accounts with the bankrupts he is entitled to set off the security which he held over these goods by way of retention against any claim made against him on behalf of the bankrupt estate.

Lord Mure—The whisky here in question belonged at one time to the appellants. It was sold by them several years ago—some of it as far back as 1881—to various parties, by all of whom the price was paid at the time of sale. None of it was actually delivered, but upon the sales being effected the whisky was duly invoiced to each of the purchasers, and entered in the books of a bonded warehouse belonging to the appellants as having been sold to those purchasers, who were charged with warehouse rent by the appellants. When stored in this warehouse the casks were so marked and numbered as to admit of their being easily identified and distinguished from casks belonging to other parties which were stored in the same warehouse; and the appellants thus became custodiers of the whisky for the purchasers.

Some time after the whiskies were so stored they were sold by the original purchasers, and the price paid to them. On the respective sales taking place an order was given by the original purchaser, who had then become the seller, upon the appellants to deliver to the new purchaser the whisky sold to him, which was duly accepted by the appellants. The name of the new purchaser was then entered by the appellants in their warehouse-book as the party to whom the whisky had been transferred, with a notandum as to the time from which warehouse rent was to be charged against him. On that being done a letter of acknowledgment of the delivery-order, in the form used by the appellants, of which copies have been produced, was sent by the appellants to the purchaser who had presented the order, intimating that "rent on the casks therein specified will be charged" against the new purchaser by the company, which was accordingly done. The appellants in so acting were in all material respects acting as warehousemen, and as such became custodiers of the whisky for the party who had purchased it.

Each of the five parcels of whisky in question were in this way transferred by the appellants to various purchasers, whose names were entered as transferees in the appellants' books. By the month of May 1887 the whole five parcels had been acquired by the bankrupts W. & J. Russell, wine merchants in Edinburgh, and so the matter stood till the sequestration of that firm in October 1887.

Since then the respondent, the trustee on the bankrupt estate, has applied to the appellants to hand over the whisky to him, as carried to him by the sequestration, with a view to the division of the proceeds among the creditors of the bankrupt, including the appellants. This the appellants have declined to do, on the ground that at the time of the original sales the whisky belonged to them, that it had never been actually removed from their warehouse, and was consequently never delivered, so that the property had never actually passed from them either to the first or any of the other purchasers. The ground of the claim of retention therefore is that the right of property is still in the appellants, and that they are entitled to retain the whisky in payment *pro tanto* of their claim against the bankrupt on a general account, and to that extent to obtain a preference over the other creditors of the bankrupt. This plea has been rejected by the Lord Ordinary, on the ground that there had been constructive delivery of the whisky, as explained in his note, and in that judgment I concur.

The case is attended with some nicety and difficulty, arising from the circumstance that the appellants were the proprietors of the whisky at the time of the first sales. But apart from that circumstance, to which I will immediately advert, it was not, and I do not think it can be disputed that what was done by the appellants, in acknowledging and giving effect to the delivery-orders in the way I have described, amounted to, what is called constructive delivery.

In dealing with this question Mr Bell, in the part of his work to which we were referred (vol. i. p. 183, 5th ed.), thus expresses himself—"Where goods are lying in the hands of a warehouseman or wharfinger at the time of the sale, the transfer of them in the wharfinger's books to the name of the buyer, by order of the seller, completes the delivery, making the wharfinger henceforward the custodier for the buyer."

In support of this view he refers to various cases both in this country and in England, and in particular to the opinion of Lord Ellenborough in a case of this description, that of *Harman* v. *Anderson*, 2 Camp. 243, where his Lordship said—"The goods having been transferred into the name of the purchaser, it would shake the best established principles still to allow a stoppage *in transitu*. From that moment the defendants became the trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his own hands. The payment of the rent in these cases is a circumstance to show on whose account the goods are held, but it is immaterial here, the transfer in the books being in itself decisive. I am clearly of opinion that the assignees are entitled to recover." And the law is laid down to the same effect in the passage in your Lordship's opinion in the case of *Anderson*, 4 Macph. 765, quoted in the Lord Ordinary's note.

Applying this rule to the present case it is of importance to attend to what occurred at each of the transferences in question; and I take, by way of illustration, the first of the five transfers mentioned in the joint minute for the parties, that of J. & G. Stewart, the orignal purchasers. They sell their whisky, which was in the appellants' custody as warehousemen, to Watters, and grant an order on the appellants as their custodiers to deliver it to Watters, and that order is accepted. This the appellants could not refuse to do, for the price had been paid, and they had no claim to hold as against J. & G. Stewart. They were therefore bound to deliver, either actually or

constructively, whichever was required. Watters did not want actual delivery at the time, and knowing that the appellants kept a bonded warehouse in which they stored, and held themselves out to the trade as warehousemen ready to store, whisky on payment of warehouse rent, it was arranged that he was to get constructive delivery in the manner I have described, and that delivery is given by the appellants as in compliance with the order.

Now, the effect of this was to give Watters constructively full possession of the whisky just as much, to use the words of Lord Ellenborough, "as if the goods had been delivered into his hands." After that delivery the right which in the person of J. & G. Stewart was a *jus ad rem*, became in Watters a *jus in re* by the joint action of J. & G. Stewart and of the appellants, who were custodiers for Stewart. The appellants were thus by their own act divested in favour of Watters of the right of property in respect of which they now claim to retain the whisky, and the full and complete right of property passed to Watters, and through him to the bankrupts, and so was transferred to the trustee by the sequestration. The appellants therefore cannot now, in my opinion, be allowed to revert to and found upon their original right of property in the whisky as still to any extent remaining in them. It passed from them as I have explained, and the whisky now belongs to the trustee for the general creditors of the bankrupt.

This appears to me to have been beyond doubt what must have been held to have been effected in the case of an ordinary warehouseman. The question is, was there constructive delivery to Watters? If the whisky had been stored by J. & G. Stewart in a warehouse belonging to another party than the appellants, such a transfer as was here made would admittedly have been constructive delivery of the whisky. But it is said not to be constructive delivery, because the forms of delivery were gone through by warehousemen who had been owners of the whisky which was still in their possession. Now, it humbly appears to me that the present is on that account rather an *a fortiori* case. I can myself see no good reason why the original sellers should not be allowed to make constructive delivery to Watters of property, the price of which had been paid to them, and which they had then no right to retain. They were at the time bound to deliver, for they had by accepting the delivery-orders agreed to deliver either actually or constructively. It is admitted that they could have done so actually, and why they should not be held to have done so constructively I must confess myself unable to comprehend. In the view I take of the case I do not consider myself entitled, in justice to parties situated as Watters then was, to interpose such a difficulty in the way of a man getting possession constructively of the goods he had paid for, and of which he was entitled to get full possession; and yet that is what the appellants now contend for, and on this broad ground, as I understood the argument, that in no case could constructive delivery be given by a seller of goods which remained in his possession. But this is, I think, a misapprehension of the law in this respect.

In the part of Mr Bell's work to which I have already referred, he gives (p. 176) several instances of cases of that description to which the rule of constructive delivery would apply. One case is that of trees sold standing, which it is the practice to mark for the buyer, as to which he says—"Such marking is good constructive delivery." Another case is that of cattle sold in a field, which it is the practice "to mark with the buyer's mark, and to leave them for grazing in the inclosure of the seller, the buyer paying the rent." In England a similar rule seems to prevail, for in the case of *Hurry*, 1 Camp. 462, quoted in a note by Mr Bell, goods sold and warehoused by the seller, who also kept a warehouse and charged rent against the buyer, were held to be constructively delivered. Mr Bell doubts the authority of that case, in so far as the charging of rent was of itself held to be sufficient to constitute constructive delivery, but assuming the charging of warehouse rent to be constructive delivery, it is a distinct decision to the effect that the circumstance that the goods warehoused had belonged to the seller, and had never been removed from his warehouse, was no bar to the application of the doctrine of constructive delivery. So also in the case of *Elmore* v. *Storer*, 1 Taunton 460, where a horse-dealer, who also took horses in at livery, sold a horse, and at the request of the purchaser immediately took the horse into livery at his stables, where it was taken charge of by the horse-dealer's servants. In a dispute about the price, the question turned on whether there had been delivery, and it was held that the horse-dealer's charge of it when at livery must be held as possession for the purchaser, although the horse had never been out of the seller's possession. In giving judgment Mansfield, C.J., said—"In the present case after the defendant had said that the horses must stand at livery, and the plaintiff had accepted that order, it made no difference whether they stood at livery at the vendor's stables or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses, but as any other livery stables' keeper might have them to keep."

Plainly, therefore, there is no fixed rule of law to the effect contended for by the appellants as applicable to their position; and holding the question thus raised by them to be open, I am quite unable to see any grounds in law, and there are certainly none in equity, for holding that their proceedings in acting as warehousemen, and giving, in obedience to delivery-orders served on them by the sellers of goods of which they were the paid custodiers, what in law is constructive delivery of those goods, are not to receive effect.

The appellants have been holding themselves out to the trade as warehousemen who store goods on certain conditions as to payment of warehouse rent as other warehousemen do, and goods are stored with them on those conditions and warehouse rent paid. They accept orders made upon them for delivery of those goods, and by doing so they undertake and contract to deliver them, and, as I have already remarked in regard to the case of Watters (and the same observation applies to all the other cases of transfers by the first purchaser), they could not have refused delivery, for they had received payment of the price of the goods, and had no grounds for refusing to act upon the

orders or for withholding delivery. Watters did not require actual, but asked for constructive delivery, and they gave it in a form which in law was good constructive delivery, and so passed the full right of property to Watters, which was transferred by him to the bankrupts. By so acting the appellants gave up, as it appears to me, any right of property that remained to them in the goods. Now, all this was done by the appellants in their character of ordinary warehousemen, and they cannot, as I conceive, now be allowed to set up their alleged right of property as a ground for refusing to hand over the goods to the trustee. I am therefore of opinion with the Lord Ordinary that their plea to that effect should be repelled.

In coming to this conclusion I do not think that I am in any respect disregarding the decisions in the cases of *Matheson*, 17 D. 274, or of *Anderson*, 4 Macph. 764, founded on by the appellants, in both of which judgments I should have concurred. In the case of *Matheson* there were only two parties concerned, viz., Matheson and Alison, the trustee on Dunlop & Company's estate, who had sold the whisky to Matheson. The sale had been entered in the seller's books, but nothing more had been done. There had been no re-sale to any other party, and no delivery-order granted. The Court were unanimous in preferring the trustee on Dunlop & Company's estate, on the ground that there had been no constructive delivery, and held that the purchaser must just rank as an ordinary creditor of the bankrupt. And so also in the case of *Anderson* there were only two parties, viz., the trustee on the sequestrated estates of the seller, and M'Call & Company, the purchasers. An attempt was made to show that the goods had been transferred by an order on a third party—Angus, a storekeeper who had entered the purchasers' name in his books. On inquiry, however, it turned out that the alleged storekeeper was only a servant acting for the seller, and that the form he had gone through could not be held to amount to more than a mere entry of the sale, and of the purchaser's name by the seller in his own books, so that there was in reality no third party concerned. The claim of the purchaser was therefore rejected.

In the present case, however, the facts are altogether different. In each transaction, after the date of the first purchase, there have been three separate parties concerned, taking the transaction I have already given in illustration, viz., J. & G. Stewart, the original purchasers who re-sold the whisky, Watters who purchased it from them, and the appellants, who had assumed the character of the paid custodiers of the whisky for the Stewarts, and who accepted and undertook to act upon the delivery-order granted by the Stewarts, and in obedience to and in implement, as I think, of that order, had constructively delivered the whisky to Watters by transferring it to his name in their warehouse-books, under an arrangement by which he was to be charged with the payment of warehouse rent. This, on the grounds I have explained, completely divested the appellants, and passed the full right of property in the whisky to Watters.

On the whole matter, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Shand—The question in this case is, whether the appellants the Distillers' Company, Limited, were entitled to retain certain parcels of whisky lying in their stores or warehouses, standing entered in their books as belonging to Messrs W. & J. Russell, who are now represented by Mr Dawson, the trustee on their sequestrated estate. They claim a right of retention for the payment of a general balance on an account arising out of transactions between them and Messrs Russell entirely unconnected with the transactions by which the latter acquired right to the whisky in question. Mr Dawson, as trustee on the estate of Messrs Russell, and as representing their creditors, is willing to pay all warehouse charges which the Distillery Company may have for storing the goods, but he disputes their right to retain the goods for their general balance on account.

The decision of the case depends on the question whether the goods are the property of the appellants. If the goods be their property, then the appellants are entitled to plead retention as against the debt due to them by the bankrupts; if not—if the appellants were custodiers merely at the date of Messrs Russell's sequestration in October 1887—then they are only entitled to withhold the goods until they receive payment of their warehouse charges under the right of lien which they have as warehousemen or custodiers of the goods.

The question raised is important, and I think it is a new question. Hitherto, so far as I am aware, the Court in the cases which have occurred for decision has had to deal only with rights of retention pleaded by a seller in respect of claims by him against the original buyer. The right of retention for that class of debts has been maintained against the buyer's creditors where the seller has become bankrupt, and also against sub-purchasers. In this case no such claim is made, and no such claim exists. . The appellants, the original sellers of the whisky, have no right of retention in respect of claims against the original purchaser. But although the right to the goods has been acquired by a series of sub-purchasers, and was ultimately acquired by Messrs Russell, the appellants, founding on an alleged right of property in the goods, claim a right of retention against Messrs Russell, the last of the sub-purchasers, because of a debt due by them on general account.

The position of the different parcels of whisky is detailed in the appendix No. 2 and joint minute for the parties, boxed 22nd November last. In all of the cases the appellants sold the goods several years ago, and at the time of the sale, or shortly afterwards, they received the price of each parcel sold. From that date down to 1887 a variety of transfers of the goods have taken place. In the case of one of the parcels, consisting of two quarters of whisky, there have been six transferences since the goods were originally purchased from the appellants in May 1881. In two other cases there have been four such transfers, and in the remaining cases two transfers. In each of these cases the original purchaser, having paid the price and re-sold the goods, granted a delivery-order addressed to the appellants in the terms stated in the joint minute, and this order having been intimated to them the appellants immediately made entries of

the transfer in their warehouse ledger, taking the goods out of the name of the original purchaser and entering them in the name of the sub-purchaser. At the same time they granted an acknowledgment by letter to the sub-purchaser of the receipt of the delivery-order, adding—"And we have to intimate that rent on the casks" therein specified will "be charged to you" from a date specified, being the day on which the delivery-order was intimated to them; and appended to these letters were certain conditions specifying the rate of rent to be thereafter charged against the transferee for warehousing the goods. In the case of each transfer by the sub-purchaser in favour of another sub-purchaser the same course was pursued—the delivery-order intimated, the transfer of the goods recorded in the appellants' books, and the goods transferred to the name of the transferee, and an acknowledgment of the delivery-order issued with an intimation that the new sub-purchaser would be charged rent at the rates specified.

The appellants are possessed of large bonded warehouses at their different distilleries of Cambus, Cameron Bridge, and Carsebridge, in which whisky manufactured by them is stored. In these bonded warehouses they have been in use for a number of years, by arrangement with persons dealing with them, to allow the goods to remain on storage rent, and each quantity of whisky as purchased is not only entered in the name of the purchaser, and transferred from time to time to sub-purchasers in the manner just explained, but the different casks are marked so as to be readily identified as being the goods specifically described in the delivery-orders and transfer entries. The information furnished by the parties does not show in detail the extent to which the company store or warehouse the goods of others as compared with their own stock; but there can, I think, be no doubt that whisky belonging to themselves and unsold must form a small proportion of the total quantity of goods in their bonded warehouses. Goods sold by them during a number of years have been constantly in use to be left in their custody for payment of warehouse rents, while I should suppose that as manufacturers they will endeavour to make sales of their own goods as soon after they are manufactured as possible.

In considering the effect of the appellants' sales, the delivery-orders and acknowledgments in the terms already mentioned, and transfer entries in their books, as bearing on their claim to be now proprietors of all the whisky in their warehouses, it appears to me to be of much importance to have in view the provisions of the Mercantile Law Amendment Act of 1856. Prior to that statute several cases had occurred in which, although the sellers of goods had received full payment of the price and implement of the contract on the part of the buyer, their creditors on their bankruptcy were held entitled to refuse delivery to the buyer or his creditors, and thus they got the benefit, first, of the price of the goods which the the bankrupt had received, and next of the value of the goods themselves. Even in the case of a sub-purchaser, who in his turn had paid the price of the goods to the first purchaser, and had obtained and intimated a delivery-order, the original seller, notwithstanding the receipt of the price due to him, and the fact that he held the goods merely as an accommodation to the buyer and for his behoof, was held entitled to a right of retention for a balance due to him by the first purchaser on new and different transactions. It appears to me to be impossible to dispute that these cases resulted in serious injustice. I am humbly of opinion that it was not a creditable state of the law that in such circumstances the rights of purchasers who had paid for their goods should have been defeated, and that the sellers who had obtained payment of the price of the goods, which were left in their possession admittedly by arrangement for custody only, or their creditors should still be entitled to refuse delivery. The decisions were rested partly on the doctrine that until delivery of goods under a contract of sale was made the right of property or *jus in re* remained with the seller, and partly on the doctrine of reputed ownership, or at least on the view that merchants were entitled to assume that goods which were in their debtor's possession were their property—that to hold otherwise would enable sellers to obtain fictitious credit—and that this was a good reason for refusing to give effect to constructive delivery. This last was the express ground of judgment of Lord Deas and Lord Benholme in the case of *Mathison* v. *Allison*. In regard to the first of these grounds the result was arrived at by the application of the principle expressed in the brocard, *traditionibus non nudis pactis transferuntur rerum dominia.*

It has always seemed to me that that principle was carried to an extreme length in the cases I refer to—I mean more particularly the cases of *Melrose* v. *Hastie* and *Mathison* v. *Allison*, neither of which unfortunately was reviewed in the House of Lords—that in these cases the principle received effect in circumstances which did not warrant its application. I assume it to have been clearly established in the law of Scotland—as I believe it to have been properly so established—that where there was a simple contract of sale with nothing following on it the property should remain with the seller. But where something material had followed beyond the *nudum pactum*, where the seller had been actually paid the price of the goods, had entered the goods in his books as belonging to the purchaser, and had set them aside and ear-marked and retained them in his premises by arrangement with the buyer for custody only, I am humbly of opinion that the brocard *traditionibus non nudis pactis transferuntur rerum dominia* had no proper application. I should perhaps rather say it had been fully satisfied, because the bare agreement, the *nudum pactum*, had been followed and clothed by implement on the part of the buyer, and by acts on the part of the contracting parties, which constituted constructive delivery. Happily, however, by the legislation of 1856 the gross injustice which had been done to buyers who had not only bought but paid for their goods was in a great measure removed as regards the subsequent dealings of traders; and in the case of sub-purchasers who had intimated their purchases by delivery-orders or otherwise to the original seller all possible right of retention on the seller's part on the ground of any claim of indebtedness against the original buyer on other transactions was abolished. It is true that the enactments of the statute do not alter the legal principle that

the seller of goods retains a right of property in them, or *jus in re* until delivery, actual or constructive; but the statute provided a remedy for the injustice and, as I think, the mischief of the law, as it had been interpreted by decisions, to an extent which it appears to me materially affects the decision of the present case. After an examination of the statute with reference to the change effected in the law, Lord Blackburn observed in the case of *M'Bean* v. *Wallace & Company*, 8 R. (H. of L.) 112—"The chief practical difference arising from the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser was that the vendor's creditors by poinding and by sequestration could take the goods. There is a nominal difference still between the law of England and the law of Scotland; but for all practical purposes the law of Scotland, where there has been a contract of sale though no delivery, is made identical with the law of England in the actual result." In the case of a sub-purchaser, particularly who has intimated his subpurchase, it seems to me that his Lordship's words are literally true.

The appellants in this case set up a claim of property to the goods which they sold years ago, and the right to which in some cases has, as I have observed, passed through several parties till it became vested in the bankrupts. They have admittedly no claim whatever to hold the goods against the purchaser from them. They have received the price, and even if the original purchasers were debtors to them in account they cannot on that ground maintain any right to retain the goods against a sub-purchaser who by intimation of the delivery-order has intimated his sub-purchase. The only means by which the appellants could have acquired such a right was not by asserting any right of property in the goods, but by resorting to the diligence of arrestment of their debtor's goods—*i.e.*, the goods of the original purchaser—in their own hands—a diligence which is competent to all other creditors of the purchaser, but which must be resorted to before intimation of the sub-sale.

It is in these circumstances that the legal effect of the intimated sub-purchase, the transfer of the goods in the books of the company, and the intimation of a charge for rent is to be considered—and that in a question with persons who as part of their ordinary business store goods for rent. It humbly appears to me that the result of the dealing between the appellants as the original sellers—who can no longer retain the goods on account of any obligation of the purchaser from them—and sub-purchasers, is that constructive delivery of the goods has been given to the latter. The system on which the company acts, and has acted for years, in my opinion makes them (as the Lord Ordinary has held) warehousemen or store-keepers in a question with sub-purchasers with whom they have dealings; and it is only right that this should be so, for much the greater part of the goods in their warehouse is held for sub-purchasers and for payment of warehouse rent. There is no doubt that if the delivery-orders and relative intimations and transfer entries in the company's books had occurred in the case of goods stored in an ordinary public warehouse, that would have been conclusive in the respondents' favour. Why should the result be different in the case of the appellants who are to a large extent warehousemen or storekeepers, although they do not receive and store whisky other than their own manufacture? It is said that the legal effect is different because they were originally sellers of the goods. The provisions of the statute have destroyed the rights of retention which persons in their position formerly had, at least to the extent I have already stated; and these provisions have at the same time, as it appears to me, made it also more easy than formerly for persons buying from the original purchasers to obtain from the appellants constructive delivery of the goods so bought and warehoused with them; and for the appellants to give such delivery. The appellants were bound to give actual delivery if asked, as they could not retain the goods even if the original purchaser owed them a general balance, and there is every presumption in favour of constructive delivery and against the notion that the sub-purchaser would elect so to transact as to leave the appellants owners of the goods which he merely stored with them.

It do not know whether it is maintained by the appellants that they cannot give constructive delivery of goods of which they were the original sellers, and which have continued to lie in their warehouse. If that be maintained, I think the contention is clearly unsound. Lord Mure has given several instances of constructive delivery of subjects purchased and left with the seller, even where the seller did not hold himself out, as the appellants do, as warehouse keepers for rent. Professor Bell mentions the case of the purchaser of a vase who, having paid for it, leaves it with the seller to have certain work executed on it. A person may purchase a horse, and having paid the price, may leave the animal with the seller at livery, or let it to the seller on hire. Surely it could not be successfully maintained that the purchaser of the vase must take it up and carry it outside the seller's premises and return with it, or that the purchaser must take his horse outside of the stable, when he may take it back again, in order to have effectual delivery. The constructive delivery is surely complete without any such proceeding of personal apprehension and removal of the subject from the seller's premises. The law, as I understand it, does not require this form to be gone through, for it would be little more than a mere form. Constructive delivery is complete by payment, followed by the new contract or arrangement made with the seller, which entirely changes his title to the goods from one of property to one of depository, hirer, or otherwise. So also with a purchaser of cattle who, having paid the price, agrees to leave the cattle for grazing at a rent or charge agreed on. The constructive delivery, I cannot doubt, would be quite as effectual as actual delivery by the removal of the cattle by the purchaser outside of the seller's field and putting them back again. A purchaser of books may leave them to be bound with a seller who also carries on business as a bookbinder, and such instances might be indefinitely multiplied. Whether anything can be maintained against constructive delivery being allowed by the law or not because of the doctrine of reputed ownership is a different matter, to which I shall refer immediately. But apart from this, I can see no reason to doubt that in the cases which I

have mentioned constructive delivery would in *bona fide* transactions be quite as effectual as actual delivery by the removal of the subjects purchased from the custody of the seller.

And so also in the case of a general warehouse or store. A purchaser of goods, desirous of leaving them with the warehouseman and willing to pay rent for them, intimates his delivery-order and gets the goods transferred in the warehouse books to his name. There has been no actual delivery or personal taking possession of the goods. But the constructive delivery is complete, because the contract of deposit with the sub-purchaser has been completed. This illustration shows, as the other illustrations do, that it is not correct or true to say that the purchaser must take physical possession of goods purchased. That is certainly not required, and if delivery with its legal consequences be effected in the case of a warehouseman, or in the other cases I have mentioned, it must, as it appears to me, be equally effected in the case of goods lying with a seller where the price is paid and the goods are left, entirely because of a new arrangement that the seller shall hold them on deposit, or shall so hold them and store them in return for a certain charge or rent. I cannot assent to the view that a seller by the law of this country cannot effectually make such an arrangement, nor can I believe that such constructive delivery, if the facts are clear and the *bona fides* of the parties is evident, is not as effectual as actual delivery would be. I do not regard an arrangement to pay rent as at all essential or necessary, though the payment of rent is a clear piece of evidence as to the true nature of the agreement of the parties. If the purchaser were by his servants, in his dealings with the appellants (and I say the same of sub-purchasers), to roll the puncheons of whisky out of the store in order to take actual possession, and to roll them back again, but clearly on an arrangement for custody and deposit only, this would be taking actual delivery. Surely constructive delivery can be given and taken without going through this process. I cannot doubt that if on the occasion of the intimation of the delivery-orders by the original purchasers of the goods in question being intimated to the appellants—who, as I have shown, were bound to give actual delivery if asked. because they could have no claim to retain the goods for a debt due by the purchaser—the appellants had acknowledged the order, and in their letter had undertaken expressly to hold the goods for the sub-purchasers as warehousemen or custodiers for rent for their accommodation, the delivery would have been effectual. But this would only have been the giving and taking of constructive and not actual delivery.

And in effect this in my opinion was what occurred in reference to the goods now in question. The appellants had no power to hold them for a day after the original buyer demanded them, and his sub-purchaser was in a position to take either actual or constructive delivery as he chose. Is there any reason for saying he preferred to take neither, but to leave his original sellers that *jus in re* which they now seek to plead and enforce after all that has occurred? The appellants are warehousemen—though they only agree to store goods of their own manufacture—for they have regular stores which are largely used by third parties who arrange to pay storage rents or charges; and when goods are transferred by the original buyer, who having paid the price and being under no obligation of any kind to the seller, is under the statute to all practical effects the owner (the seller having no possible right of retention of the goods)—when the transfer is duly recorded in the warehouse books—and an intimation given to the sub-purchaser that henceforth "rent" will be charged against him for the goods, I am of opinion that the goods are then left with the appellants and accepted by them as custodiers or warehousemen for custody on rent. Under this arrangement they cannot in my opinion rear up or revert to their former right of ownership, an empty right which, if it existed at all when the sub-sale was intimated, had then no legal effect or consequences even in a question with the original purchaser. If I be right in so thinking, of course they cannot obtain the preference they now seek to gain over the general creditors of Messrs Russell.

The view I have now stated does not conflict with the decision in the case of *Anderson* v. *M'Call & Company*, on which much of the appellants' argument was based. I should without difficulty have concurred in the decision of that case, for as soon as it was settled that the storekeeper Angus was merely a servant of Jackson & Son, the owners of the goods there in dispute, and that therefore in giving a delivery-order on him they were merely giving an order on themselves, the case resolved into an attempt on the part of persons giving an advance on moveable property to have an effectual pledge although the property was left entirely in the debtors' hands. Jackson & Son continued themselves to hold the sugars on the security of which their creditors made the advances, and an undertaking to hold these sugars, which were their own property in every sense of the word, in their own possession for behoof of a particular creditor was of course ineffectual, because a pledge cannot be given by a debtor who continues in possession of it. The law is entirely different in a case of purchase and sale where the price has been paid. It seems to me, accordingly, that the *dicta* in the case of *Anderson* v. *M'Call*, founded on by the appellants, must be regarded as *obiter* in a question like this of purchase and sale and sub-sales followed by the dealings above detailed. The passage mainly founded on in the opinion of your Lordship is as follows:—"In order to operate constructive delivery by means of a delivery-order there must be three independent persons, the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor there ceases to be a third independent person; and therefore constructive delivery cannot in that case be effected by a delivery-order. That is the clear law of Scotland, which is well established, and has received effect in a number of cases. Applying that rule of law I am of opinion that this verdict is for the pursuers." If that passage be read as limited in its application to such a case as that of *M'Call*, where it was attempted to make a security effectual over moveables *retenta possessione* of the owner, I entirely agree with it. But it has no relation, I think, to a case like this where sub-purchasers' rights at common law and under the statute are in question. In that case there was no sub-

purchase and no delivery-order by the first purchaser to a sub-purchaser who had paid for the goods. In this case in each sub-purchase there were three parties concerned, and for the reasons I have explained I think the appellants, who were one of these parties, and who were the custodiers of the goods, were truly third parties, although they had at one time been owners and sellers of the goods. It is said there were only two persons, viz., the original sellers or owners and the buyers or their mandatories or assignees. This seems to me to be begging the whole question. The original sellers had in my opinion become custodiers or warehousemen of the goods by contract. In any case they had a double character. The sub-purchasers had acquired an independent position. It is only by regarding them as sellers and owners only that the appellants can maintain their argument, for they could not be custodiers only of their own property. But if the appellants were custodiers only, as I think they were, by contract having lost any right of property after constructive delivery of the goods, there were plainly three persons taking part in each sub-sale and delivery.

In my opinion, however, already explained, I do not think that it is in the least degree necessary to constructive delivery that three persons shall take part in the transaction.

Any question of reputed ownership, or of the supposed inference as to ownership, to be drawn from the mere possession of goods which to a large extent entered into the decision of the cases of *Melrose* v. *Hastie* and *Mathison* v. *Allison*, and which formed the ground of judgment of Lord Deas and Lord Benholme in the case of *Mathison*, does not, I think, arise here. The appellants are here themselves only claiming their contract rights. They are not represented by creditors who might plead that they had been induced to give credit because of continued possession of goods allowed to their debtor. But even if the question had occurred with creditors of the appellant seeking to gain the preference over the general creditors of the sub-purchasers which the appellants now do, I am clearly of opinion that the plea of apparent or reputed ownership would not avail. If the appellants are the owners they must succeed in their plea of retention on that ground. If they are not, there is no room for saying that the sub-purchasers have so acted as to warrant third parties to assume or believe that the appellants were the owners. In the case of *M'Bean* v. *Wallace & Company* this subject was discussed in reference to a ship in the course of being built in the shipbuilders' yard, and the plea did not receive much countenance—and the cases of *Orr* v. *Tullis*, 8 Macph., and *Robertson*, 9 R., are recent authorities showing that the title of possession is the point to which persons must look in giving credit to others. In Prof. Bell's Principles, sec. 1315, he says—"Possession alone is not a ground on which moveables shall be made to answer for the debt of the possessor, or on which creditors are entitled to rely, for the goods in their debtor's possession may be with him, not as owner, but under some contract requiring temporary possession. Hence, every legitimate cause of possession makes an exception to the credit of apparent ownership. So in Commodate the possession of the borrower is no lawful ground of credit to him. In Hiring, neither the subject let nor materials in the hands of a workman under *locatio operis* can afford a fair ground of enlarged credit to the possessor. In Deposit, though the thing deposited may appear as part of the custodier's stock, it remains separate on his bankruptcy as the property of the depositors." This seems to me to be quite applicable to the present case, and to be conclusive. I do not think that because goods for the buyer's convenience are left in a seller's warehouse after being sold and the price paid, there is ground for reputed ownership—especially now, having regard to the provisions of the Mercantile Law Amendment Act as affecting the rights of sellers and their creditors. And in so far as the judgments of *Melrose* v. *Hastie* and *Mathison* v. *Allison* proceeded on that view, they were, I think, unwarranted. In some of the cases on this branch of the law Judges have said it was the buyers' own fault that they did not take actual delivery, and they must take the consequences. I see no fault in the matter, nor do I see any reason for this consequence, viz., that they should lose the goods they had paid for. The exigencies of business and the convenience of merchants (and I think the convenience of trade should have great weight in such questions) often require, or at least make it highly desirable, that goods bought and paid for should remain with the original seller, not as his goods, but on the contract of deposit. If this be arranged constructive delivery results. The transaction cannot be held invalid or ineffectual because third parties choose to infer without warrant that the possession of an original seller is necessarily continuous as the possession arising from ownership, whatever may have been the seller's contracts or dealing with his goods.

Finally, I think reputed ownership is out of the question with reference to such a business as that of the appellants, whose warehouses in the knowledge of everyone dealing with them are so much used for the storing of goods sold often years before by the appellants to third parties.

I am, on the whole, of opinion that the judgment of the Lord Ordinary is sound, and that it should be affirmed.

Lord Adam—By the laws of Scotland the property of goods sold but not delivered remains with the seller.

Nothing but delivery, actual or constructive, will pass the property. There has been no actual delivery in this case. The whisky sold is now, and has all along been, in the possession of the Distillery Company. It lies now, and has lain all along, in the cellars or warehouse of the company.

Has there then been constructive delivery? The Lord Ordinary is of opinion that if the company were here in a question with the original purchaser, they must have prevailed. I agree with him, for I think that the cases of *Matheson* v. *Alison*, and *Wiper* v. *Harvey*, rule this case. In the case of *Matheson* v. *Alison*, as in this case, the whisky sold remained in the seller's warehouse, but the price of the whisky was paid by the vendee. An invoice was sent to him, and the sale recorded in the warehouse-books of the seller. But the Court held that all this did not operate constructive delivery, that the vendor remained the undivested owner of the goods,

and that what passed to the vendee was a right to demand delivery of the goods sold.

The only difference that I see between this case and that of *Alison* v. *Matheson* is that on the invoice sent to the vendee there is endorsed as a condition of the sale that the spirits would be held free of rent charge for six months in the company's casks and twelve months in customer's casks from date of invoice, and that thereafter the spirits should be subject to a rent charge of 1d. or 2d. a-week as the case might be.

It is said, as I understand, that the effect of this condition was, that thereafter the vendor held the goods, not in his title of undivested owner, but as a warehouseman under an implied contract to that effect.

It is, I think, quite settled that if the owner of goods delivers them to a warehouseman, or other neutral custodier to hold them for him, that an order by the owner to the custodier to deliver them to the purchaser intimated to the custodier will operate as constructive delivery of the goods, and transfer the property of them to the purchaser.

Your Lordship in the case of *Pochin* v. *Robinow*, 7 Macph. 622, thus states the law in this respect—"Constructive delivery may take place, and generally does take place, where specific goods or other moveables being in the custody of some person other than the owner the owner gives to the purchaser of these goods a delivery-order addressed to the custodier ordering him to deliver to the purchaser those specific goods. When this delivery-order is intimated to the custodier, constructive delivery is effected, because the custodier becomes from that time holder for the purchaser, just as before he was holder for the seller. But to the completion of such constructive delivery two things are indispensable, that the holder shall occupy an independent position, and be neither the owner nor in any way identified with the owner of the goods." That, I think, is a correct exposition of the law, but I can find no facts admitting of its application in this case.

I cannot see how a condition such as the one in question adjected to a contract of sale for the mutual accommodation of the vendor and vendee can have the effect of converting the vendor into a neutral warehouseman or independent custodier of the goods. So far, then, I concur with the Lord Ordinary, and I think he is right in saying that the Distillery Company must have prevailed in a question with the original vendee. But I differ from him in thinking that it makes any difference that the question has arisen with a sub-vendee.

If the original vendee had, as I think he had, only a *jus ad rem*—a right to demand delivery of the goods—he could give no higher right to a sub-purchaser. The original vendee could not give delivery of the goods to the sub-vendee, because he never had possession of them himself. The course of dealing with the goods in this case was this. The vendee granted to the sub-vendee a delivery-order—that is, a request addressed to the vendor to deliver to him, the sub-vendee, the goods therein mentioned.

This delivery-order was intimated to the vendor. The receipt of it was acknowledged by him, with an intimation that rent for the casks would be charged from a date stated, and the transfer is entered in the vendor's books.

The effect of this appears to me to be simply to substitute the sub-vendee in place of the original vendee. It gives the sub-vendee a right to demand delivery of the goods from the vendor—which is just the right which the original vendee had—and completes the transaction as between the vendee and sub-vendee.

The Lord Ordinary quotes with approval the statement of the law by your Lordship in *Anderson* v. *M'Gall*, that "in order to operate constructive delivery by means of a delivery-order, there must be three independent persons—the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor, there ceases to be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order."

But when the Lord Ordinary goes on to say that in this case there are three independent parties, the vendor—*i.e.*, in his view the original vendee—the bankrupts vendees, and the appellants warehousemen, I think he has mistaken the contract of which implement is sought.

There is no question as to implement of the contract of sale between the original vendee and the sub-vendee. That was implemented by the delivery to the latter of the delivery-order and its intimation to the Distillery Company.

The contract here which is sought to be enforced is the contract between the original vendor and vendee, and to this contract there are only two parties, the vendor and the sub-vendee, as coming in place of the original vendee. There is no third party concerned, independent or otherwise.

On the whole matter I am of opinion that the Distillery Company have all along been in possession of the goods in question in their title of undivested owners, and that they are entitled to retain them against the general balance due to them by the bankrupts.

Of course the number of times any particular parcel of whisky may have been transferred can make no difference in the result.

Lord Kinnear—I agree with your Lordship in the chair, and therefore I need hardly say that I also agree with Lord Shand in thinking that the doctrine of reputed ownership has no bearing whatever on this question. The only point which we have to consider is, whether the goods have or have not been delivered to the bankrupts as now represented by the trustee on their sequestrated estate, who is the respondent in the reclaiming-note.

If it could have been considered an open matter whether delivery had been made to the first purchaser, the question is one which might have given rise to some difficulty, and might have required serious consideration, but I think that all your Lordships are of opinion along with the Lord Ordinary that it is absolutely concluded by authority, and accordingly we are all agreed, as I understand, that the goods were not delivered to the first purchaser, and that they remained with the sellers as undivested owners. Now, that being so, it follows as a necessary consequence that the position of the first purchaser was that of a creditor under a personal obligation to deliver the goods, and that was the only right

which the first purchaser could give to any sub-purchaser from him. He could not deliver the goods to his own sub-purchaser, because they were not delivered to him, and were not in his possession. All he could do was to put the sub-purchaser in his shoes, and enable him to go to the seller and ask for delivery. And accordingly I do not understand that those of your Lordships who agree with the Lord Ordinary are prepared to hold that delivery was given by the first purchaser to the sub-purchaser. I rather think that the view which your Lordship has adopted is, that the original vendor delivered to the sub-purchaser upon an intimation to him of the first purchaser's assignation. But then the original vendor did nothing more upon that assignation being intimated to him than he was bound to do whether he intended to deliver to the sub-purchaser or not, because, as both Lord Mure and Lord Shand have pointed out, he had no alternative after the intimation was made to him that the goods which he held undelivered to the first purchaser had been assigned by that purchaser to a sub-purchaser, except to acknowledge that he had received that intimation, and to make the corresponding entries in his books, which placed the sub-purchaser in the position of the original buyer. Now, if that was what he was bound to do whether he delivered or not, I have great difficulty in seeing how constructive delivery could thereby be effected. But I have a further difficulty, because I cannot see how the granting of letters of acknowledgment or the alteration of entries in the seller's books which would not have the effect of delivery to the first purchaser could possibly have the effect of delivery to the sub-purchaser or to anyone else.

I cannot help thinking that a great deal of perplexity has been introduced into the argument by the introduction of the elementary question whether delivery is or is not necessary. That is a question of law, but when once it is held that delivery is necessary, I think we are all agreed that the question whether it has taken place or not is a mere question of fact, and is to be proved just as much as any other question of fact. You require to prove a case of what is called constructive delivery in the sense in which that expression has been used in the argument, just as you would prove a case of what is called actual delivery of goods. When goods sold are not in the hands of the seller but in the hands of a third person subject to the seller's order, then delivery of an order upon the custodier, and one intimation of that order to him, is just as much delivery in fact as if the goods had gone out of the hands of the seller, and had been handed over by him to the buyer, because the intimation of the delivery-order controls the position of the seller, and vests the buyer with possession, just as effectually as if the seller or the custodier having civil possession of the goods had handed them over to the actual possession of the buyer himself.

I think there is some unfortunate expression in the argument arising from the fact that the case has been treated as a case of constructive delivery in the sense in which that expression is used in cases where delivery has been dispensed with, and where from the position of things it is impossible to give possession to the buyer in any actual sense, such cases have been suggested to us by way of illustration, but I do not know how far the principles of law upon which they depend, and which have been borrowed from the law of England would be carried into effect or not in our law. Such cases are, however, altogether outside the present question. I have no doubt whatever that in a case where goods are in the hands of a custodier for the seller, and are put into the possession of the buyer by the delivery to him of an order upon the custodier, there is actual delivery terminating the possession of the seller and putting the buyer into his place. If that be so, it would follow that whatever effect ought to be given to the book entries, and to the letters of acknowledgment upon which the respondent relies, they cannot be founded upon as inferring constructive delivery. There can be no delivery till they leave the possession of the seller and go into the absolute and actual possession of the buyer. The case is just the same as if there had been no sub-purchaser.

It is, however, quite possible that the seller of goods in the position in which this Distillers' Company stands may place themselves by contract or by a course of conduct in such a situation with a buyer that they would be precluded from maintaining any such right of retention as is claimed here, or a right of property in goods even although these may remain in their custody. If a seller had undertaken to deliver in terms that would prevent him from pleading a right of retention against a sub-purchaser, he must deliver according to his undertaking, and would be in no different position from a person who had given an obligation to give a right of property to another. And therefore the real question appears to me to be whether there is anything in the contract or in the conditions of sale to suggest such an obligation as that? For the reasons to which I have already referred I think there cannot be, because there is nothing in the contract beyond what one would have expected to find there whether there was to be delivery or not. It is therefore quite impossible to put any interpretation either upon the letter of acknowledgment or upon the book entries which would bar the original vendor from pleading his right of retention to the same extent as he would have been entitled to plead it apart altogether from such acknowledgment and entries.

But then it is said that the vendor holds the goods for the assignee under an intimated assignation. But the assignee is in the same position as his cedent as regards the vendor. The vendor still remains undivested owner under obligation to deliver when called on to do so unless before delivery is made he can establish some good right which will justify him in resisting such a demand. If so, then it seems to follow that when a sub-purchaser to whom the goods have been sold calls upon the original vendor to perform his obligation to deliver up the goods sold, he is in a position to say that he will not perform his contract because of another transaction on which money is owing to him, and in regard to which the purchaser has not performed his obligation. He may say as to the goods still undelivered that he is ready to deliver them on payment of the general balance due to him.

If that is the position at common law I do no

think that the Mercantile Law Amendment Act makes any difference upon it. The effect of that Act has been repeatedly considered, and its effect in a question of this kind was fully discussed in the case of *Wyper*.

The Court pronounced the following interlocutor :—

"Recal the interlocutor reclaimed against, and the deliverance of the trustee appealed from, and remit to the trustee to rank the appellants for the sum of £742, 18s. 10d., and to allow them to retain the whisky in dispute as their own property." . . .

Counsel for the Distillers Company—Balfour, Q.C.—Goudy. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for W. & J. Russell's Trustee—Jameson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, February 20.

SECOND DIVISION.

SCOTT AND OTHERS *v.* HORSBRUGH (SCOTT'S TRUSTEE).

Bankruptcy—Sale of Furniture left in Bankrupt's House—Reputed Ownership—Mercantile Law Amendment Act 1856, *sec.* 1.

In 1885 a bankrupt entered into a composition arrangement with several of his creditors, including his mother-in-law, who in reduction of her claim bought his furniture as valued by an appraiser. She thereafter lent it to her daughter, the wife of the bankrupt, and it remained in his house until 1888, when his estates were sequestrated. *Held* that the trustee in bankruptcy was not entitled to sell the furniture in a question with the bankrupt's wife and sister, to whom their mother had bequeathed the furniture.

The Mercantile Law (Scotland) Amendment Act 1856 (19 and 20 Vict. c. 60) provides by section 1 that "From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser."

The affairs of William Begg Scott, now butcher, Bervie, became embarrassed in 1885. At that time he was a baker and grocer in Montrose, and consulted Mr Ramsay, agent for the Bank of Scotland there with a view of coming to an arrangement with his creditors.

The following circular, unsigned but drawn up by Mr Ramsay, was issued :—

"*Bank of Scotland,*
Montrose, 11th February 1885.

"Dear Sir,—Mr W. B. Scott, baker and grocer, Ferry Street, Montrose, has put his affairs into my hands, with a view to an arrangement with his creditors. He has made an agreement with a baker in town to take over the whole stock, plant, &c., at valuation in May next. When he advertised the business he was under the impression that with some help from his friends he would be able to pay 20s. per £ to all his creditors. But I have gone thoroughly into his affairs, and I find he is hopelessly insolvent. There is such a large deficiency that his friends cannot undertake any responsibility connected with it.

"The following is an abstract of the assets and liabilities :—

Assets.

Bakehouse plant and utensils (Estimate by Mr M'Queen, baker).	£104	14	9
Stock of baking and grocery goods, with shop-fittings, &c.	146	14	5
Book debts, £68 (of which doubtful, £15), say	60	0	0
Life Policy p. £200 (dated 1879)	20	0	0
Household furniture	70	0	0
	£401	9	2
Less preferable debts—rents	38	10	0
	£362	19	2

Liabilities.

Trade debts	£408	13	3		
Accommodation from bank and relatives	688	0	0		
				£1096	13	3
Showing a deficiency of and a dividend of 6s. 7½d. per £.				£733	14	1

"With assistance Mr Scott proposes to pay 7s. per £ on promissory-note, payable 3 months hence—the bill to be countersigned by his brother Mr George Scott, cattle-salesman, and to be met out of the proceeds of the purchase price of the stock from the new tenant. There cannot be a doubt that this proposal is as favourable as the creditors need expect. If it is not agreed to it will be necessary to take out sequestration, I fear, to prevent preferences being forced. I may say that Mr Scott will not make any higher bid to avoid the unpleasantness and publicity of sequestration. I may add that in making the offer of 7s. he is doing more than the state of his affairs prudently warrants; because I have little hope that the stock will come up to the valuation put on it when it comes to be taken over.

"Trusting you will agree to the proposal for settlement—I am, yours faithfully,

"*P.S.*—Under sequestration the yield will be very much less of course. The furniture will not produce nearly £70 if brought to the hammer."

Scott afterwards settled with most of his creditors by paying them 8s. in the £. Among these creditors was his mother-in-law Mrs Gouk, who had a preferential claim for the rent of a house, amounting to £25, and a claim to rank *pari passu* with other creditors for a loan of £100. In reduction of these claims she bought his furni-

ture for £50, 7s. 6d., valued by a licensed appraiser as shown in the following note of settlement, No. 15 of process :—

"Half-year's rent of shop, house, bakehouse, &c., due at Whitsunday 1885 to Mrs Gouk . .	£25	0	0
Composition of 8s. per £ on Mrs Gouk's claim of £100 . . .	40	0	0
	£65	0	0
Deduct value of Mr Scott'e household furniture purchased by Mrs Gouk	50	0	0
	£14	12	6

"*Montrose*, 1*st June* 1885.—Received payment of the above sum of fourteen pounds 12/6, by the hands of Alex. Ramsay, Esq., banker, Montrose.

	AND. GREIG,	
Agent	*for Mrs*	*Gouk.*
	1/6/85."	

The Bank of Scotland received nothing towards the reduction of their claim amounting to £288. Mrs Gouk allowed the furniture to remain in Mr Scott's house on loan for the use of her daughter Mrs Scott and her husband, and by them it was removed to Bervie when they went to reside there in 1887.

Mrs Gouk died on 17th December 1885, leaving a settlement by which she directed her furniture to be divided between her two daughters Mrs Scott and Mrs Maconochie in certain proportions.

Scott remained insolvent from 1885 to 1888, when his estates were sequestrated. Mr H. M. Horsbrugh, C.A., Edinburgh, was appointed trustee on his sequestrated estate on 17th June 1888. Upon the said trustee proposing to sell the furniture in the bankrupt's dwelling-house in Bervie Mrs Scott and Mrs Maconochie raised an action of interdict against him in the Sheriff Court at Stonehaven in November 1887. Interim interdict was granted, and a record made up.

The pursuers pleaded—"(1) The female pursuers being the true owners of the furniture and other effects as condescended on, are entitled to obtain interdict against the defender selling the same."

The defender pleaded—"(2) The pretended sale having been entered into by the bankrupt when in insolvent circumstances with his mother-in-law, who was a conjunct and confident person with him, without a just price being paid, and with a view to defraud his just and lawful prior creditors, is null and void and of no avail at common law. (3) Mrs Gouk being a conjunct and confident person with the bankrupt, the presumption is that the alleged purchase was entered into without a true, just, or necessary cause, and without a just price being paid, and with a view to defraud his just and lawful prior creditors, it is therefore null and void and of no effect. (4) The furniture in question not having been sold, and having remained in the undisturbed possession and occupation of the bankrupt, and immixed with his effects at the date of sequestration, the female pursuers have no right or title to the same, [and their claim ought to be repelled."

A proof was taken upon 6th June 1888 before the Sheriff-Substitute (BROWN). The circular issued to creditors, the note of settlement (both quoted above), and the following receipt—

"*Current Account Receipt.*

Bank of Scotland Branch,

"£150. *Montrose, 12th February* 1885.

"Received from Mr George Scott, cattle-dealer, Montrose, the sum of one hundred and fifty pounds sterling, which is placed to the credit of Mr Wm. B. Scott.

"*For the Governor and Company of the Bank of Scotland.*

"*Entd.* J. S.	ALEX.	RAMSAY,	*Agent.*
No.		12/2/85."	

were, *inter alia*, produced in evidence.

Alexander Lyell deponed—"I am a solicitor in Montrose, and the agent for the British Linen Bank there. On 17th February 1885 Mr Ramsay, agent for the Bank of Scotland, came to my office and told me that the bankrupt was in difficulties. He asked me to take charge of the matter, and suggested that I should endeavour to negotiate a settlement of his affairs with the creditors, as they would have nothing to do with him seeing he was a creditor. He placed a statement in my hands dated 11th February 1885. It was sent to all the creditors. . . . I paid a dividend of 8s. per pound in terms of the last meeting of creditors, except to George Scott, cattle dealer (£300), Alexander Ramsay, agent for Bank of Scotland (£288), and Mrs Ann Gouk (£100). I understand the 8s. in the pound was paid to Mrs Gouk through Mr Greig, who got it from Mr Ramsay. Mr Greig handed me the document (No. 15 of process). . . . I do not know anything about the purchase by Mrs Gouk of the furniture. . . . In the summer of 1885 Mrs Gouk called upon me once, and I think twice, but I am not sure of that, with reference to the furniture. I was then acting on behalf of the bankrupt. She said that she wanted to make sure that the furniture which she had bought from the bankrupt was made sure to her, and that Mr Scott's creditors could not touch it. She said she wanted it made sure to her daughters. I advised her to consult her agent Mr Greig, who was then acting for her. I understood that Mrs Gouk referred specially to the furniture, which she said she had purchased from Mr Scott. Mr Ramsay said he was willing to take the composition of 8s."

Andrew Greig deponed—"I was agent for the late Mrs Gouk, who was the mother of the female pursuer Mrs Scott. I was consulted by her with reference to the preparation of her settlement. I am now shown the settlement I prepared for her. It is dated 11th September 1885. I continued to be agent for Mrs Gouk until her death. Mrs Gouk spoke to me several times about the furniture in question after the preparation of the deed, expressing the hope that it was perfectly safe as belonging to her. That had reference to the composition settlement by her son-in-law Mr W. B. Scott. Mr Scott became bankrupt in March 1885. Mrs Gouk had a claim upon his estate of £125, £25 of that being preferable for rent. Mr Scott offered a composition of 8s. in the pound, which reduced Mrs

Gouk's claim to £100. She subsequently told me that she was willing to buy Scott's furniture upon her own account. I intimated that to Mr Ramsay, agent for the Bank of Scotland in Montrose, who was acting for the bankrupt. Mr Ramsay came to settle with me. I prepared the document. The receipt in that document is in my handwriting. I received the balance of £14, 12s. 6d. from Mr Ramsay. After I received that balance Mrs Gouk spoke to me about the furniture. She expressed the hope that the thing was secure to her. The doubt that was distressing her was that the furniture was in the possession of her son-in-law, to whom she had given the use of it. . . . I think that Mr Ramsay, banker, took the initiative in advising the bankrupt, but afterwards Mr Alexander Lyell, solicitor, did so. I think Mr Ramsay called the first meeting. The receipt was delivered to Mr Ramsay. . . . I looked upon Mrs Gouk as a creditor, and she got the same dividend as the others. The settlement was a private one. I understood that all the creditors agreed except Mr Ramsay."

Alexander Ramsay deponed—"I have been for many years agent for the Bank of Scotland at Montrose, and I have just resigned that agency. William Begg Scott, the bankrupt, was a baker in Montrose for some years before 1885, and was a customer of the bank. In 1885 he got into embarrassed circumstances, and thereupon effected private arrangement with some of his creditors, having promised them a dividend of 8s. per pound. At that time he was due the bank an unsecured debt of fully £300. I did not obtain payment of any dividend on behalf of the bank; I tried to get it but failed. The bankrupt was unable to pay it, and accordingly no settlement was made with him by me on behalf of the bank. . . . No public sale of his effects took place at that time. . . . I cashed one or two cheques which I knew were payments of dividends to his creditors, and in particular there was one of £14, 12s. 6d. which I cashed to Mr Andrew Greig, solicitor, Montrose, in the ordinary course of business; I received no acknowledgment for the money, so far as I remember, beyond delivery of the cheque. Shown No. 15 process, a receipt dated 1st June 1885, by Mr Greig for £14, 12s. 6d. — Depones — "I have no recollection of having seen it before until recently; I would not have taken such a document as the receipt for the money. . . . The bankrupt continued insolvent from 1885 to the date of sequestration. I gave him credit on the faith of his business, his furniture, and his right of succession to Mr and Mrs Gouk's estates."

The Sheriff-Substitute on 16th August 1888 pronounced this interlocutor:—"Finds that the pursuers have failed to prove that the household furniture and effects in question belong to them, or that they have any title to retain possession of them; therefore recals the interim interdict granted on the 25th day of November 1887, assoilzies the defender from the conclusions of the action, finds the defender entitled to expenses," &c.

The pursuers appealed to the Sheriff (Guthrie Smith), who on 31st October 1888 dismissed the appeal, and affirmed the interlocutor appealed against with expenses.

"*Note.*—The furniture in question was originally the property of Scott the bankrupt, and it was in his apparent possession at the date of his sequestration, which is enough to entitle the trustee to dispose of it for the benefit of his creditors unless the pursuers can show some right to it. Their allegation is, that becoming insolvent in 1885, when he was in business in Montrose, he compounded with some of his creditors—one of whom was his mother-in-law, the late Mrs Gouk—and it was then agreed that she should take the furniture at the valuation put upon it (£50, 7s. 6d.) in payment of her claim, and accept cash for the balance, £14, 12s. 6d., which it is proved was paid. Without inquiring too minutely into how Mrs Gouk's claim arose, I am willing to accept the note of settlement produced in process as reasonable evidence of the alleged sale, and I shall assume that this note would have entitled Mrs Gouk at any time before sequestration to have claimed delivery of the furniture from the bankrupt. But unfortunately for the pursuers she did nothing of the kind. It was left in Scott's possession, and with the buyer's consent was carried by him from Montrose to Bervie. It is now said that this was done on the understanding that it was lent by Mrs Gouk to her daughter Mrs Scott. But this, if proved, is too thin a quality to distinguish the case from *Anderson* v. *Buchanan*, 11 D. 270, and others of that class, which decide that a sale by an insolvent of his household furniture *retenta possessione* confers no right on the purchaser in competition with creditors. On this ground the judgment of the Sheriff-Substitute appears to me to be right."

The pursuers appealed to the Court of Session, and argued—There had been a *bona fide* sale. It did not suit Mrs Gouk's purpose to remove the furniture from Mr Scott's house. This was not the case of the purchase of a bankrupt's furniture for himself. She had got delivery, and had a *jus in re* in the furniture, or alternatively she, and accordingly her representatives, were entitled to delivery now under section 1 of the Mercantile Law Amendment Act 1856 (19 and 20 Vict. c. 60)—*Orr's Trustee* v. *Tullis*, July 2, 1870, 8 Macph. 936; *M'Bain* v. *Wallace & Company*, January 7, 1881, 8 R. 360, and July 27, 1881, 8 R. (H. of L.) 106; *Duncanson* v. *Jefferis' Trustee*, March 4, 1881, 8 R. 563; *Robertsons* v. *M'Intyre*, March 17, 1882, 9 R. 772; *Anderson* v. *Buchanan*, December 22, 1848, 11 D. 278 (*per* Lord Moncreiff *diss.*); *The Heritable Securities Investment Association (Limited)* v. *Wingate & Company's Trustee*, July 8, 1880, 7 R. 1104 (*per* Lord Young *diss.*); *Cropper & Company* v. *Donaldson*, July 8, 1880, 7 R. 1115 (*per* Lord Young *diss.*)

Argued for respondent—The Sheriff-Substitute had taken the correct view here. The *onus* of proving the furniture to be theirs lay on the appellants. They had not discharged that *onus*. Possession by the bankrupt was presumption of ownership. There was no evidence here either of a debt due to Mrs Gouk or of a *bona fide* sale. The furniture remained just where it was, and was removed by the bankrupt among his effects to Bervie. There had been no actual delivery, or anything equivalent to it. There was no possession by the bankrupt on any other title than property, whereas to transfer a *jus in re* to the

purchaser where the furniture remains with the seller there must be possession by the seller upon a fresh contract—*Wingate* (*supra*). There was no *jus ad rem* under the Mercantile Law Amendment Act—*M'Bain* v. *Wallace* (*supra*). Lord Blackburn's opinion relied upon by the appellants was to this effect, that where the purchaser allows the seller to keep possession of the goods in a way quite inconsistent with his *jus ad rem*, the property is attachable by the seller's trustee in bankruptcy, and the Mercantile Law Amendment Act does not apply—*Sim* v. *Grant*, June 3, 1862, 24 D. 1033 (*per* L.J.-C. Inglis; *Robertsons* v. *M'Intyre* (*supra*) was not in point. This alleged transaction was struck at by the Act 1621—Goudy on Bankruptcy, p. 56.

At advising—

Lord Young—Looking to its money value this case has occupied an undue amount of time, but the discussion has been able and interesting, and the legal question involved is important. The facts of the case are within a very narrow compass indeed. Mr Scott got into money difficulties in 1885, and he availed himself, at first at least, of the assistance of Mr Ramsay, agent for the Bank of Scotland at Montrose, and who at his request, or at least in his employment, seems to have made inquiry into his affairs with the view of helping him out of his money difficulties by an arrangement with his creditors. Mr Ramsay issued a circular to Scott's creditors, in which he gave a state of Scott's liabilities, and I notice that in that state among Scott's liabilities an item is entered "Accommodation from bank and relatives, £688." Mr Ramsay suggests to the creditors that they will be wise to accept a composition of 7s. in the £, which he says Scott proposes to pay with the assistance of others if his creditors are agreeable to this arrangement. No arrangement was in fact come to, but many of the creditors, including Mrs Gouk, were arranged with upon the footing of a composition of 8s. in the pound. I notice Mr Ramsay is just a little inconsistent here, although I do not doubt his integrity or honesty in the least. He says—"In 1885 Scott got into embarrassed circumstances, and thereupon effected a private arrangement with some of his creditors, having furnished them a dividend of 8s. per pound. At that time he was due the bank an unsecured debt of fully £300. I did not obtain payment of any dividend on behalf of the bank; I tried to get it but failed." The inconsistency to which I refer on this head is, that that is Mr Ramsay's answer in chief, whereas in cross he says—"I was present at the meeting of the bankrupt's creditors in 1885. . . . The bank never agreed to accept 8s. per pound of a dividend." Now, trying to get and failing indicates considerable willingness to take if they could get it. I have quoted this as showing that Scott was owing the bank and his relatives over £600.

Well, Mr Ramsay was acting for the bankrupt, but he goes to Mr Lyell upon the ground that his (Ramsay's) bank is a large creditor, and he asks Mr Lyell to act for him, and Mr Lyell says —[*His Lordship here read the passage quoted above*]. That is, he was just to carry on what he Mr Ramsay had advised.

Just at this stage Mrs Gouk, Scott's mother-in-law, comes upon the scene in the matter in which we are interested, and she shows her wisdom by going to a separate man of business, Mr Greig, and consulting him about the matter, and he discovered that Mrs Gouk had claims against her son-in-law to the extent of £125, £25 for rent and £100 for money advanced. That shows that he, her agent, enters upon his duties on the footing that she is a creditor to the extent of £125, and that her son-in-law offers a composition of 8s. in the pound. She subsequently indicated her willingness to buy the furniture, and Mr Greig says he went to Mr Ramsay and intimated that fact to him. It may be untrue, but it is in evidence, and I do not doubt it. Mr Greig goes to Mr Ramsay and communicates Mrs Gouk's willingness to buy the furniture. Nothing could be more straightforward than this matter heretofore. Mr Greig, continues Mr Ramsay, "came to settle with me," and No. 15 of process is a note of that settlement. It sets out Mrs Gouk's preferable claim for rent to the extent of £25, and her claim not preferable to a ranking for £100, which at 8s. per pound amounts to £40. She is entitled as a creditor to this claim, but it is arranged by her man of business and Mr Scott that she shall accept the furniture at the value of £50, 7s. 6d., the price put upon it by an appraiser, in part payment of her claim. There is nothing suspicious in this; it is all open and above board, She is to abate her claim by that amount, and a settlement takes place upon that footing, and a receipt for the balance is given, which if not signed by is presented by Mr Ramsay, agent for the bank of Scotland, the man of business employed by Mr Scott, who must have known it was Mrs Gouk's dividend. He is asked—"Did the bankrupt inform you in 1885 that an arrangement was to be made whereby the valuation of the furniture was to be set off against the rent of the shop, and the composition on the landlady's claim?" The question is objected to, but the objection is repelled, and Mr Ramsay answers—"I understood from Scott that the furniture was to go as an off-set to Mrs Gouk's claim." That is not intelligible on any other footing but as a purchase.

Mr Greig says—"I prepared the document No. 15 of process [the note of settlement]. The receipt in that document is in my handwriting. I received the balance of £14, 12s. 6d. from Mr Ramsay." And again, "The receipt No. 15 of process was delivered to Mr Ramsay." Necessarily so, because this document No. 15 of process is the only thing that brings out the £14 as due to Mrs Gouk. All was known to Mr Ramsay at the time, and all was above suspicion. In 1885 Mrs Gouk honestly purchased the furniture for £50, 7s. 6d., being the value put upon it by a professional appraiser. She proceeded just as if her claim had been paid in money, and she had then gone and bought the furniture with it. She no doubt does not take delivery of it, that not being her purpose, which was, that it should remain with her daughter and son-in-law, and be used by them, and she carried out that intention by allowing it to remain in the possession of the seller.

I give no opinion as to the legal effect of a party getting the furniture in his own house in which he is residing purchased for him by a friend, it may be, and retaining possession of it as it stood. It may be a question whether such

a transaction is or is not a *nudum pactum*. We have some decisions upon that, curious enough, because in our land a *pactum* may remain *nudum* upon which a price has been paid, although in Roman law a *nudum pactum* meant a mere stipulation and nothing more, ceasing to be *nudum* whenever arles had been given, because something having followed upon it, it had become clothed. Our decisions run on the other line of rails, or did, and it may be a long time yet before a different view of the law prevails. I give no opinion, then, upon the purchase of furniture in a man's own house for his own benefit, because there there is no ceremonial of delivery. But here we have a specimen of a very different class of cases—a class provided for by the Mercantile Law Amendment Act. From what I have said it will be seen that I differ from the Sheriff-Substitute and agree with the Sheriff in his assumption, and I think moreover that his assumption is not a mere assumption, but is conform to the truth as regards the facts of the case. He says—"Without inquiring too minutely into how Mrs Gouk's claims arose, I am willing to accept the note of settlement produced in process as reasonable evidence of the alleged sale, and I shall assume that this note would have entitled Mrs Gouk at anytime before sequestration to have claimed delivery of the furniture from the bankrupt." Now, the Act says—"From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same."... Here an honest buyer, who had paid the price but had allowed the goods to remain in the custody of the seller, wishes to have delivery, and the trustee of the seller wishes to prevent delivery. I think what the trustee wishes cannot be done. All Mrs Gouk did was open and above board, and no false credit was given to the bankrupt because of his possession of the furniture. I therefore think that she or her representatives are entitled to demand delivery now.

The Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee concurred.

The Court pronounced this interlocutor:—

"Find in fact that the furniture in question was purchased by the late Mrs Gouk from William Begg Scott at a price ascertained by a competent person, and that the price was duly paid by her: Find in law that the pursuers, as in her right, are entitled to delivery of the furniture: Recal the judgments of the Sheriff and Sheriff-Substitute appealed against: Grant interdict as craved: Find the pursuers entitled to expenses in the Inferior Court and in this Court."

Counsel for the Pursuers and Appellants—Law. Agent—Alexander Campbell, S.S.C.

Counsel for the Defender and Respondent—C. K. Mackenzie. Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, February 20.

SECOND DIVISION.

HORSBRUGH (SCOTT'S TRUSTEE) *v.* SCOTT AND OTHERS.

Married Women's Property Act 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 3, *sub-sec.* 2—*Marriage before the Act—Husband's Right of Administration—"Estate . . . heritable, and Income thereof."*

The Married Women's Property Act 1881, sec. 3, sub-sec. 2, provides—"In the case of marriages which have taken place before the passing of this Act . . . the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act."

By a marriage before the date of the Act the husband obtained a right of administration over his wife's heritable estate. *Held* that this right was not excluded by the Married Women's Property Act 1881, and that he was entitled to the income of the estate after the date of the Act, such not being "estate moveable or heritable, and income thereof" to which the wife had acquired right after the date of the Act.

The late David Gouk, merchant, Commerce Street, Montrose, who died on 10th September 1875, by disposition and settlement dated 28th August 1874 left his whole heritable estate to his wife in liferent, and to his two daughters Mrs Maconochie and Mrs Scott jointly in fee, and gave entry to the disponees in liferent and fee immediately after his death.

Mrs Gouk, the widow, died on 17th December 1885. William Begg Scott married one of the two daughters without any marriage settlement on 26th May 1876. His estates were sequestrated on 19th May 1887, and Henry Moncreiff Horsbrugh, C.A., Edinburgh, was appointed trustee.

In December 1888 a Special Case was presented to the Court by the said trustee, Mr Scott, and others, to have it determined, *inter alia*, whether the income derived since the passing of the Married Women's Property Act 1881 from the heritable estate belonging to Mrs Scott under her father's settlement fell under the *jus mariti* of her husband, the said William Begg Scott, and so was liable for his debts, or whether it was excluded by the terms of that Act.

Section 3 of the said Act (44 and 45 Vict. c. 21) provides that "in the case of marriages which have taken place before the passing of this Act . . . (2) . . . the provisions of this Act shall not apply except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act."

Argued for the trustee — The wife here was married before the passing of the Act. The heritable estate in question was acquired by her before her marriage, and fell under her hus-

band's right of administration, which included the right to draw the rents. From such heritable estate the provisions of the Act of 1881 were expressly excluded by sec. 3, sub-sec. 2 of that statute. The income of that estate consequently was liable for the husband's debts. It made no difference that up to the death of the widow in 1885 the right to the income was in abeyance owing to her liferent. The date to be considered was when the wife acquired right to the heritable estate, of which the income was an inseparable accessory.

Argued for Mrs Scott—The income derived from the heritable estate varied in amount according to the rents, and only fell due at the half-yearly terms. It was therefore either moveable estate which, inasmuch as it fell to the wife after 1881, was free from her husband's *jus mariti*, or it was income of heritable estate to which the wife acquired right after the passing of the 1881 Act, and from which the husband's right of administration was by that Act excluded.

At advising—

Lord Justice-Clerk — The only substantial question here is as to the interpretation of sec. 3, sub-sec. 2, of the Married Women's Property Act 1881, and the question arises in this way. The late Mrs Gouk had the liferent interest in certain heritable property left by her husband, who died in 1875. Her daughter Mrs Scott had the fee. She enjoyed the liferent until her death in 1885. The Married Women's Property Act passed in 1881, and the question is, had it affected the rights of Mrs Scott, who received no rents until the death of her mother in 1885. Now, the words of the Act are—"In the case of marriages which have taken place before the passing of this Act . . . the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act." Now, the only difficulty arises as to the meaning of the words "and income thereof," and as to how the clause applies to this case. If there had been no intervening liferent, there is no doubt that from 1875 to 1881 the daughter would have been in receipt of the income derived from the heritable estate, and her husband, under the law then in existence, would have been entitled to receive that income, and it would have been liable to all the consequences to which his own estate was liable. The question is, whether the passing of the Act deprived him of that right, and whether after 1881 the wife obtained that income free from his *jus mariti* and right of administration. Suppose Mrs Gouk had died just before the last term when the rents fell due before the passing of the Act, the husband's rights would not have been excluded as regards the rents falling due at that term. Were his rights excluded at the next term by the Act having passed between the two terms?

I think the exclusion of a husband's *jus mariti* and right of administration does not apply to any estate acquired before the passing of the Act or to the income thereof. I think that the position of estates acquired before the passing of the Act, and the husband's right to the income of these estates are not altered by the Act, and that we must answer the question submitted to us accordingly.

Lord Young—I am of the same opinion, and I think the law is as your Lordship has stated it. By the law of Scotland, before the Act of 1881, a husband had right to the administration of his wife's heritable estate, and to the income thereof. He had two rights over her heritable estate, while her moveable estate passed to him absolutely. Now, the wife of the husband in this case, who is bankrupt, became entitled to the fee of heritable estate in 1875, which, however, yielded no income to her as it was burdened with a liferent to her mother. Her husband was entitled, however, to administer the estate in her interest as fiar, and as soon as it began to yield income irrespective of statute he could draw the rents or possess it himself. He could enter into possession if there were no leases, and if there were he could draw the rents. The idea of the Act stopping that, notwithstanding the words of section 3, does not commend itself to me. The husband might have possessed the estate for thirty years. The idea of the statute to my mind is this—"You, who have married a wife with heritable estate, shall not be affected by this Act. Your right is a right to administer the estate and to draw the income, and that which has existed heretofore is not to be affected by the Act. After the passing of the Act you must regard any heritable estate coming to your wife as a windfall upon which you had no right to calculate, and which you must take under the law then existing." I cannot read the Act as meaning "estate heritable, and income thereof, falling to the wife after the passing of this Act." The estate and the income thereof are joined together. Each year's rent is not a separate subject depending upon the terms of the leases.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Lee—I had some difficulty about this question. I have come to the same conclusion as your Lordships. The exclusion of the *jus mariti* applies to all moveable estate acquired by a wife after the passing of the Act, but the question is, are the rents of heritable estate excluded as moveable estate falling to a wife after the passing of this Act? No doubt the clause admits of being read as applying to the income of heritable estate which comes to a wife after the passing of the Act, and not to the income of heritable estate which fell to her before the passing of the Act, and on that ground I agree with your Lordships as to the answer we should give to the question submitted to us.

The Court found that the income derived from Mrs Scott's heritable estate since the passing of the Married Women's Property Act 1881 fell under the *jus mariti* of her husband.

Counsel for Trustee — C. K. Mackenzie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Mrs Scott—Law. Agent—Alexander Campbell, S.S.C.

Friday, February 22.

SECOND DIVISION.

THOMSON'S TRUSTEES *v.* THOMSON AND OTHERS.

Trust—Powers of Trustees under Trust-deed—Investment of Trust Funds—Shares in a Company after Voluntary Liquidation and Reconstitution.

Trustees were empowered by trust-deed to lend the trust funds upon certain enumerated securities. They were also recommended not to change any of the investments made by the trustee, which they were authorised to continue without incurring personal responsibility. A company, which was not among the enumerated securities, but which paid large dividends, and in which the trustee held several shares, was wound up voluntarily for the purpose of being re-constituted with larger capital and more extensive powers.

Held that, however desirable it might be for the beneficiaries under the trust-deed to become shareholders in the new company, it was not within the powers of the trustees to hold the shares allotted to them in lieu of those held in the old company.

David Jugurtha Thomson, merchant in Edinburgh, died on or about the 16th March 1871, leaving a trust-disposition and settlement dated 3rd December 1868 and recorded 23rd March 1871. By said deed Mr Thomson disponed his whole estate, heritable and moveable, including "shares in trading and other companies," to trustees therein named, with the powers and for the purposes therein expressed.

The deed conferred the usual general powers upon the trustees, and contained a number of special directions with regard to the management and investment of the trust-estate, and specially, with regard to trust investments, the trustees were authorised "to continue or not, as they may think advisable, such investments of my means and estate as I may have made during my lifetime of whatever kind or denomination, and that without incurring any responsibility for so doing, but (though without prejudice to the general discretionary powers hereby conferred) I recommend my trustees not to change any of the said investments, unless circumstances may in their opinion render it expedient for them to do so." The trustees were further empowered to lend the trust funds upon heritable security, or upon security of debentures of incorporated companies, or on the security of the Government funds, or of shares in chartered or incorporated companies in Great Britain, and they were empowered to invest the trust-estate, or any part thereof, in the Government funds in the purchase of heritable property, feu-duties, ground annuals, or other heritages, or of the guaranteed or preference or debenture stock of railway or other incorporated companies in which the liability of each shareholder is limited, or to retain the same in bank in Great Britain. General power was also conferred upon them to alter and renew the securities from time to time as they might consider expedient.

The estate left by the truster included 37 £100 shares of the North British Rubber Company, Limited, a company registered under the Limited Liability Act 1856 (19 and 20 Vict. c. 47) on 30th March 1857. The trustees continued to hold these shares except three, which they sold. The investment proved a very remunerative one for the trust, the dividends during the last ten years on the ordinary selling price of the stock having averaged about 8 per cent. On or about 28th March 1888, at a general meeting of the company, a scheme for the reconstruction of the company was submitted, and the meeting approved thereof and instructed the directors to carry it out.

Under that scheme it was arranged that the company should go into voluntary liquidation, and that a new company should be formed upon the same basis as the old one, but with enlarged capital and more extensive powers. The old shareholders were, if they wished it, to have their interest in the old company satisfied by shares in the new company, and to have the first offer of the additional shares about to be issued by the new company. The new company was registered under new memorandum and relative articles of association on 9th August 1888, and on 3rd September the liquidator of the old company intimated to Mr Thomson's trustees that he had accepted on their behalf certain shares in the new company, and as an equivalent for the foresaid shares held by them in the old company. By the re-constitution of the company there was no material change of the assets or liabilities of the company as it existed prior to re-constitution, and it was probable that the registration under the later Companies Acts would prove of advantage to the shareholders.

The beneficiaries under the trust-deed were anxious to become shareholders in the new company, but the trustees being doubtful as to their powers to hold the shares allotted to them without incurring personal responsility in the event of loss occurring to the trust-estate in said shares, a special case was prepared by the trustees of the first part, and the beneficiaries of the second part, submitting the following questions for the opinion and judgment of the Court, viz.—"(1) Are the parties of the first part bound to sell the shares in the new company now offered to them in exchange for those formerly held by them in the old company? Or (2) are they entitled in the circumstances stated to retain the same as a proper investment of the trust funds?"

Argued for the first parties (the trustees)—They were not entitled to invest the trust funds in any other securities but those enumerated above, and this was not one of them. They were, no doubt, entitled to retain the investments made by the truster, but his investment in this company had come to an end by its liquidation. They were not entitled to hold the shares allotted to them in the company as now re-constituted. It was virtually a new company, although many of the old shareholders were members of it.

Argued for the second parties (the beneficiaries)—The shares of the new company offered to the trustees being of a greater nominal value, as well as of at least an equal actual value, as the shares in the old company originally held by the testator and thereafter by his trustees, formed an

investment for the trust funds authorised by him by his trust-disposition and settlement foresaid, which the trustees might hold without incurring personal responsibility therefor; and further, that looking to the powers generally and specially conferred upon the trustees by the said trust-disposition and settlement, and the testator's recommendation therein expressed not to change any of his investments unless circumstances rendered it expedient, the trustees were not in the circumstances entitled to realise the shares offered to them in the new company, but were bound, or at all events entitled, to accept and hold them as a proper investment of the trust funds. It was the same business, which was to be carried on by the same people, only with more extensive powers. This case was analogous to that of two railway companies being amalgamated.

At advising—

Lord Justice-Clerk—However desirable it might be that these beneficiaries should become members of this company, the Court cannot say that there is any authority in the trust-deed enabling the trustees to make them so.

The testator recommends his trustees not to change any of his investments, but that is a totally different thing from authorising them to become members of a new company, with new capital, and under new conditions. The company in which the shares were held is in liquidation. It has been put an end to, and could not have been put an end to in any other way. Probably the new company will consist largely of the same members as the old one, and no doubt it may be highly successful. In this age of competition large extensions are sometimes of immense advantage to companies, but that does not make this company the less a new one, of which the trustees have no power to become members.

Lord Young and Lord Lee concurred.

Lord Rutherfurd Clark was absent on Circuit.

The Court answered the first question in the affirmative and the second question in the negative.

Counsel for the Trustees—G. W. Burnet. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Beneficiaries — Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, February 23.

FIRST DIVISION.

WALTER AND ANOTHER, PETITIONERS.

Process—Nobile Officium—Certified Copy of Proceedings in Scottish Courts—Clerk's Certificate.

The pursuer in an action of damages for libel depending in the Court of Session, raised an action in Ireland on the same grounds against the same parties who were defenders in the Scottish action. On the petition of the defenders the Court authorised and required the principal Clerk of Session to certify a copy of the proceedings in the Scottish action for production in the Irish Court.

An action of damages for libel at the instance of Charles Stewart Parnell, M.P., against John Walter and George Wright, was dismissed by the Lord Ordinary (Kinnear) on the ground of want of jurisdiction on 5th February 1889, and a reclaiming-note was thereafter presented by the pursuer to the First Division.

During the dependence of the reclaiming-note an action of damages for the same alleged libels was raised by Mr Parnell against the same defenders in the High Court of Justice in Ireland, and an order for service was granted by that Court. Mr Walter and Mr Wright thereafter applied to have the order for service set aside on the ground of the dependency of the action in the Court of Session.

This was a petition by Mr Walter and Mr Wright in which they prayed the Court to direct the principal Clerk of the Division to sign an authenticated copy of the proceedings in the action before the Court of Session, which they averred was necessary in order to support their application in the Irish Court.

It appeared that the Clerk had pronounced himself unable to give the certificate required, as he knew of no authority which bound or entitled him to do so.

By the Act 50 Geo. III., cap. 112, sec. 14, it is provided:—"Provided always, and be it enacted, that it shall and may be lawful for any party to require, and the said assistants respectively are hereby required, to furnish to such party authenticated copies of all or any part of the proceedings in any cause, signed by one of the principal Clerks of Session, and which copy the principal Clerks of Session are hereby respectively required to sign, but no fee whatever shall be paid or payable for such copy (save and except the ordinary charge for copying paid at the time in the Court of Session)."

Counsel for the petitioners founded on this section, which he maintained could not be held to have been repealed by the Statute Law Revision No. 2 Act (35 and 36 Vict. cap. 97), sec. 1, schedule, although in terms that was done. The section in question did not fall within the preamble of the Statute Law Revision Act, and the enacting clause of that Act bore that the Act should not "affect any form or course of pleading practice or procedure." Even without any statutory authority the Court must have power to direct some method of certifying such proceedings—Dickson on Evidence (2nd ed.) 1255.

At advising—

Lord President—I do not see that we require any statutory authority to do what Mr Murray asks. It seems to me a matter of ordinary procedure which the Court in its discretion may adopt where necessary for the ends of justice.

Lord Mure and Lord Adam concurred.

Lord Shand was absent.

The Court pronounced an interlocutor authorising and requiring the principal Clerk of Session to certify the proceedings as craved.

Counsel for the Petitioners—Graham Murray Agents—J. & F. Anderson, W.S.

COURT OF JUSTICIARY.

Thursday, February 21.

GLASGOW CIRCUIT.

(Before Lord Rutherfurd Clark).

H. M. ADVOCATE *v.* J. A.

Justiciary Cases—Proof—Witnesses—Particeps Criminis—*Incest.*

J. A. was indicted and charged with having committed the crime of incest with his daughter. She having been called as a witness for the Crown, her evidence was objected to on the ground that being of age she was liable to be charged with the crime, and on the authority of *H. M. Advocate* v. *A. E.*, Dec. 5, 1887, 15 R. (J.C.) 32, could not be examined except as Queen's evidence. The objection was *repelled.*

COURT OF SESSION.

Friday, February 22.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GAVIN *v.* ARROL & COMPANY AND ANOTHER.

Reparation—Negligence—Injury by Falling into Unfenced Cutting near Footpath—Footpath.

The contractors for the construction of a new line of railway in the course of their operations intercepted by a cutting the direct and usual access from a house on the south of the line to the neighbouring town on the north. The only other access was by a somewhat inconvenient and circuitous path. Near the house mentioned they afterwards built a hut for the accommodation of their employees, who generally in going to or coming from the town took a short cut along the edge of the cutting. A path was thus formed which became the usual access to the hut for others besides its inhabitants, and the use of this path was known to the contractors. A woman who had been to the hut to nurse a patient was returning to the town by this path when she fell into the cutting, and sustained injuries.

In an action by her against the contractors, *held* that she was entitled to damages, on the ground that the defenders had failed to fence the new pathway, which by general use had become an established route.

The Forth Bridge Railway Company employed Messrs Arrol & Company as the principal contractors for the construction of a new line of railway from North Queensferry to Inverkeithing. The latter company in turn employed Mr John Williams as sub-contractor for the section of the line near Inverkeithing.

The line near Inverkeithing ran in a north-easterly direction a short distance to the south of the town and parallel to Hope Street, Inverkeithing. At this part the railway passed through a deep cutting, terminating at its north-east end in a tunnel constructed underneath a public footpath, known as the Shore Brae, leading southwards from Hope Street to the shore. Immediately to the south of the line, and about fifty yards west of the public footpath, there was a house called Brae Cottage. Prior to the formation of the cutting there were two accesses to this house, one leading directly north, almost in a straight line to Hope Street, Inverkeithing, the other starting south from the house and leading round three sides of a field on to the Shore Brae, and so north to Hope Street.

The cutting was begun in September 1887, and the effect was very soon to close the northern and direct access to Brae Cottage.

After that had taken place, in the month of October 1887 Messrs Arrol & Company built a wooden house called Brae Hut close to Brae Cottage, and let it to a foreman ganger in the service of Mr Williams called Buxton, who lived there with his wife and family, and also took in as lodgers some of the men employed on the new line. In consequence of the direct access to Hope Street having been cut off the inhabitants of Brae Hut and others began to take a short cut along the southern edge of the cutting, which was unfenced, to the Shore Brae footpath, striking that latter path close to the point where it crossed the tunnel.

On the 23rd of February 1888 Mrs Gavin, who lived close to the point where the Shore Brae path joined Hope Street, was called in to attend Buxton's wife, who was about to be confined. Mrs Gavin paid several visits to Mrs Buxton, and on March 3rd, at about 8 p.m., she was returning from one of these when she fell into the cutting near the entrance to the tunnel, and was seriously injured.

The present action was brought by Mrs Gavin and her husband against Messrs Arrol & Company and Mr Williams to recover £500 as damages for the injuries sustained by her from the accident.

The pursuer averred that the footpath by which she was going when she met with her accident was the proper and only available access to Brae Hut. The old access to Brae Cottage had been closed by the formation of the railway cutting, and a new access was required. The path referred to had consequently been formed. The accident to the pursuer was caused by the unprotected and dangerous state of this path, and occurred through the fault or negligence of the defenders, whose duty it was to provide a safe and convenient access to the hut.

The defenders in answer averred that the proper access to Brae Hut was by the path leading round the field to the south of the hut on to the Shore Brae, and not by the so-called path along the edge of the cutting, which was on private ground. When the pursuer visited Mrs Buxton she "went alone, and instead of going by the proper access chose to walk across the foresaid private waste ground." On the night when she met with her accident "she again chose of her own accord to go across said private waste ground, and not to go by the proper and safe access."

The pursuers pleaded—"(1) The pursuers having sustained loss, injury, and damage, as

condescended on, through the fault or negligence of the defenders or those for whom they are responsible, the defenders are liable to them in reparation therefor, with expenses as concluded for."

The defenders pleaded—"(2) The said accident not having occurred through the fault of the defenders or of those for whom they are responsible, they are entitled to decree of absolvitor. (3) In any view, the female pursuer having contributed by her negligence to said action, the defenders should be assoilzied."

The following issues were adjusted for trial of the cause:—"(1) Whether, on or about 3rd March 1888 the pursuer Mrs Ann Mercer or Gavin fell into an unfenced and unlighted railway cutting at or near the town of Inverkeithing, and sustained injuries, through the fault of the defenders Arrol & Company, and William Arrol, Joseph Philipps, and Travers Hartley Falkiner, to the loss, injury, and damage of the pursuers? Damages laid at £500. (2) Whether, on or about 3rd March 1888 the pursuer Mrs Ann Mercer or Gavin fell into an unfenced and unlighted railway cutting at or near the town of Inverkeithing, and sustained injuries, through the fault of the defender John Williams, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The defenders did not seek to establish separate grounds of defence.

The trial took place before Lord Wellwood and a jury on 8th and 9th January 1889, and from the evidence then led the following facts appeared:—In the autumn of 1887 the field to the south of the cutting was under potatoes, which were lifted in September. Thereafter the field was allowed to go out of cultivation. After the old access to Brae Cottage had been destroyed by the cutting, and Brae Hut had been built, a regular beaten track several feet wide was formed along the edge of the cutting to the Shore Brae. It was used by others besides the inhabitants of the hut, and was in fact the general route for friends from Inverkeithing wishing to visit the people in the hut, or tradesmen bringing them supplies. Sometimes also there were a good many people living in the hut. Buxton on this point said—"Sometimes there is a considerable community of us." The cutting along the edge of which the new path ran was 34 feet deep, and was unfenced. The distance by that path to the Shore Brae was about 50 yards; by the path which led round the field about 150 yards. This latter path was steep in places, and had steps on it. To the south of the railway the Shore Brae path was separated from the field in which Brae Hut stood by a sunk fence, which began close to the point where the Shore Brae path crossed the tunnel. At that place the sunk fence was only about a foot in height. When the tunnel was being made the contractors put up a fence on the Shore Brae path, where it crossed the tunnel, for the safety of passengers, and this fence was continued a few feet south of the railway, and joined to the beginning of the sunk fence. Buxton finding the fence in the way when he wished to bring in coals to the hut, turned the edge of it round in order to have room to get a barrow on to the path which had been formed along the edge of the cutting. Gray, who was Arrol & Company's manager, remonstrated with Buxton for moving the fence, and told him to put it back in its place. That, however, was not done. At the time of the accident a crane was in course of erection on the south side of the cutting between Brae Hut and the Shore Brae path, and when Mrs Gavin was leaving Brae Hut on the night of the accident Buxton deponed that he gave her particular directions as to the side on which she should pass the crane.

The jury returned a verdict for the pursuer, assessing the damages at £100.

The defenders obtained a rule on the pursuer to show cause why this verdict should not be set aside as being contrary to evidence.

Argued for the pursuer—It was the duty of the defenders to see that there was a safe and convenient access to the hut. They knew that the path along the edge of the cutting was being used as the access to the hut, and it was therefore their duty to see that it was sufficiently fenced and protected—*M'Feat* v. *Rankin, &c.*, June 17, 1879, 6 R. 1043; *Baillie* v. *Parker*, June 7, 1887, 14 R. 783; *Holmes* v. *North-Eastern Railway Company*, May 25, 1869, L.R., 4 Exch. 254.

Argued for the defenders—The question was whether in the circumstances there was an obligation on the defenders to fence the cutting. The law with regard to questions of this sort was (1) If a person went on unfenced ground as a trespasser and fell into a hole, he had no claim; (2) If a person went on the ground of another *ex gratia*, he was entitled to be informed of any hidden danger or trap into which he might fall; (3) The proprietor of any ground in immediate vicinity of a public road must take care that any quarry or hole was fenced so as to obviate the danger of accident; (4) The law recognised the doctrine of "invitation." If a person allowed his property to be used by members of the public for certain purposes, and there was a danger into which they might fall, he was bound to guard against that event—Addison on Torts, 314, 621; *Hounsell* v. *Smyth, &c.*, Feb. 1, 1860, 29 L.J., C.P. 203; *Bolch* v. *Smith*, Jan. 30, 1862, 31 L.J., Exch. 201; *Ross* v. *Keith*, Nov. 9, 1886, 16 R. 86; *Forbes* v. *Aberdeen Harbour Commissioners*, Jan. 24, 1888, 15 R. 323. The regular route was by the path round the field to the south of the hut. Even if Buxton was in fault in removing the fence near the tunnel, and the public were thereby in a manner invited to go that way, that was not the fault alleged against the defenders, and it did not carry the pursuer very far in the question as to whether the defenders permitted people to go that way, and further, with regard to the question of contributory negligence, it did not go any way to meet the objection that the pursuer walked into a known danger. The only case by the pursuer on record was that from the time Brae Hut was built the path in question was formed, and became the ordinary and only available access to Brae Hut. This view was contradicted by the evidence.

At advising—

Lord President—The scene of the accident which forms the subject of this action, was a line of railway which the Forth Bridge Railway Company are constructing between North Queensferry and Inverkeithing, and the two parties who are called as defenders are Messrs Arrol & Com-

pany, the principal contractors, and Mr John Williams, the sub-contractor under them for the new line. Two issues were taken, one applicable to each of the defenders, but we were given to understand that the two made common cause, and accordingly the question which we have now to determine is whether the jury were justified in finding a verdict against the defenders.

The question is a somewhat delicate one. The place where the accident took place was alongside of an unfenced railway cutting, and there is no doubt that the place where the pursuer was when she met with the accident was used as a footpath. It was not a footpath which had been constructed for the purpose of being used, but it was one which persons engaged in the making of the railway cutting and others had made by actual use along the edge of a field through which the cutting was being formed. What we have to decide is whether the defenders were under a duty to fence that pathway so brought into use by the persons to whom I have referred. Accordingly, this is hardly a motion to set aside a verdict on the ground of want of evidence; the point rather is, whether the evidence discloses an obligation on the part of the defenders to fence the path on which the pursuer met with her accident.

The history of the matter is that there is a house upon the south side of the railway cutting called Brae Cottage. There were two accesses to the house, one from the north connecting it with Inverkeithing, and running in a straight line from Brae Cottage to Hope Street, and another from the south. The access from the north has been destroyed by the operations of the railway company. The interposition of the railway cutting prevented that road from being of any further utility to Brae Cottage. In that state of matters Messrs Arrol's contractor built a wooden hut immediately to the south of that house for the purpose of accommodating his workmen. The nominal tenant of that hut was a man named Buxton. He took in as lodgers the navvies who were under his charge. But these were not the only persons who required access to the hut. Those who brought their food supplies, and those who had occasion to visit the inmates of the hut and their wives and children had to be provided with an access. There was undoubtedly the access from the south, but it was by a roundabout route, and it was only natural that a short cut should be invented and set up, and it was upon that short cut that the pursuer met with the injury complained of. A straight line of road led from the town of Inverkeithing to the seashore, and somewhat to the east of the hut to which I have referred it crossed over a tunnel over the new railway. There was a communication from this road to the hut by the footpath which I have already described as having been formed by the use made of it by the workmen and their friends. The defenders say that they did not make this footway, and that there was no duty on them to make it; that there was an existing access to the hut which was perfectly well established and well known, and that no one had a right to go to the hut except by that access; but upon the other hand there is no doubt that they saw that this path was coming into use, and that everyone went by it in preference to the roundabout way from the south. There is an indication of this in the evidence of Gray, the defenders' foreman, for he noticed that the paling which divided the footpath running north and south over the tunnel from the field had been interfered with and turned round so as to open a way to enable the inhabitants of the hut to carry in their coals, and so soon as he had observed this he remonstrated with Buxton, but unfortunately he did not sufficiently insist upon his remonstrance. He was conscious that the fence ought to have been put right and that this had not been done. I think that these circumstances raise a sufficient duty upon the part of the defenders to make the path safe, not merely for the workmen who may be supposed to have been able to take care of themselves, but also for other persons, because it was impossible for the workmen to occupy the hut without other people coming there also, and the needs of those other people had also to be attended to. This unfortunate person was coming there for the very legitimate purpose of attending the wife of the ganger. Accordingly I am of opinion that there was an obligation upon the defenders to fence this pathway so as to prevent the risk of accident.

But there is a further consideration which does not seem to have been urged at the trial, viz., whether there was not contributory negligence on the part of the pursuer. There is a plea to that effect, but the statement in support of it is not very strong. It is stated in the sixth answer to the condescendence that "the pursuer went alone, and instead of going by the proper access chose to walk across the foresaid private waste ground," *i.e.*, the footpath in question. Again, in the seventh answer, "explained that on said occasion she again chose of her own accord to go across said private waste ground, and not to go by the proper and safe access." It does not appear to me that these statements afford a relevant ground for the plea of contributory negligence. If this path was used by the employees of the defenders and by all who had occasion to visit the hut, and if that fact was seen by and known to the defenders and they took no steps to prevent it, it is not for them to say that the pursuer "chose of her own accord to go across private waste ground." Can it be said that she walked into an obvious and known danger? She had fair ground for thinking that she was doing what others did. She received particular directions to keep upon the one side of a crane which was being erected close to the path, and if she had done so she would probably have escaped. She took the wrong side of the crane very unfortunately both for herself and the defenders, but that fact is not in my opinion sufficient to justify a plea of contributory negligence.

Lord Mure—I agree with your Lordship that there was a duty on the defenders to have a fairly safe path to the hut which they had built for the use of their workmen, the old footpath having been put an end to.

Upon the question of contributory negligence I have more difficulty. My doubt is not due to the consideration that the allegation upon record does not amount to an allegation of contributory negligence. But the pursuer's own statement is that she was accompanied half-way up the road

by another woman whom she asked to go along with her, as she seems to have been afraid to go by herself. I should myself have hesitated to say that there was no contributory negligence on the part of the pursuer, but the question was one eminently for a jury, and as they have taken a different view I do not think the verdict should be disturbed upon that ground.

Lord Adam—Before the formation of the new railway there was only one house in the neighbourhood of this cutting, viz., Brae Cottage. There were two accesses to it, one from the north leading from Hope Street straight down to it, and another which led by a circuitous route turning first south and then north again before it reached the cottage. In August 1887 the contractor took possession of the field in which the cottage was situated, and built a hut in it for the accommodation of their workmen. Buxton became tenant of it and took in lodgers. "Sometimes," he says, "there is a considerable community of us." There would, therefore, be a good deal of traffic to the hut in consequence. The railway cutting was commenced in September. About the end of October the road from the north which formed the direct access to the hut was interrupted, and a new access came to be formed by the constant passage of the workmen, message boys and others, across the field from the other road to the hut. This was a short cut to prevent the necessity of going round three sides of the field. As the railway cutting which shut off the access from the north progressed, a fence was erected along the sea brae road from north to south, fencing it off from the cutting, and which was originally prolonged across the entrance to the new path, but about the end of December or beginning of January the end of the fence to the extent of 7 or 8 feet was removed and turned round along the cutting so as to leave the access to the new path again open. The use of the new path had gone on until at the time when the accident in question occurred a distinct, definite, and well-worn track had been formed, and was being used to the knowledge of the defenders by many persons having legitimate business at the Buxtons' house.

The question is, whether or not, that being the origin or genesis of the footpath, there was an obligation upon the contractors to look after and be responsible for the safety of those using the road. They knew of its existence—they were daily on the ground, they permitted it to go on, and the footpath passed close by the unfenced cutting, which was some 30 feet deep. There was, I think, an implied invitation to passengers to use it, and in these circumstances I think there was a duty upon the defenders either to stop the use of the road, or to see that it was properly protected against the chance of accident. Accordingly I concur.

I also agree in thinking that there was no contributory negligence such as would disentitle the pursuer to recover damages. The question is a jury one, and I do not think there is any ground for disturbing their verdict.

Lord Wellwood—I agree in the result to which your Lordships have come, but not exactly on the same grounds.

I confess that I should not myself have taken the view which the jury did, although I say so with diffidence after hearing the opinions which have now been expressed by your Lordships. I thought at the trial, and I think still, that the pursuer has not succeeded in establishing that there was an obligation upon the defender to fence the pathway in question. The proper and legitimate access to the hut was undoubtedly the circuitous road which led round to it by the shore, and the footpath which formed the short cut was not as alleged on record originally formed or sanctioned as an access by the defenders. Now, although it appears to me that if the footpath had been used for a considerable time there might have been a duty on the part of the defenders to protect it, I think that the use which has been proved here was not sufficient to impose such an obligation upon them.

On the other hand, there are, I think, certain elements in the case sufficient to support the verdict. In the first place, there is evidence to show that the footpath was used to some extent as an access to Brae Hut. In the second place, there is little, if any, evidence of the use of the circuitous route to the hut as an access to and from Hope Street, although as I have said it was the legitimate route. In the third place, there is evidence that after a fence had been put across the entrance to the footpath it was removed by Buxton in the knowledge of the defenders and not replaced. I think the jury were of opinion that there was thus a kind of recognition of the footpath by the defenders, and an invitation by them to people like the pursuer to use it. Accordingly I think that the verdict which was returned cannot be held to be contrary to evidence.

In regard to the question of contributory negligence, I think there was not sufficient evidence to disentitle the pursuer on that ground to recover damages.

The Court discharged the rule.

Counsel for the Pursuer—Guthrie Smith—J. A. Reid. Agent—P. H. Cameron, S.S.C.

Counsel for the Defenders—Comrie Thomson—M'Lennan. Agents—Reid & Guild, W.S.

Tuesday, February 26.

SECOND DIVISION.

MURRAY AND OTHERS (THE DALMELLINGTON IRON COMPANY) *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Condictio indebiti—Error in Payment—Repetition—Knowledge.

Where a person makes a payment in the knowledge that the sum paid is not due, he is presumed to have waived all inquiry and to have admitted the debt. In order, however, to bar his right to repetition of the payment it must be established that the knowledge that the sum was not due was, or should have been, present to his mind at the time of payment.

An iron company and a railway company

entered into an agreement by which the railway company, *inter alia*, undertook "not to carry traffic for any other party at lower proportionate rates than those charged to the iron compay, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line. Troon traffic . . . alone excepted from this condition."

The iron company regularly paid for fifteen years the rates charged by the railway company on their traffic.

In an action by the iron company against the railway company, founded on this clause, for repetition of certain sums which they averred they had paid in excess of sums charged and paid by two other traders, the railway company pleaded that the pursuers were barred from repetition in respect they had paid the alleged overcharges in the knowledge (possessed by their manager and secretary) that the two traders were being charged less for their traffic.

Evidence on which the Court *held* that the pursuers were entitled to repetition in respect that (1) they neither knew nor ought to have known of the overcharges; (2) in respect that the defenders must be held to have known they were violating their own agreement.

Carrier—Railway—Agreement—Construction.

A railway company entered into an agreement with an iron company to carry upon their railway system the whole mineral and other traffic (under a certain exception) which the iron company might send, of the description and at rates and charges specified in the third article of the agreement. In that article the traffic was divided into two classes, of which Class A included "pig iron, coke, hewing stone, bricks, and tiles," and Class B included "rubble stone, iron ore, coal," &c. The railway company further undertook not to carry traffic for any other party at lower proportionate rates than those charged to the iron company, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line.

Held, on a sound construction of this agreement, (1) that it imposed an obligation on the railway company not to carry traffic, inwards or outwards, for any other traders at lower proportionate rates per ton per mile than those charged to the iron company, irrespective of the terminus to which the traffic was carried; (2) that in the case of lower rates being charged to other traders, the iron company was entitled to a reduction only on the same kind of traffic comprised in the class to which the particular traffic belonged.

On 30th March 1868 The Dalmellington Iron Company, Limited, having their registered office at 109 Hope Street, Glasgow, entered into an agreement with the Glasgow and South-Western Railway Company, under which the former bound themselves that the whole mineral and other traffic of the description specified in the third article thereof, which they might have occasion to send along the latter's railway to or from their works or mineral fields, should be sent and be conveyed by the railway company over their railway system, and that the iron company should pay in respect of the conveyance of such traffic the rates and charges therein specified. By the third article of the agreement it was set forth—"The mineral and other traffic referred to in article second shall be held to embrace all traffic falling under the descriptions following, excepting therefrom all traffic to or from the port and harbour of Troon:—Class A. Pig iron, coke, hewing stone, bricks, and tiles. Class B. Rubble stone, calcined or raw ironstone, iron ore, coal sent to or by the second party in the capacity of ironmasters, but not as coalmasters, shale, lime, limestone, sand, and fire-clay."

The fourth article of the agreement was in the following terms—"The rates and charges which shall be exacted by the first party in respect of the conveyance over their railways of the mineral and other traffic falling under the said respective classes shall be as follows:—Class A. When carried six miles or under, the sum of ninepence per ton; when carried any distance beyond six miles, and not beyond sixteen miles, the sum of one penny half-penny per ton per mile; when carried any distance beyond sixteen miles, the rate above prescribed for the first sixteen miles, and for every mile thereafter the sum of one half-penny per ton per mile. Class B. When carried six miles or under, the sum of sevenpence half-penny per ton; when carried any distance beyond six miles, and not beyond sixteen miles, the sum of one penny farthing per ton per mile; when carried any distance beyond sixteen miles, and not beyond twenty-six miles, the rate above prescribed for the first sixteen miles, and for every mile thereafter the sum of three farthings per ton per mile; when carried any distance beyond twenty-six miles, the rates above prescribed for the first twenty-six miles, and for every mile thereafter the sum of one half-penny per ton per mile: Declaring that, in addition to the rates stipulated in this agreement, the second parties shall be bound to pay to the first party on all their traffic one penny per ton for the use of waggons on their private branches to and from their iron furnaces: Provided also that the first party shall carry or charge for the second parties' traffic by the shortest ordinary and usual route between the sending and receiving points by which the first party are carrying traffic of the like description, and not by any longer or unreasonably circuitous route: But it is also hereby provided and declared, notwithstanding anything herein contained, that for the period from the date hereof to the 1st day of February 1870, but no longer, the charges made by the first party against the second party under Class B before mentioned, shall be one penny half-penny per ton more than the charges specified under Class B, whatever distance the said articles may be conveyed: As also declaring that the rates and charges in this agreement shall not apply to traffic going to or coming from the port and harbour of Troon, but the first party shall be entitled to charge for such traffic such rates and charges within the powers of their Acts as they may think proper."

This agreement came into operation on 1st January 1868, and was to continue for ten years.

It was acted upon for some years, but was

modified and altered by a supplementary agreement dated 24th December 1872 and 14th and 15th February 1873, which was to come into force from and after the 31st August 1872, and which extended the time during which the original agreement was to continue in force till 1st October 1890. The second article of the agreement was in these terms—"The restriction or limitation in article third of the said agreement, which limits the coal traffic coming under Class B to coal sent to or by the second party in the capacity of ironmasters, but not as coalmasters, shall be, as the same is, hereby removed; and it is hereby declared that the traffic coming under Class B shall include all coal sent to or by the second party, whether in the capacity of ironmasters or coalmasters." The third article was as follows—"The first party also undertake to reconsider article third of the said agreement with reference to the exception from the operation thereof of traffic to or from the port and harbour of Troon, and to endeavour to make some arrangement by which the exception may be removed." The fifth article provided—"The first party undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line; Troon traffic, unless arranged for as above, alone excepted from this condition."

On 16th June 1887 James Murray and others, the surviving partners of the Dalmellington Iron Company, raised this action against the Glasgow and South-Western Railway Company generally, on the ground that the defenders had carried, in violation of the above agreement, traffic for other persons and firms at rates lower than those charged to the pursuers, and that they were entitled to repetition of the amount paid by them in excess of what was charged to and paid by others.

In Cond. 7 the pursuers averred that they had since 1868 paid to the railway company in respect of carriage of coals, iron, limestone, &c., under the agreement at the following mileage rates—"Class A, when carried 6 miles or under, 9d. per ton; beyond 6 miles and under 16 miles, 1½d. per ton per mile; beyond 16 miles the above rates for the first 16 miles and thereafter ½d. per ton per mile. Class B, 6 miles or under, 7½d. per ton; 6 miles and under 16 miles, 1¼ per ton per mile; beyond 16 miles and under 26 miles, ¾d. per ton per mile; beyond 26 miles the above rate for the first 26 miles, and ½d. per ton per mile thereafter. These rates were duly paid by the pursuers in the erroneous belief that they were the same proportionate rates as were demanded from other parties and traders on the system for traffic as enumerated and defined under Tables A and B, and relying on the defenders fairly and honestly fulfilling their part of the said agreement, and without the pursuers knowing the fact that there were more favoured traders in the matter of mineral traffic rates."

In Cond. 8 the pursuers set forth that in 1884 they discovered for the first time that the defenders had entered into an agreement dated 3rd and 13th April 1866 with the Earl of Eglinton, under which traffic was conveyed by them to Ardrossan from Hurlford, a distance of twenty miles, for 1s. 7d., while the rate according to the pursuers' agreement was 1s. 11d., and also that under it the defenders carried pig-iron from the Portland Iron Works, Hurlford, to Ardrossan at lower rates than those charged to the pursuers.

This agreement provided for reduction of rates on coal traffic from Hurlford, Springorde, and Fergushill districts to Ardrossan Harbour, which reduction was to continue in force for twenty-one years from 1st January 1866. The fourth article provided—"It is hereby agreed that the rates for the conveyance of coal and pig-iron to Ardrossan from collieries and works in the Hurlford district . . . shall not, during the said period of twenty-one years, exceed the rates for the time-being charged for the conveyance of coal and pig-iron from such collieries and works respectively to Troon Harbour by more than twopence per ton; and on the other hand, the second party (the railway company) may during the foresaid period, if they see fit, charge for the conveyance of pig-iron and coal (from works and pits which are specified, not within the Hurlford district) to Troon Harbour, rates of any amount not less than twopence per ton higher than the rates for the time-being charged for the conveyance of such pig-iron and coal to Ardrossan Harbour."

In Cond. 11 and 12 the pursuers averred that they had ascertained in June 1886 that the defenders had been in use for many years past to grant special reductions to, *inter alios*, the Lanemark Coal Company, under an agreement entered into with the latter in 1874, in terms of which they had for the period from 25th August to 17th August 1885 carried coals from Lanemark Collieries, a distance of thirty-one miles, to and from Troon, at the rate of 1s. 9d. per ton, and to Ayr, a distance of twenty-four miles, at the rate of 1s. 7d. per ton, while the rates, according to the pursuers' agreement with them, should have been for these distances—2s. 6d. to Troon, and 2s. 2d. to Ayr.

The conclusions of the summons were for payment of the four following sums in name of overcharges—(1) £2767, 14s. 4d. as the difference between the amount the pursuers had paid under Schedule B of their agreement from 31st August 1872 to 31st December 1874, and what they should have paid had they been charged during that period at the Eglinton rate from Hurlford to Ardrossan; (2) £16,356, 6s. 9d. as the difference between what they had paid under the same schedule from 31st December 1874 to 25th February 1885, and what they should have paid during that period if charged at the Lanemark Coal Company's rate or their coal carried from Lanemark to Ayr; (3) £2784, 2s. 2d. as the difference between what they had paid under the same schedule from 25th February 1885 to 31st October 1886, and what they should have paid during that period if they had been charged at the Lanemark rate; (4) £14,837, 15s. 9d. as the difference between payments made between 31st August 1872 and 31st December 1886 under Schedule A for pig-iron, and what they should have paid had they been charged at the Eglinton rate for coal and pig-iron between Hurlford and Ardrossan, and in particular from Messrs W. Baird & Company's Portland Iron Works at Hurlford. As regards this latter conclusion, the pursuers averred in Cond. 17 that applying the distance rate charged against the pursuers for a

distance such as that between Hurlford and Ardrossan Harbour, Messrs Baird & Company should have paid 2s. 1d. for their pig-iron traffic, whereas they had, since the Eglinton agreement, been charged at a rate on that traffic of 1s. 8d. only.

The defenders answered that the terms of Lord Eglinton's agreement were all along known to the pursuers and to the late John Hunter, their manager, as also were the rates charged to the Lanemark Coal Company, Mr Hunter being at the time a partner of the latter company. They further averred that it was in consequence of Lord Eglinton's agreement that the Troon exception was inserted in the agreement founded on. As regards the sum first concluded for the defenders answered—"Explained that the pursuers are claiming a reduced rate on articles which are not embraced within the table of rates charged under the agreement with Lord Eglinton, which agreement provided for a reduction on the rates for coal traffic only. Explained that the said sum of £2767, 14s. 4d. bears to be made up on the footing of the pursuers being entitled to a deduction from their rates to all places whatever, proportionate to the amount by which the rate of 1s. 7d. charged for traffic from Hurlford to Ardrossan, being 20 miles, falls short of the scheduled rate under pursuers' agreement for that distance. Of said sum of £2767, 14s. 4d. only £6, 1s. 9d. bears to be in respect of traffic carried from the pursuers' works. Further, only £39, 5s. 1d. bears to be in respect of traffic between the pursuers' works and Ardrossan, the balance, £2728, 9s. 3d. bearing to be in respect of traffic beween their works and other places to which the rates charged against them are as low as those charged against any other traders. Only £711, 10s. 2d. of said sum of £2767, 14s. 4d. bears to be in respect of coal traffic."

As regards the sum second concluded for the defenders answered—"Explained that the said sum of £16,356, 6s. 9d. bears to be made up on the footing of the pursuers being entitled to a deduction from their rates to all places whatever, proportionate to the amount by which the rate of 1s. 7d. charged for coals carried from Lanemark to Ayr falls short of the rate for a similar distance under the pursuers' schedule, which the pursuers state to be 2s. 1½d., but which, in point of fact, is only 1s. 11¾d. Of said sum of £16,356, 6s. 9d. only £243, 12s. 3d. bears to be in respect of traffic carried from the pursuers' works, and less than half bears to be in respect of traffic carried between the pursuers' works and Ayr. More than half the sum sued for bears to be in respect of traffic between the pursuers' works and places other than Ayr, to which the pursuers' rates are as low as those charged against any other traders. Further, although the Lanemark rate applies only to coal traffic, less than one-fourth of the sum sued for bears to be in respect of such traffic."

As regards the sum third concluded for the defenders answered—"The said sum of £2784, 2s. 2d. bears to be made up as explained in the previous article. A considerable proportion of said sum bears to be in respect of traffic between the pursuers' works and places other than Ayr. Further, although the rate founded on applies solely to coal traffic from Lanemark, only £373, 18s. 11d. of the sum sued for bears to apply to traffic carried from the pursuers' works, and only £378, 7s. 4d. bears to apply to coal traffic."

As regards the sum fourth concluded for the defenders answered—"Explained that said sum of £14,837, 15s. 9d. bears to be made up on the footing of the pursuers being entitled to a deduction from their rates to all places whatever, proportionate to the amount by which the rate of 1s. 8d. charged for pig-iron traffic from Messrs William Baird & Company's Hurlford works to Ardrossan Harbour, falls short of the rate under the pursuers' schedule for a similar distance, which they state to be 2s. 1d. Explained that said rate of 1s. 8d. is made up of the rate from the Hurlford works to Troon, being twelve miles, with 2d. added, in terms of the agreement with Lord Eglinton before referred to."

The defenders also founded on an alteration made by Mr Barr, solicitor for the pursuers, on the draft agreement which they maintained showed knowledge on his part of Lord Eglinton's agreement as regards the Troon traffic.

The pursuers pleaded—"(1) Under the several agreements mentioned the pursuers were entitled to have their whole traffic specified in said Classes A and B carried during the period in question at the lowest rates either to Lord Eglinton or the Lanemark Coal Company for any of the goods or materials mentioned in the said classes respectively. (2) The pursuers having been overcharged by the defenders, are entitled to repetition of the sums so overcharged."

The defenders pleaded—"(1) The pursuers' statements are irrelevant. (2) *Mora* and acquiescence. (3) The payments in question having been made by the pursuers voluntarily in full knowledge of the whole facts now alleged, so far as material, they are not entitled to demand repetition of the said sums. (4) The pursuers' averments, so far as material, being unfounded in fact, the defenders are entitled to absolvitor. (5) On a sound construction of the agreements, the defenders are not indebted to the pursuers, and are entitled to be assoilzied. (6) In any event, the pursuers are only entitled to a reduced rate on articles carried under Lord Eglinton's agreement, or for the Lanemark Coal Company at a lower rate than that charged against the pursuers. (7) In any event, the pursuers are only entitled to a reduction on their rates for coal traffic to Ayr, and pig-iron and other traffic to Ardrossan; *et separatim*, they are not entitled to have their rates to any places reduced below those charges to the same place against those traders on a comparison with whose rates to other places the pursuers' claim for reduction is based."

A lengthy proof was led upon the first question raised as to whether the pursuers had paid the charges complained of as overcharges in the knowledge that others were being charged less than they were for their traffic. The result of the proof will be found in the Lord Ordinary's opinion.

It appeared that in 1859 Mr Hunter, the manager of the pursuers' company, became a partner of the Lanemark Company, in which he held an interest till his death in 1886. From 1846 he managed the pursuers' firm. In 1872 he became a partner therein. Mr Gavin, secretary of the pursuers' company, deponed—"I was aware that Mr Hunter was a partner of the Lanemark Coal Company.... He did not take anything to do with the management of the company to my know-

ledge. . . . Mr Hunter always signed the railway accounts as long as he was alive. In saying that he did not go into the details, I mean that he did not go into the figures and additions of the accounts. He could see the rates charged if he chose to look at the accounts. Mr Hunter's practice was simply to sign the accounts if he saw the check clerk's initials at them. He signed the accounts up to his death. He had been signing them from 1852. . . . The first time I discovered anything about the Lanemark railway rates was in 1882. We had a small contract at that time with the Ayr District Asylum to supply dross and gas coal. The Asylum is situated convenient to a coal siding which we had at Belmont, near Ayr, about 11 miles distant from the works, between Ayr and the works. We had no gas coal ourselves, and we bought it from the Lanemark Coal Company in order to fulfil our contract. Having purchased it from them we applied to the railway company for a rate from Lanemark to Belmont. Our application to the railway company for the rate and their answer were in writing. The company quoted a rate of 2s. 4¾d. This was on 1st July 1882. On getting that quotation I compared it with our own rate of 2s. 3d. or 2s. 3½d. from the works to Lanemark. We had a right with reference to a short distance route. . . . I wrote objecting to the rate, and mentioned our rate, and also that I had heard that the Lanemark Company had a considerably lower rate to Ayr, which is close to Belmont. I cannot recollect from whom I heard about the Lanemark rate, but it was not what I considered any reliable source. The railway company adhered to their rate. I submitted the matter to Mr Hunter, and mentioned that I had been asking a rate for the coal. I told him the difference between the rates, and drew his attention to Lanemark having a rate of 1s. 9d. to Ayr—that I had heard a rumour of that. I said I wondered if the Lanemark people would tell us the truth of it, and he said I might write if I liked and ask them. I wrote to the Lanemark Company on 7th July 1882, and received no answer. I had occasion to write them again on the 1st August with reference to an account, and in a postscript I reminded them that they had not replied to my enquiry. I received a reply after that telling me what their rate was. I laid the reply before Mr Hunter."

Mr Brunton, the solicitor of the railway company, deponed—"Shortly stated, the reason for the Troon exception was, that we had to carry between Troon and Ardrossan for 2d. per ton, and if we had given the Dalmellington Iron Company schedule rates to Troon and 2d. per ton additional to Ardrossan we would have been charging them less than schedule rates to Ardrossan, which would have caused a conflict with the Eglinton Iron Company and Merry & Cuninghame. . . . We understood that Mr Barr and Mr Hunter were quite conversant with the terms of Lord Eglinton's agreement under which the difficulty arose, because we explained that that was the arrangement under the agreement with Lord Eglinton. The discussion proceeded on the assumption that they knew all about it. They must have known of it, because Mr Hunter in his letters to Mr Johnstone refers to that difference between Troon and Ardrossan; he calls it 2½d. instead of 2d. I have no doubt he and Mr Barr were distinctly told, and that it was discussed, that we could not charge more as between Troon and Ardrossan than 2d. a ton."

The following correspondence and documentary evidence was produced:—"Letter, David Barr to John Hunter. *Glasgow, 24th July* 1867.—My dear Sir,—I now send you copy of agreement between the Glasgow and South-Western Railway Coy. and the Eglinton Iron Coy., and will be glad to have it back, with your remarks, as soon as convenient."

"Letter, Mr Hunter to Mr Johnstone. *Dalmellington Iron Works, by Ayr, 27 Sept.* 1870.—My dear Sir,—I am in receipt of a letter from Mr Wainwright informing me that you had submitted to the directors my letter regarding the high rate charged for the carriage of limestone from Troon, and that they could not see their way to make the reduction asked; I fear therefore that they cannot understand the true position of the matter in question, otherwise they would not have so decided. You are aware that when the agreement was entered into that Troon was excluded from the mileage rate, because your existing agreements with the other parties would not admit of your charging less than 2½d. per ton from there than is charged from Ardrossan, and as the rates from the various places were reduced on the 1st February last, I think that if you were to present the case to the directors as to the reason why Troon was excluded from the mileage rate, they could not reasonably refuse to allow us a corresponding reduction from that port from 1st of February. I shall expect to hear from you as to this."

"Letter, Mr Hunter to Mr Johnstone. *Dalmellington Iron Works, by Ayr, 1st Octr.* 1870.—My dear Sir,—I am a good deal astonished to learn from your letter of 29th ultimo that all the facts of the case regarding the high rate charged for the carriage of limestone were laid before the directors, and that notwithstanding they could not see their way to make the reduction asked. If there was any truth in the argument used at the entering into the agreement, about 2½ years ago, that there must be a difference of 2½d. per ton between the carriage to and from the harbours of Troon and Ardrossan as the reason why Troon could not be included in the mileage rate, surely the same argument holds good at the present time, and therefore I consider we are justly entitled to the reduction. I will feel obliged by your letting me know when the next meeting is to be held, and will myself appear before the directors and state my case."

On 30th May 1876 Mr Hunter wrote the following letter to Mr Barr:—"*Dalmellington Iron Works, by Ayr.*—My dear Sir,—Has the agreement between the G. & S.-W. Ry. Coy. and the Dalmellington Iron Co, to which you refer in your letter to me of the 6th December 1872, ever been executed? If it has not, no time should be lost in getting it completed," &c.

From a number of letters it appeared that the pursuers through Mr Hunter were continually pressing for a reduction in their rates, and on 29th August 1883 Mr Hunter wrote the following letter to the defenders:—"(*Private and confidential.*)—My dear Sir,—I beg to inform you that this long depression in the iron trade has about reached a climax at Dalmellington Iron Works, and unless we get some reduction in the carriage of our pig-iron and minerals to and from these

works they must be stopped. I may mention that the mineral proprietors met us with a reduction in the lordships during the last twelve months, which has given us some relief so far, but notwithstanding this and the low rate of workmen's wages, we are still carrying on at a serious loss, and this having continued for so many years, we are compelled to face the question of stopping altogether. I will be glad to hear from you as soon as possible whether or not your company is disposed to grant us any reduction."

On 14th March 1888 the Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Repels the first, second, third, and fifth pleas-in-law for the defenders: Finds that under the agreement of 1868, and supplementary agreement of 1872, between the parties, that the pursuers were and are entitled to have the traffic sent by them to the defenders conveyed along the defenders' railway system at the same rates per ton per mile as are charged by the defenders to other traders for the same kind of traffic; and are now entitled to repetition of any rates or charges paid by them to the defenders in excess of rates charged by the defenders for the same kind of traffic to other traders: *Quoad ultra* continues the cause, &c.

"*Opinion.*—In 1868 the pursuers and defenders entered into an agreement under which the pursuers bound themselves that the whole mineral and other traffic of the description specified in the third article thereof, which they had occasion to send by public railway to and from their works or mineral fields, should be sent by them to be conveyed by the defenders over their railway system, and that the pursuers should pay, in respect of the conveyance of such traffic, the rates and charges therein stipulated. This agreement came into operation on 1st January 1868, and was to continue for ten years.

"By the third article of said agreement it was set forth that the mineral and other traffic above referred to should be held to embrace all traffic falling under the description there given, 'excepting therefrom all traffic to or from the port and harbour of Troon.' The traffic was divided into two classes—Class A and Class B—and certain rates were agreed on to be paid for its conveyance. It is not necessary to specify what articles were included in either class, but the rate or charge on each article in each class was the same—that is to say, that one rate was charged on the different articles contained in Class A, while a different rate was charged on all the articles contained in Class B. With regard to the traffic to and from the port and harbour of Troon the defenders were authorised to charge such rates or charges 'within the powers of their Act' as they might think proper.

"This agreement was acted upon for some years, but it was modified and altered by a supplementary agreement dated 24th December 1872 and 14th and 15th February 1873, which extended the time during which the original agreement should continue in force till 1st February 1890. That supplementary agreement (which was declared to come into force from and after 31st August 1872) contained the following clause—'*Fifth*, The first party (the defenders) undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party (the pursuers), and to place the latter on the same footing as that enjoyed by the most favoured traders on the line, Troon traffic . . . alone excepted from this condition.'

"The pursuers now aver that in violation of the clause just quoted the defenders carried traffic for other persons and firms at rates lower than those charged to the pursuers, and they seek repetition of the amount paid by them in excess of what was charged to and paid by others.

"The parties have argued before me three questions involved in the defences, and on these questions I have been asked to give judgment in the meantime, because if decided in favour of the defenders the pursuers' claim would be excluded in whole or in part, while if decided in favour of the pursuers they would be entitled to decree for such sum as an accounting would show to be due to them. These three questions are—(1) Did the pursuers pay the charges now complained of as overcharges in the knowledge that others were being charged less than they were for their traffic? (2) Does that knowledge, if it existed, or such as it was, bar the pursuers from insisting in their present claim? and (3) On a construction of the agreements before referred to, what parts of the pursuers' claim, if any, can be maintained, and what parts are excluded?

"1. On the first question proof has been submitted by both parties, partly parole and partly documentary, the result of which will now be considered. It is not proved that any of the partners of the pursuers' company (as then constituted) knew of the lower rates which were being charged to other traders, except perhaps Mr Hunter. Indeed, on this part of the case it is not maintained by the defenders—it certainly is not established—that there was knowledge on the part of anyone connected with the pursuers regarding the lower rates conceded to other traders, except on the part of Mr Hunter and Mr Barr, the law-agent of the Dalmellington Company. The defenders, however, maintain that any knowledge which Mr Hunter had must be regarded as knowledge on the part of the pursuers, because of Mr Hunter's position in the pursuers' firm. This makes it necessary to consider what that position was. Mr Hunter was from 1846 the manager of the pursuers' company, his duties being 'to take the practical management of the iron works in all its details.' 'He was not then authorised in any way to enter into agreements of a large or important character for the company. If there was any question of entering into a lease or traffic agreement, he was instructed to go to the partners of the company.' Mr Hunter in 1874 became a partner of the pursuers' company to a small extent—'a thirty-first share'—but he continued still to take the practical management of the works. That being Mr Hunter's position, the next question is the state of Mr Hunter's knowledge, and that so far as the case has been presented to me concerns the rates at which the defenders were carrying traffic under (1) Lord Eglinton's agreement, and (2) under agreement or arrangement with the Lanemark Company. I shall take these in their order.

"Under an agreement entered into between the defenders and the Earl of Eglinton dated in 1866 the defenders agreed that their rates on coal and pig-iron from the Hurlford district to Ardrossan should not exceed the rates for the time being charged for the conveyance of coal

and pig-iron from the same district to Troon by more than twopence per ton, while for coal and pig-iron conveyed from works and pits (which are specified) not within the Hurlford district to Troon, the defenders might charge rates of any amount not less than twopence per ton higher than the rates for the time being charged for the conveyance of such traffic to port of Ardrossan. It is said by the pursuers, and I understand it is not disputed, that under this agreement traffic was conveyed by the defenders to Ardrossan at rates less than those which were charged to the pursuers on similar traffic to the same terminus. It is said, however, by the defenders in reply that this agreement, and the fact that traffic was carried under it for reduced rates, was known to Mr Hunter, and this, they further say, is now established by the proof adduced. The first item of proof referred to by the defenders in support of this position is a letter written by Mr Barr (the pursuers' law-agent) to Mr Hunter, dated 16th August 1867, at the time when the original agreement between the pursuers and defenders was in course of adjustment. In that letter Mr Barr says 'Mr Kerr' (who was then the defenders' law secretary) 'explained to me that in consequence of agreements with the Duke of Portland and Lord Eglinton they could not include Troon Harbour in the agreement.' The defenders maintain as a fair inference from this letter that Mr Kerr explained to Mr Barr on the occasion referred to what the terms were of the agreements with the Duke of Portland and Lord Eglinton, and put Mr Barr, at least, in possession of such knowledge of the terms of these agreements as the pursuers admit they have since acquired. Unfortunately it is not possible now to get any information from Mr Kerr or Mr Barr as to what actually passed between them. Mr Kerr is dead, and Mr Barr's memory 'does not enable him to recal anything connected with the negotiations and communications referred to in the correspondence.' This matter must therefore be determined on the letter as it stands. I am of opinion that the terms of that letter do not, either necessarily or by any fair implication, support the defenders' view. At the time when that letter was written the pursuers were binding themselves to send all their traffic by the defenders' railway system, and at certain rates. The defenders proposed to accept from the generality of the agreement all traffic to Troon, and as the reason for this exception advanced the statement that they were under certain agreements with other parties which prevented them from including Troon traffic in their agreement with the pursuers. It was not necessary for the defenders to say more than this, and it does not appear to me that the pursuers could ask them to say more. What the agreement with these third parties was as to rates or otherwise was not then a matter which the defenders were called on to explain. It was enough to say that these agreements precluded the defenders from including Troon traffic in their agreement with the pursuers. I think the letter fairly read means no more than this, and this only had been said. If the terms of the agreement had been minutely explained by Mr Kerr to Mr Barr I think this would probably have been mentioned, and if the agreement had been exhibited to Mr Barr (the best way, and the business-like way, of making him acquainted with their terms), I think he would certainly have said that he had seen them. I am of opinion therefore that this letter does not prove knowledge on the part of Mr Barr, or through him knowledge on the part of Mr Hunter of the terms of Lord Eglinton's agreement.

"The next part of the proof relied on by the defenders as showing knowledge on the part of Mr Hunter of the terms of Lord Eglinton's agreement consists of three letters written by Mr Hunter to the defenders dated 15th September, 27th September, and 1st October 1870. To understand these letters aright it is necessary to have in view that under the agreement entered into in 1868 between the pursuers and defenders, it was stipulated that notwithstanding what was there agreed to as to the rates charged on traffic, Class B, the defenders were to be entitled to charge 'to the 1st day of February 1870, but no longer,' one penny halfpenny per ton more than the rates specified for Class B. When the first of the letters now under consideration (that of 15th September 1870) was written, the right to charge that additional three halfpence per ton on Class B had ceased, and the purpose which Mr Hunter had in writing the letter was to ask a corresponding deduction of three halfpence per ton on the Troon traffic. He says—'You are aware that when the last agreement was entered into that Troon was exempted from the mileage rate in consequence of your existing arrangements with other people, compelling you to have a difference of not less than 2½d. per ton between that port and Ardrossan, but as a reduction of 1½d. per ton, came into operation on the 1st February last, I think we are justly entitled to a corresponding reduction from Troon from the same date.' Now, to my mind this letter does not prove (any more than Mr Barr's letter, already considered) any knowledge of the rates charged under Lord Eglinton's agreement. It no doubt shows that Mr Hunter had been informed that there must be a difference of not less than 2d. per ton (the 2½d. of the letter is an error) between Ardrossan and Troon rates, but it does not show that he knew the rates charged for traffic either to the one harbour or the other, and unless it can be shown that Mr Hunter knew this, and was consequently in a position to contrast the rates to Ardrossan charged under Lord Eglinton's agreement with the rates charged to Ardrossan under the pursuers' agreement, this letter is not evidence bearing in any way on the question which I have to determine. The same observations apply to the second letter (27th September 1870), which is for the most part a repetition of the first. It contains, however, a sentence on which the defenders lay great stress—'I think that if you were to present the case to the directors as to the reason why Troon was excluded from the mileage rate they could not reasonably refuse,' &c. Something might perhaps have been made of this had Mr Hunter been available for examination, but as he is not, I can only proceed now upon what is written, or upon any reasonable inference deducible from what is written. The only reason which hitherto I have met with in the case assigned by the defenders for the exclusion of the Troon traffic from the pursuers' agreement is simply this—that on account of other existing agreements Troon rates must be in excess of Ardrossan rates by twopence

per ton, and therefore Troon could not be included in the pursuers' agreement, which was an agreement as to rates to Ardrossan and elsewhere. Why that reason should be put forward by Mr Hunter as a ground for asking a reduction of rates to Troon I do not know. But I cannot deduce from Mr Hunter's letter that he knew the defenders were charging other traders (under Lord Eglinton's agreement or otherwise) less rates on their traffic to Ardrossan than were being charged to and paid by the pursuers on their traffic. If he had known that he might very reasonably have assigned that fact as a reason for asking a deduction on his Ardrossan rates, but not on Troon rates, which were excluded from his agreement.

"The third letter (1st October 1870) presents no features differing from the other two calling for further observation. It no doubt speaks of the 'argument used' for the exclusion of Troon traffic from the pursuers' agreement, but this appears plainly enough from the letter itself to be a phrase synonymous with the 'reason why' elsewhere used. Up to this time, therefore, I think the defenders have failed to show that Mr Hunter, or any other person representing the pursuers' firm, knew of the rates to Ardrossan charged under Lord Eglinton's agreement.

"In 1872 the parties were negotiating for a modification or alteration of the agreement of 1868. The defenders were obtaining an extension of the period of its endurance, and the pursuers were desirous that the exception of the Troon traffic should be abolished. A meeting took place on 6th February 1872 between Mr Hunter and Mr Barr, as representing the pursuers, and the chairman and directors of the defenders' company. What took place at that meeting is to be found stated in a memorandum written on the day of the meeting by Mr Barr, and communicated by him same day to the defenders. The third article of that memorandum is in these terms—'The peculiarities of the Troon exception were explained and discussed, and railway company saw no means of removing same, looking to the effect same would have on Messrs B.'s agreement, but railway company to endeavour to make some arrangement by which exception may be removed.' Now that memorandum in itself, and apart from extraneous explanation, amounts only to this, that some explanation and discussion had taken place regarding the peculiar position in which the defenders stood towards the Troon traffic under their existing agreements with others, and that standing these agreements the defenders were still prevented from including Troon traffic in the pursuers' agreement. The memorandum makes no reference whatever to the Ardrossan rates under Lord Eglinton's agreement. It does refer to the effect which the change desired would have on 'Messrs B.'s agreement,' and that I am told is an agreement between the defenders and Messrs Baird, otherwise referred to as the Eglinton Iron Company's agreement. That was an agreement with which Mr Hunter and Mr Barr were well acquainted. I take it to be the agreement of which a copy had been furnished to them, and which is referred to in Mr Barr's letter of 16th August 1867. The effect of the Troon exception being abolished upon that agreement might very well be discussed, because the parties to the discussion knew all about it. But how the abolition of the Troon exception and its effect upon Lord Eglinton's agreement could be discussed I do not very well see, because so far it is not proved that Mr Barr or Mr Hunter knew anything about it, beyond the fact that in some way or other it prevented the defenders including the Troon traffic in the pursuers' agreement. But an explanation of this memorandum is given by Mr Brunton, the defenders' solicitor, who was present at the meeting to which the memorandum refers. I refer for this explanation to the proof where it is given without here repeating it. But I observe upon it that the discussion which took place between the representatives of the pursuers and defenders regarding the Troon exception and its peculiarities proceeded 'on the assumption' that Mr Hunter and Mr Barr 'knew all about' the agreement with Lord Eglinton, an assumption which I have not found to be warranted by anything I have yet seen. But if Mr Hunter and Mr Barr were 'understood' and 'assumed' to know all about the Lord Eglinton agreement it is surely more than probable that its details were neither stated nor explained at the meeting, a probability likewise which may be inferred from the fact that the memorandum, while referring to the effect of abolishing the Troon exception on Baird's agreement, makes no reference (in terms at least) to its effect on Lord Eglinton's agreement, or the effect of Lord Eglinton's agreement upon it. Mr Brunton's explanation complicates the matter (so far as I am concerned) by the introduction of a new element about the rate to be charged for traffic to be carried between Ardrossan and Troon. This is something outside of the several agreements to which I have referred, so far at all events as my attention has been called to them. These agreements relate to traffic between certain districts and Ardrossan or Troon, but not to any traffic carried between these two ports themselves. I am bound to say that I have not been much enlightened by Mr Brunton's explanation. But in my opinion it is certainly not proved either by the memorandum or Mr Brunton's explanation that at the meeting in question the defenders stated, or the pursuers understood, that the defenders were carrying traffic from Hurlford district to Ardrossan for a less charge per ton per mile than they were charging the pursuers for their traffic to Ardrossan. If this had been stated or understood it is inconceivable that the pursuers would have gone to the defenders for a reduction of rates as they did in December 1883, and less conceivable still that they would have been contented with the answer that they then got.

"I come therefore to the conclusion that the defenders have failed to prove knowledge on the part of the pursuers of the rates charged and chargeable under Lord Eglinton's agreement for traffic to Ardrossan.

"I come now to consider the proof bearing upon the question, whether the pursuers knew of rates being charged to the Lanemark Company which were less than those charged to the pursuers? The pursuers, I think, did not know of these rates, unless it be held that knowledge on the part of Mr Hunter or Mr Gavin (the pursuers' clerk) is knowledge by the pursuers. In 1859 Mr Hunter (then manager, as I have already said, for the pursuers) became a partner of the Lanemark

Company, in which he held a very substantial interest until his death. He was therefore quite aware in 1868 and 1872 of the rates paid by the Lanemark Company to the defenders for the traffic carried by them for that company.

"When the agreement of 1868 was entered into Mr Hunter was not a party to it; he was then the pursuers' manager at the works—nothing more. He had no authority to make traffic agreements or enter into any important contract as representing the pursuers. In these circumstances I am of opinion that the knowledge which Mr Hunter had in 1868, and which came to him as a partner of the Lanemark Company, cannot be imputed to the pursuers, because Mr Hunter was at that time also the pursuers' servant. Matters, however, stood in a different position in 1872. Mr Hunter was then a partner of the pursuers' company, and was apparently put forward by the pursuers as their representative in negotiating on their behalf along with Mr Barr, their law-agent, the agreement of 1872. This appears from the correspondence and from the memorandum of the meeting held on 6th February 1872 with the chairman and directors of the defenders' company, in which Mr Hunter is described (by Mr Barr) as appearing for the 'Dalmellington.' No other partner of the pursuers' company appears at that time to have taken part in the negotiations. Accordingly I am of opinion that in 1872, when the supplementary agreement was negotiated and concluded, the pursuers, through their partner Mr Hunter, must be regarded as being in the knowledge that the charges made by the defenders for the Lanemark Company's traffic were less than those charged for similar traffic to the pursuers. I need say nothing about Mr Gavin's knowledge. What he learned on the subject now under consideration was only learned in 1882, and went no further than to Mr Hunter, and if Mr Hunter's knowledge of the Lanemark rates was the pursuers' knowledge in 1872, what Mr Gavin learned in 1882 neither made that knowledge more nor less.

"2. This leads me to the second question submitted at present for decision, viz., What is the effect of the pursuers' knowledge; does it bar the present claim? At the most the pursuers' knowledge of the Lanemark rates could only bar the present claim in so far as it consists of charges made by the defenders in excess of the Lanemark rates. But in my opinion it has not even this effect. Whatever knowledge the pursuers had about the Lanemark Company, or any other trader's rates, the defenders had at least as much knowledge. In this state of matters the parties entered into an agreement, which is free from all ambiguity. They agreed that from and after 31st August 1872 the defenders should not carry traffic for any other party at lower proportionate rates than those charged to the pursuers (*i.e.*, the rates charged to the pursuers under the original agreement), and the defenders undertook to place the pursuers on the same footing as that enjoyed by the most favoured traders on the line—Troon traffic 'alone excepted from this condition.' Nothing could be more explicit. Nobody using the defenders' line was to have any advantage over the pursuers in the matter of rates; the pursuers were to be put on an equal footing with the most favoured traders. Assuming now that both parties to this agreement knew that the Lanemark Company, or any other trader, was at the date of the agreement in a better or more favoured position as regards rates than the pursuers, what was the purpose and effect of that agreement? Simply to abolish the inequality by putting the pursuers on a footing with the most favoured. I do not know whether the parties had any particular rates or agreement in view at the time this agreement was made, but if they had, then it was their knowledge of the existing inequality which probably led to the agreement being expressed as it was; if they had not, then it was to prevent any inequality for the future that they stipulated. Whatever knowledge either or both of the parties had before the agreement was concluded cannot affect or overrule the agreement actually made. Nor can the defenders be heard to say that the Lanemark Company's rates, or the Lord Eglinton agreement rates, were in view of the parties, and were intended to be treated as exceptions. Troon traffic alone was excepted from the agreement.

"3. One or two questions have been raised on the construction of the fifth article of the agreement of 1872.

"(*a*) The defenders say that 'traffic' means only outward traffic. I see no ground for this limitation. I think traffic means all traffic—outward or inward.

"(*b*) The defenders further say that if the pursuers are not charged more than other traders for the same kind of traffic to the same port or terminus they are then placed on the footing of the most favoured trader, and can ask nothing more. I do not adopt this view. Suppose that one trader sends goods to Ardrossan alone, that being his market, and that the pursuers never send anything to Ardrossan, having there no market, is the Ardrossan trader to have his goods sent to Ardrossan at 1s. 6d. per mile for twenty miles, and the pursuers to be charged 2s. per mile for twenty miles in another direction? That would neither be placing the pursuers on the footing of the most favoured trader nor observing the other branch of the defenders' obligation 'not to carry traffic for any other party at lower proportionate rates than those charged to' the pursuers, for lower proportionate rates mean lower rates per ton per mile irrespective of the direction in which the traffic is carried.

"(*c*) The pursuers maintain that if the defenders have carried for another trader any traffic at lower rates than those charged to the pursuers, they are entitled to have carried at the lower rate, not only the same kind of traffic, but the whole articles comprised in the class to which the particular traffic belongs. Thus, by the pursuers' agreement with the defenders the defenders are bound to carry under Class A 'pig-iron, coke, hewing stone, bricks, and tiles,' at 1½d. per ton per mile for any distance over six and not beyond sixteen miles. Suppose that the defenders have carried for another trader bricks for fifteen miles at 1d. per ton per mile, in that case the pursuers maintain that they are entitled to have pig-iron carried for the same distance at the same rate, not because the defenders have carried pig-iron on these terms for anyone, but because the defenders having carried bricks at that rate, and bricks being one of the articles in Class A of the pursuers' agreement, the whole of Class A must be put on the same footing and carried at

the same rate. In short, the pursuers maintain that Class A is a *unum quid*, and that if they are entitled on any ground to have one of the articles enumerated in that class carried at lower than agreement rates, the whole class must be carried at the rate thus reduced. I do not so read the agreement. The classification of different kinds of traffic saved repetition, but does not seem to me to have had any other intention or purpose. It was easier to say that pig-iron, coke, bricks, &c., shall be carried at 1½d. per ton than to say pig-iron 1½d. per ton, coke 1½d. per ton, and so on. In my opinion the pursuers get all the benefit which the clause was intended to give, or does give, if they are charged the same rates per ton per mile as is charged on the same kind of traffic to the most favoured trader."

The defenders reclaimed, and argued—The first point (apart from the question of knowledge on the pursuers' part) at which it was material to arrive, was a just construction of the equality clause of the agreement. The rate there mentioned was a special rate. The Lord Ordinary was of opinion that the pursuers obtained all the benefit which the clause was intended to give them if they were charged the same rate per ton per mile as that which was charged to the most favoured traders on the same kind of traffic. If this reasoning was correct it led to the construction that they were only entitled to reduction where they could show that the defenders had been giving preference for traffic to the same or analogous destinations, and in the same direction. The pursuers sent only to Ardrossan, and had no concern with alleged preferences given to the other traders who sent their traffic to Carlisle and Glasgow. There could be no question of reduction in the case of traffic involving no competition whatever. The importance to the defenders of this construction of the agreement being given effect to was brought out by the following figures:—The result of the Lord Ordinary's construction of the 3d question raised upon the construction of the agreement, viz., as regards material, was (apart from the question of knowledge) to reduce the pursuers' claim from £36,745, 19s. to the sum of £20,266, 6s. 9d. If the defenders' present argument was given effect to, viz., that the traffic must be restricted to similar materials going to the same places in the same direction, then the pursuers' claim would fall to be still further restricted to £1823, 7s. 9d. The next question was whether the alleged overcharges were paid by the pursuers in the knowledge that other traders were being charged less for their traffic. That question fell to be considered with reference (1) to the Lanemark agreement, and (2) to Lord Eglinton's agreement. The first three conclusions of the summons would be disposed of if knowledge of the former agreement were established, just as knowledge of the latter agreement would affect the further conclusion. First, then, with reference to the Lanemark agreement. It was quite clear that Mr Hunter, the manager of the pursuers' company, knew of it throughout the whole time. In 1859 he became a partner in the Lanemark Company, in which he held a substantial interest till his death in 1886. He was therefore quite aware in 1868 and 1872 of the rates paid by the Lanemark Company. In 1874 he became a partner in the pursuers' firm, and was put forward as the *alter ego* of the company in the negotiations along with Mr Barr, the pursuers' law-agent. The correspondence and memorandum of meeting with the defenders of 6th February 1872 showed this. Hunter was described as appearing "for Dalmellington." He was clearly the acting and responsible manager. He signed the railway accounts, and was thus cognisant of all the rates paid. Throughout his correspondence with the railway company he dealt with them as having power to adjust and get new rates. The Lord Ordinary was of opinion that knowledge on his part was proved in 1872. It was also beyond question that Mr Gavin knew also in 1882. It must be taken, then, as clearly proved that both Hunter and Gavin knew of the Lanemark rate. That being so, the pursuers had, in respect of this knowlege, intentionally abandoned their advantage under the equality clause of the 1872 agreement. Second, with reference to Lord Eglinton's agreement, the evidence, though not so absolutely clear, was equally convincing. The first point to observe was that this agreement was well known to Hunter when the original agreement in 1888 was in course of adjustment. Indeed, Barr sent the Eglinton Iron Company's agreement (which contained the same clauses as to schedule rates as Lord Eglinton's agreement) to Hunter on 16th August 1887. He wrote Hunter saying that in consequence of Lord Eglinton's agreement the defenders could not include Troon Harbour in the agreement. The reason for the impossibility of removing this exclusion was that stated by Mr Brunton. If the defenders had given the Troon rate they would have been giving the pursuers to Ardrossan less than schedule rates, and the Eglinton Iron Company under their equality clause would have at once asked for a 31-mile rate. With the Eglinton Iron Company's agreement in his hands, Hunter saw that the Eglinton Iron Company were paying schedule rates to Troon, and he knew he was paying a great deal more owing to Troon being excepted. The correspondence showed that full explanations were given to him as to the reason of the exclusion. The expressions in the subsequent letters, "the argument used," and "the reason why" were conclusive of this. Then the subsequent memorandum of meeting showed that the "peculiarities of the Troon traffic" were fully explained to him. Brunton deponed quite distinctly that the discussion proceeded "on the assumption" that Hunter and Barr understood all about the Eglinton agreement. The proof then established that the pursuers made payment of the alleged overcharges in the knowledge that traders under Lord Eglinton's agreement were being charged less. In this state of the facts, what was the law applicable? It appeared to be settled, according to the law of Scotland and the law of England, on a review of the cases cited by the pursuers *infra*, that (1) if a payment were made in full knowledge of the facts the Court would not give the remedy of repetition to the person who had made such payment; (2) that while the mere existence of the means of knowledge would not absolutely disentitle the person who has made payment from recovering, yet if it appeared that he had so acted as to waive all inquiry his right of repetition would be barred: (3) the Court would also consider the element whether it was unconscionable for the person paid to retain the money, and unconscionable

for the person who had paid to demand it back again. The recent case of *Eversbed* was *a fortiori* of the present. The proof then having disclosed a case of waiver by the pursuers of their right to recover the alleged overcharges, as well as of payment by them in the full knowledge that they were paying less than was paid by Lord Eglinton and the Lanemark Coal Company, their right to recover could not be maintained—*Eversbed* v. *London and North-Western Railway Company*, Feb. 1877, L.R., 2 Q.B. Div. 254, and July 5, 1878, L.R., 3 App. Cas. 1029.

Argued for the pursuers — The Lord Ordinary's views upon the construction of the agreement were sound, subject to the modification that the pursuers were entitled to have Class A dealt with as a whole, so that for ironstone and limestone carried for others they were entitled to have a coal-rate because they were in the same class. (2) On the question of knowledge (*a*) with reference to the Lanemark rate.—It was important to observe that until 1878 the pursuers dealt solely with iron, while the Lanemark rate was a coal-rate. It was also important that they had no knowledge which the defenders did not possess, and the latter had a duty to see that their accounts were properly charged under the equality clause. Hunter paid no detailed attention to Lanemark; indeed he could not do so as his whole time was required for the pursuers' business. He had no authority to enter into agreements. It was evident too that he was constantly pressing to get reduced rates for the pursuers' traffic. From the evidence given by Mr D. Houldsworth it was clear that at the meeting referred to by him in 1883 with the railway company he pressed for a reduction, not as matter of right, but owing to the exigencies of trade. That was an attitude quite inconsistent with the attitude of a man who thought he was entitled to a reduction of rates. Indeed from 1871 he was constantly fighting for a reduction of coal-rates. That was a period prior to the date when he became a partner, and prior to the agreement which alone gave him the equality clause, and further prior to the date when he had any interest in coal at all. He had no suspicions that the pursuers were being dealt with unfairly, and never waived inquiry. It was inconceivable that if the pursuers had known of the agreement that they should not have insisted on a reduction when the equality clause was inserted into the 1872 agreement. No explanation of this important feature in the case had been offered. This was a piece of real evidence against an inference sought to be drawn from communings prior to 1872. It was proved too that Hunter never knew in 1876 that in 1872 the deed had been signed, and there was nothing in the case to warrant the inference in fact that Hunter in neglecting the latter agreement had in his mind what was done in 1871. It was true that Gavin had a certain amount of information in 1882 about it; but he obtained this information in order to satisfy himself about a special transaction which was never carried out. He had, moreover, nothing to do with the rates. When the transaction came to an end the information would very naturally go out of his mind. (*b*) As to Lord Eglinton's agreement—The Lord Ordinary had gone very fully into the letters and oral evidence which were said to show knowledge of this agreement on the part of the pursuers, and his view of the evidence was sound. Here again Hunter's position as practical manager of the pursuers' firm did not admit *prima facie* of his paying strict attention to other rates charged to other traders. The letter of 16th August 1867 meant no more than that the defenders were precluded by their agreements with other parties from including Troon traffic in the agreement of 1872. If the terms of Lord Eglinton's agreement had been fully explained to Mr Kerr he would most certainly in this letter have told Hunter. The same remark applied to the letter of 15th September 1870. It did not show that Hunter knew the rates charged for the traffic either to Ardrossan or to Troon. No doubt the letters of 27th September 1870 and of 1st October 1870 contained expressions which were capable of the construction put upon them by the defenders, but they did not show that Hunter knew that the defenders were charging other traders less rates on their traffic to Ardrossan than were being charged to and paid by the pursuers on their traffic. The memorandum also of 6th February 1872 made no reference to Ardrossan rates under Lord Eglinton's agreement. Brunton's evidence as to what passed only amounted to an argument on his part that Hunter knew of the agreement. If Hunter had known, it was absolutely inconceivable that the pursuers would have gone to the defenders for a reduction of rates as they did in December 1883. The proof then on this part of the case also failed. In this state of facts how stood the law? The old doctrine of *condictio indebiti* was that an unavoidable error in fact or in law was sufficient to ground an action to recover payment made in such error—3 Ersk. 354; Stair 179; Bell's Prins. 534. There was no distinction recognised between the two classes of error—*Carrick* v. *Carse*, August 5, 1778, M. 2931. It was quite true that Lord Brougham had as regards error in law laid it down in two cases—*Wilson* v. *Sinclair*, December 7, 1830, 4 W. & S. 398–409, and 3 Scot. Jur. 123; *Dixons* v. *Monkland Coal Company*, September 17, 1831, 5 W. & S. 445–452—that by the law of Scotland payment made under such an error could not be recovered. There was, however, good reason to doubt whether the rule so laid down could be accepted as sound—Kerr on Fraud, 474. The Court had expressed hesitation in accepting these cases as absolutely settling the law, although it was admitted that in very few cases would *ignorantia juris* found a *condictio*. In *Dickson* v. *Halbert*, where these general doubts were expressed, the Court held that error in point of law afforded a ground for reducing a discharge granted *sine causa* in ignorance of the granter's legal rights—*Dickson* v. *Halbert*, February 17, 1854, 16 D. 586, 26 Scot. Jur. 266. In England Lord Brougham's *dictum* had been rejected—*Kelly* v. *Solare*, 1841, 9 Mees. & Wel. 54; *Townsend* v. *Crosby*, 1860, 8 C.B. (N.S.) 477; *Dixon* v. *Brown*, April 13, 1886, L.R., 32 Ch. Div. 597. At the present time the law seemed practically settled that *condictio indebiti* will always lie where the party paying has not paid knowingly and voluntarily intending to waive all inquiry—*Baird's Trustees* v. *Baird & Company*, July 10, 1877, 4 R. 1005; *Durrant* v. *Ecclesiastical Commissioners for England and Wales*, November 16, 1880, L.R., 6 Q.B.D. 234; *Balfour* v. *Smith &*

Logan, February 9, 1877, 4 R. 454, *per* Lord Shand, 462; *Lancashire and Yorkshire Railway Company* v. *Godlow*, 1875, L.R. (H. of L.), 517, Lord Chelmsford, 527. Further, the pursuers were not barred from their right to recover by lapse of time since they made the payment—*Earl of Beauchamp* v. *Winie*, 1873, L.R., 6 E. and Ir. App. 223; *Cooper* v. *Phibbs*, 1867. L.R., 6 E. and Ir. App. 149; *Durrant* v. *Ecclesiastical Commissioners for England and Wales*, *supra*. The case of *Evershed* did not apply, because there was there the amplest and fullest knowledge on the part of the agent who had charge of the traffic. On the whole matter, then, the proof disclosed facts sufficient in law to ground a *condictio*, and the overcharges fell to be repaid to the pursuers.

At advising—

Lord Rutherfurd Clark delivered the opinion of the Court:—

This is an action for the recovery of overcharges. It is founded on an agreement entered into between the pursuers and defenders in 1868, and a supplementary agreement dated in December 1872 and February 1873. The latter agreement by the 5th article thereof provides as follows—"The first party undertake not to carry traffic for any other party at lower proportionate rates than those charged to the second party, and to place the latter on the same footing as that enjoyed by the most favoured traders on the line, Troon traffic, unless arranged for as above, alone excepted from this condition." On the construction and effect of that agreement I adopt the judgment of the Lord Ordinary. I have nothing to add to the views which his Lordship has expressed in his note.

The rates with which the pursuers compare the rates charged to them are—1st, Hurlford to Ardrossan for ironstone; and 2nd, Lanemark to Ayr for coal. These were charged to the Eglinton Iron Company and the Lanemark Company respectively, and were lower than the rates charged to the pursuers.

The defenders aver that the pursuers knew the rates which were charged to these companies, and that they paid the rates charged to them in the full knowledge of the overcharge. They plead that the pursuers are thereby barred from recovering the evercharge.

The persons to whom this knowledge of the overcharge is attributed are Mr Hunter and Mr Gavin. Mr Hunter was during the period libelled the manager of the pursuers' company, and became in 1874 a small shareholder. Mr Gavin was at one time a clerk, and afterwards the secretary of the pursuers. It is not alleged that any of the other partners or officials were aware of the overcharge.

In considering this question it is to be observed that the parties are not in the same position. The defenders knew, or must be held to have known, that they were overcharging the pursuers. They knew the agreement, and of course they knew the rates which they were charging to other traders, and consequently knew, or must be held to have known, that they were violating the agreement. They say that they put upon it a construction other than that which has been adopted by the Court, and that the rate which was allowed to the Lanemark Company was a special rate, which under the agreement they were not bound to allow to the pursuers. But I must hold that they were wrong. Nor do I see any plausible ground on which they can maintain the construction which they put on the agreement. To my mind there was no justification for their charging higher rates to the pursuers for ironstone than they charged to the Eglinton Iron Company. Nor can I see how any special rate could be excepted from the operation of the agreement. For the agreement is expressed in very absolute terms, and applies to all traffic carried for any trader, with the single exception of Troon traffic, and though the pursuers choose to call the Lanemark rate a special rate, it was nothing more than a charge for carrying coals from Lanemark to Ayr.

Again, there is nothing in the case to suggest that the pursuers intended to submit to what they knew to be an overcharge. It is inconceivable that they should. Further, their correspondence, which was conducted almost exclusively by Mr Hunter, shows that there was a continuous effort on their part to get the rates reduced. But they made no claim for a reduction under the equality clause. It does not seem to have occurred to their mind that the circumstances admitted of an appeal to it. Their application was based on the necessities of their trade, and writing on 29th August 1883 Mr Hunter goes so far as to say that "unless we get some reduction in the carriage of our pig iron and minerals to and from these works they must be stopped." Such a course of action and such expressions seem entirely inconsistent with the notion that the pursuers knew of the overcharge and voluntarily submitted to it.

The defenders, however, undertake to prove that Mr Hunter knew of the rates allowed to the Eglinton Iron Company and Lanemark Company, and it is necessary that I should shortly notice the evidence in regard to each of them, though I am relieved from the necessity of going into this matter at any length from the detailed examination which the Lord Ordinary has made of it.

The rate allowed to the Eglinton Iron Company, called the Hurlford rate, was fixed by an agreement between that company and the defenders in 1865. One important consideration is, that that rate was fixed some years before the agreement between the pursuers and defenders. If the pursuers or Mr Hunter, who took a leading part in negotiating the agreement, had known of the Hurlford rate in 1868, it may be doubtful if they would have accepted the rates fixed by the agreement in that year. But when in 1872 they got the benefit of an equality clause, they would either have insisted on a reduction of the existing rates, or made a claim under that clause. It cannot be imputed to them that they desired to pay more than they could help. If they knew of the Hurlford rate at the time when they settled the equality clause, they must have known that they had an immediate right to a reduction.

It is the case of the defenders that Mr Hunter came to know of the Hurlford rate when the agreement of 1868 was settled. They say that the Eglinton Iron Company's agreement or the terms of it was communicated to Mr Hunter. There is evidence to the effect that at later discussions the arrangements of the defenders

with Lord Eglinton and the Eglinton Iron Company were fully explained to Mr Hunter and Mr Barr who represented the pursuers. But I am unable to hold that there is any sufficient proof of Mr Hunter's knowledge, because it seems to me to be certain that if the knowledge which is imputed to him had really existed, he could not have acted as he did, but would at once have insisted on the right of his company to a reduction, which it is conceded on both sides he never did. On this question of fact I agree with the Lord Ordinary, and I need not go into more detail.

With regard to the Lanemark rate, I think that it is proved that it was at one time known to Mr Hunter. Mr Hunter was a partner of the Lanemark Company, though he took very little if any charge of its affairs in consequence of the pursuers insisting that he should give his whole time to the management of their company. It further appears that the Lanemark rate became known to Mr Gavin the pursuers' secretary, though in connection with a particular transaction which was not carried out. And when I am on the subject of Mr Hunter's knowledge, I may notice that it is not clear that he ever knew whether the agreement of 1872 was signed or not if we are to judge by the terms of his letter to Barr dated 30th May 1876.

One matter more requires to be stated, viz., that until 1878 the pursuers dealt almost entirely in iron. Till that date the amount of coal carried for them was inconsiderable, and the coal rate was not of much importance to them.

It is in these circumstances that the defenders contend that the pursuers are barred from recovering the overcharges for which they sue. As I think that the pursuers did not know of the Hurlford rate, the case of the defenders so far fails. But as Mr Hunter and Mr Gavin had some knowledge of the Lanemark rate, I have to consider how that knowledge may affect the pursuers.

There is high authority for the proposition that a payment made in the knowledge that it is not due cannot be recovered. It seems to depend on the principle that such a payment imports a waiver of all objections and an admission that the debt is justly due. When there is a question whether money is due, and when it is paid in the knowledge of the facts on which that question depends, it may be reasonably inferred that all objections are waived, and that the debt is admitted. To hold that a payment so made cannot be recovered is nothing more than to hold that the voluntary waiver and admission cannot be afterwards called into question, or, in other words, that a person who has paid a debt which he has admitted to be due will not be allowed to go back on his admission. I can see no other principle on which the rule of law can depend.

I do not think that we can apply this rule of law unless we are satisfied that the presumption on which it is founded is, or at least may be, in accordance with the fact, nor, in my judgment, can this condition exist unless it be the case that at the time when the payment was made the knowledge of the overcharge was present to the mind of the person who made the payment. If it was not he could not intend to waive any right or make any admission. It may be sufficient if the knowledge should have been present to his mind, on the ground that he cannot be allowed to say that he did not know what he ought to have known. But unless it was present or should have been present it would, I think, be unjust to apply the rule, and particularly in this case, when I think it to be certain that neither the pursuers nor any of their officials ever intended to waive any right or submit to any overcharge.

Assuming that the pursuers are to be identified with Mr Hunter and Mr Gavin, it is in my opinion plain that when the rates charged by the defenders were paid they never thought that there was any overcharge. Such a thing never entered into their minds.

As I have already said, Mr Hunter was constantly urging the defenders to concede a reduction of rates. He may have known of the Lanemark rate, in the sense that it had at sometime or other been brought under his notice, but it seems to have escaped his recollection. That he should have knowingly submitted to the overcharge which the defenders made is out of the question unless he was defrauding the pursuers for the benefit of the Lanemark Company, a charge which has not been made against him. Nor is it remarkable that the Lanemark rate might have dropped from his memory, because his whole attention was given to the pursuers' affairs, and because at the time when the rate was fixed, and for a long time afterwards, coal traffic was of little importance to the pursuers. The position of Mr Gavin need hardly be considered. His knowledge was confined to a particular transaction which was not carried out, and besides, it does not appear that the payment of the rates fell within his department.

Nor can it, I think, be said that the pursuers—including Mr Hunter—ought to have been aware of the overcharge when the rates were paid. Assuming such knowledge as may be fairly imputed to Mr Hunter, I think that his oversight was excusable, and that the defenders cannot retain the moneys which they have received in excess of what was justly due to them on the plea that the pursuers were in default. The defenders were the real defaulters. There was no excuse for them making the overcharge, and in my opinion they must repay the amount of it.

The Court pronounced this interlocutor :—

"Refuse the reclaiming-note, and adhere to the interlocutor reclaimed against, . . . Remit the cause to the Lord Ordinary to proceed therein as accords," &c.

Counsel for the Pursuers (Respondents)—Asher, Q.C.—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders (Reclaimers)—Balfour, Q.C.—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Tuesday, February 26.

SECOND DIVISION.

[Sheriff of Ayrshire.

YEATS' TRUSTEES (BELLFIELD COLLIERY COMPANY) *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Railway—Undue Preference—Difference of Rates over same Portion of the Line of Railway—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 83.

The 83d section of the Railways Consolidation (Scotland) Act 1845 provided for the alteration or variation of such tolls as a railway company might by special Act be entitled to charge, "provided that all such tolls be at all times charged equally to all persons, and after the same rate . . . in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances." . . .

A railway company charged a certain rate per mile, and every part of a mile was accounted a whole mile. *Held* that each mile was to be considered as a unit in determining the "portion" of the railway over which the traffic of two different coalmasters passed, just as it was considered a unit in fixing the charges which the railway company were entitled to make in respect of such traffic, and that where the sidings of two collieries joined the main line at different distances from the terminus of their respective journeys, but were within the same mile from it, the traffic of both passed over "the same portion of the railway" within the meaning of the 83d section of the statute.

The Bellfield Colliery siding joined the down line of the railway to Troon. The Wellington Colliery siding joined the up line of the railway at a point 415 yards nearer Troon than the Bellfield siding. Wellington Colliery traffic for Troon was carried back by the railway company to cross-over points in the immediate vicinity of the Bellfield siding. Wellington traffic was, however, invariably, and Bellfield traffic usually, carried to a siding beyond Hurlford station, and there marshalled for despatch to Troon. Both collieries were within the same mile from Troon. The railway company charged a certain rate per mile, and every part of a mile was accounted a whole mile.

In an action at the instance of the Bellfield Colliery proprietors against the railway company on the ground of undue preference in the rates charged for the Wellington traffic, the defenders contended that their contract was to carry the traffic of each colliery to Troon from the respective points where it reached their railway, and that inasmuch as the pursuers' siding joined the railway 415 yards further from Troon than the Wellington siding, their traffic was not carried "over the same portion of the line of railway." *Held* that the traffic of the two collieries was carried "over the same portion" of the railway.

Opinion that the traffic of both collieries must be viewed as carried to Troon from Hurlford station, and therefore that it passed "over the same portion" of railway.

The Railway Clauses Consolidation (Scotland) Act 1845, sec. 83, provides—"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly either in the hands of the company or of particular parties, it shall be lawful therefore for the company, subject to the provisions and limitations herein, and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken either upon the whole or upon any particular portions of the railway as they shall think fit: Provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether *per* ton, *per* mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

Bellfield Colliery and Wellington Colliery were situated on either side of the Glasgow and South-Western Railway in the immediate vicinity of Hurlford station. Bellfield Colliery, which was carried on by the testamentary trustees of the deceased Robert Yeats of Kilmarnock, possessed a siding which connected with the down line to Troon exactly at Hurlford station. Wellington Colliery on the other side of the line was worked by Allan Gilmour, coalmaster, Kilmarnock, and was connected with the up line from Troon by a siding which was 415 yards distant from Hurlford station, and therefore so much nearer Troon than the siding of the Bellfield Colliery. As, however, Wellington Colliery joined the up line, traffic from that colliery for Troon had to be carried back to cross-over points a few yards on the other side of Hurlford station, where it was marshalled. Traffic from Bellfield Colliery was sometimes carried on to Troon from the colliery siding on the down line, but it was usually carried back past Hurlford station and made up for Troon at the same siding where the Wellington traffic was marshalled. Both collieries were within the same mile—that is to say, more than eleven miles and less than twelve miles—from Troon.

The railway company had treated the two collieries as each twelve miles from Troon, the rate for carriage of coal and dross being 1s. 3d. per ton.

In May 1875 an agreement was entered into between the railway company, of the first part, and certain coalmasters, including Allan Gilmour, and Robert Yeats & Company, Grange Colliery, and Robert Yeats and Others, individual partners

of that company. It was agreed, *inter alia*, that the first party should carry the coal of the second parties at certain specified rates per ton per mile, and it was thus provided:—"In coal or dross . . . fractions of tons to be charged as a whole ton, and fractions of miles as a whole mile." It was further provided that if the railway company should charge any other trader lower rates for carrying coal to the same terminus than those stipulated, the second parties should be entitled to a corresponding reduction. In the case of *Mackinnon* v. *Glasgow and South-Western Railway Company*, July 15, 1885, 12 R. 1309, *aff.* June 23, 1886, 13 R. (H. of L.) 89, the pursuer, the trustee in the sequestration of Mr Gilmour of the Wellington Colliery, founded on the above agreement. It was decided that the railway company, in consequence of rates charged to traders outside of the agreement, were bound to carry coal and dross from Wellington Pit to Troon at a reduction of 4½d. on the rate of 1s. 3d. per ton.

The trustees of the deceased Robert Yeats, who carried on the Bellfield Colliery, raised the present action in September 1886 in the Sheriff Court at Kilmarnock against the railway company. They sued for the sum of £190, 0s. 3d., which was subsequently restricted by agreement to £178, the amount of alleged overcharge by the defenders for the carriage of coals in violation of the agreement of 1875, and of the Railways Clauses Consolidation (Scotland) Act 1845, sec. 83.

The pursuers averred that with a view to meet the opposition created by the construction of a rival line or to mitigate the decrease of traffic which would thereby be caused to their railway, the defenders in August 1884 issued a table of rates for collieries situated on the North British Railway in Lanarkshire, whereby they agreed to carry, and for the period from 25th August 1884 to 31st January 1885 (both dates inclusive) carried, coals from these collieries to Ardrossan, Irvine, Troon, and Ayr, at rates considerably lower than those stipulated in the said agreement, having regard to the respective distances. A corresponding reduction to said rates for the pursuers would entitle them to have their coals carried from Bellfield Colliery to Troon—a distance of twelve miles—at 4½d. per ton less than the rates they have been charged by the defenders and have paid to them. The pursuers had been charged by the defenders, and had paid carriage to them to Troon, from said 25th August 1884 till 17th August 1885, upon 10,134 tons, 2 cwts. of coals, at the rate of 1s. 3d. per ton, from said Bellfield Colliery, and the overcharge thereupon, at 4½d. per ton, amounts to £190, 0s. 3d.

The pursuers founded on the case of *Mackinnon* above mentioned. They further averred—"The coals and dross from the pursuers' pit and from the said Wellington pit are of the same description, and are conveyed and propelled by like carriages and engines, and pass only over the same portion of the defenders' line of railway—to wit, from Hurlford station to Troon harbour—under the same circumstances. The pursuers were therefore entitled to be charged equally with the said Wellington pit, and after the same rate per ton per mile. The defenders, however, had been charging the pursuers, between the 25th day of August 1884 and the 17th day of August 1885, the rate of 1s. 3d. per ton for the conveyance of coal and dross from Hurlford station to Troon harbour, which is 4½d. per ton more than the rate they were bound under the said agreement to charge to the said Allan Gilmour.

The pursuers pleaded, *inter alia*, that the defenders were bound by the agreement, and "(4) The defenders having charged the pursuers a higher rate than they had agreed to charge another coalmaster for the carriage of goods of the same description, conveyed and propelled by like carriages and engines, and passing only over the same portion of defenders' line of railway under the same circumstances, have violated the Railways Clauses Consolidation (Scotland) Act 1845, sec. 83, and are bound to repay to the pursuers the amount of the overcharge."

The defenders pleaded—"(1) No title to sue. (5/2) No violation of the Railways Clauses Consolidation Act 1845, sec. 83, having been committed by the defenders, the action, so far as founded thereon, is untenable."

The proof before the Sheriff-Substitute disclosed the custom and practice in marshalling of traffic from the respective pits as explained above.

On 29th June 1887 the Sheriff-Substitute (Hall) pronounced this interlocutor:—"Finds that the pursuers' author Robert Yeats was not as an individual a party to the agreement No. 5 of process, and that the pursuers have no title to sue under that agreement: Finds that Wellington pit, Portland Colliery, presently carried on by William Mackinnon, C.A., as trustee for behoof of the creditors of Allan Gilmour, a party to the said agreement, and the pursuers' Bellfield Colliery, both adjoin the main line of the defenders' railway in the immediate vicinity of Hurlford station: Finds that the junction of Bellfield Colliery siding with the said main line is at Hurlford station: Finds that the junction of Wellington pit siding with the said main line is 415 yards further on the way to Troon, but on the up-line, from which, in order to be conveyed to Troon, its traffic must be transferred to the down-line: Finds that the nearest point at which this can be done is the through crossing at Hurlford station: Finds that Wellington pit and Bellfield Colliery have hitherto been treated by the defenders as equidistant from Troon, the distance in each case being charged for as twelve miles, and the rate for the carriage of coal and dross being 1s. 3d. per ton: Finds that in its transmission to Troon the traffic from both collieries has its *terminus a quo* at Hurlford station, and passes over only the same portion of the defenders' line of railway: Finds that in virtue of the above-mentioned agreement, and in respect of the rates charged by the defenders to traders who are not parties to the said agreement, it has been decided that the defenders came under an obligation to carry coal and dross from Wellington pit to Troon during the period from 25th August 1884 to 17th August 1885, at a reduction of 4½d. on the said rate of 1s. 3d. per ton: Finds that between the said dates the pursuers paid to the defenders the said rate of 1s. 3d. per ton for the carriage of 9538 tons 2 cwts. of coal and dross from Bellfield colliery to Troon, conform to the receipts or discharged accounts Nos. 25 to 67 of process: Finds in law (1) that the case falls

under section 83 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33); (2) that in conformity therewith the pursuers are entitled to the same reduction as that to which the proprietors of Wellington pit have been found entitled on the rate paid by them to the defenders for the carriage of their coal and dross from Bellfield colliery to Troon during the said period: Therefore repels the defences, and decerns against the defenders in terms of the prayer of the petition: Finds them liable in expenses, &c.

"*Note.*—The deceased Robert Yeats was a partner of Robert Yeats & Company, which firm and the individual partners thereof were parties to the agreement No 5 of process. Some four years after the agreement was concluded Robert Yeats in his individual capacity acquired the colliery of Bellfield which now belongs to the pursuers. Had he as an individual been a party to the agreement No. 5 of process, the pursuers in virtue of article 12 of that agreement would, even though Bellfield colliery was acquired subsequently, have succeeded to his rights and obligations under it. But in the opinion of the Sheriff-Substitute, Robert Yeats was a party to the agreement only as a partner of the firm of Robert Yeats & Company, which has no interest in Bellfield colliery, and article 12 must therefore be held not to apply to the case.

"The action is, however, laid not merely on the agreement No. 5 of process, but also on section 83 of the Railways Clauses Consolidation (Scotland) Act 1845. The object of that section is to prevent inequality in the imposition of rates by railway companies on traders whose traffic is of the same description, and passes only over the same portion of the line of railway under the same circumstances. It is at first sight a little startling that a claim under section 83 should be founded on the alleged partiality of the defenders in their treatment of the proprietors of Wellington pit, considering that the reduction on the standing rate which they have conceded, or in which they have been held liable to them, was forced upon them very much against their inclinations. On the other hand, there seems no reason to hold that if a railway company enters into agreements which, as judicially construed, result in an actual preference being given to one trader over another under such circumstances as would otherwise bring the case within section 83 of the Act, the application of that section is excluded by the mere fact that on the part of the railway company the preference was involuntary and undesigned. This, indeed, was scarcely maintained by the defenders who rather rested their opposition to the pursuers' claim on the alleged difference in the distance from Troon of Wellington pit and Bellfield Colliery respectfully.

"Now the truth is, that the point of connection of Bellfield Colliery siding with the line of the defenders' railway is exactly at Hurlford station, while that of Wellington pit is 415 yards nearer Kilmarnock, and therefore so much further on the way to Troon. As, however, Wellington pit siding connects with the up-line, while Kilmarnock can only be reached by the down-line, the traffic from Wellington pit must be carried back to the through crossing at Hurlford station, which is thus the starting point for both collieries on the journey to Troon. Some evidence was led as to the sidings and the mode of working them, which seems to the Sheriff-Substitute to be wholly irrelevant. It was also proved that in practice most of the Wellington pit traffic, as well as much of the Bellfield Colliery traffic, is carried back to the main sidings at the point marked G on the plan No. 88 of process, where mineral trains are made up or marshalled. But this arrangement, which is adopted merely for the defenders' own convenience in conducting their business at Hurlford station, may, the Sheriff-Substitute thinks, be dismissed from consideration. The real question is, whether, in view of the 415 yards which have to be traversed by the Wellington pit traffic before reaching Hurlford station, where it starts on its journey to Troon, that traffic has a different *terminus a quo*, and makes a different journey from the Bellfield Colliery traffic, which enters the defenders' line of railway exactly at Hurlford station. The Sheriff-Substitute has with some hesitation come to the conclusion that to answer this question in the affirmative would be to put too pedantically strict a construction on the words 'only over the same portion of the line of railway' in section 83. In dealing with that part of the clause which requires the circumstances to be the same, Lord Fullerton in the case of *Finnie* v. *Glasgow and South-Western Railway Company*, March 10, 1853, 15 D. 523, remarked that to exclude its application 'the difference of circumstance must be real and substantial, not evasive and pretended.' In like manner it seems to the Sheriff-Substitute that to deprive an aggrieved trader of his right to redress under section 83, the difference in the portions of the line of railway traversed must be substantial, which is not the case here. The decisions, so far as known to the Sheriff-Substitute, do not throw much light upon the question. In *Murray* v. *Glasgow and South-Western Railway Company*, November 29, 1883, 11 R. 205, and in one branch of the English case of *Denaby Main Colliery Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 1885, L.R., 2 App. Cas. 97, the complaint was that the railway company charged one trader as much as or more than another whose traffic was carried over a greater portion of their line of railway, so that it was assumed in the ground of action that the portions of the line traversed were not the same. In point of fact the difference in *Murray's* case was four miles, while the case of *Denaby Main Colliery Company* had reference to a group of collieries, forty-eight in number, the most remote members of which were separated from each other by a distance of fifteen miles. In another branch of *Denaby Main Colliery Company* the portion of the line of railway traversed was admittedly the same, and the controversy between the parties was whether there was or was not such a difference in the circumstances as to entitle one trader to a preference over another, without a violation of the section in the English Act corresponding with section 83. If, however, the fact that the traffic of one colliery has to be drawn 415 yards along the line to reach the starting point, while that of another has not, prevents the application of section 83 by making a different *terminus a quo* in the two cases, then it would seem that the identity of the *terminus ad quem* must also be destroyed if a similar distance

happens to be interposed between the loading berths to which the traffic is in each case conveyed. The Sheriff-Substitute rather thinks that this would not be to give fair play to a statutory provision which is of a favourable nature, and seems entitled to the utmost latitude of construction of which the language will admit. On the whole matter, therefore, though not without difficulty, the Sheriff-Substitute has decided in favour of the pursuers."

The defenders appealed to the Court of Session, and stated that they accepted the Sheriff-Substitute's view upon the agreement of 1875.

Argued for them — Their contract with the Wellington Coal Company must be kept in view in considering whether the 83d section of the statute applied. They had contracted to take the coal from the Wellington siding to Troon. The siding was 415 yards nearer Troon than the Bellfield siding, and so the Bellfield coal was not carried "over the same portion of the line of railway." The drawback to the cross-over points did not matter, as this was merely a convenience for the defenders. Delivery was not taken at Hurlford station, but at the Wellington siding. The Sheriff-Substitute proceeded on the view that the difference between the two pieces of line was too small to make a substantial difference of circumstances. But it had been decided that a large difference of distance was unnecessary if the traffic was sent to the same place, *Finnie* v. *Glasgow and South-Western Railway Company*, March 10, 1853, 15 D. 523, *per* Lord Fullerton, p. 531. Besides transit "over the same portion" was absolutely necessary, *Murray* v. *Glasgow and South-Western Railway Company*, March 29, 1883, 11 R. 205; *Denaby Main Colliery Company* v. *Manchester and Sheffield and Lincolnshire Railway Company*, 1885, L.R., 2 App. Cas. 97; *Evershed* v. *The London and North-Western Railway Company*, February 1877, 2 Q. B. Div. 254, and 3 Q. B. Div. 135, *aff.* July 1878, 3 App. Cas. 1029.

Argued for the pursuers—The defenders admitted that they had to draw back from Wellington siding to Hurlford, and so implied that the Wellington traffic started from the same terminus as the Bellfield traffic. It was not reasonable construction to argue that a few yards made all the difference as to traffic being "over the same portion" of the line. Probably no two traders could reach the railway company's line at equidistant points from the place of destination. The short distance between Wellington siding and Hurlford was not charged for, and was a matter considered in *Evershed's* case (*supra*). In *Murray's* case (*supra*) the goods of both traders passed over the same portion of the line, but one trader was at a distance of four miles along the line from the other. The *Denaby* case (*supra*) showed even greater disparities. For rating purposes the mile was the unit. All traders within the same mile were, for rating, taken in at the same point. They were, therefore, within the same portion of the railway, and for the purposes of the 83d section of the statute their goods were carried over the "same portion." The construction proposed by the defenders would make the statute inoperative.

At advising—

Lord Rutherfurd Clark—In this action the pursuers founded on an agreement with the defenders. The Sheriff held that they were not entitled to sue upon it. The pursuers acquiesced in that judgment, for the argument which was addressed to us was based entirely on the 83rd section of the Railway Clauses Act.

The pursuers and the Portland Colliery send coal by the defenders' railway to Troon. The pursuers complain that the defenders have charged lower rates to the Portland Colliery than they have charged to them. The defenders admit the difference of rates, but they maintain that the traffic of the pursuers and the traffic of the Portland Colliery are not carried "over the same portion of the line of railway," and therefore that they have not violated the provisions of the Act.

The coals of the pursuers are raised at the Bellfield pit, which is connected by a siding with the down line, along which the traffic to Troon is carried. The coals of the Portland Colliery are raised at the Wellington pit, which is on the other side of the railway. The point at which they are brought by a siding to the railway is about 400 yards nearer Troon than the Bellfield siding, but inasmuch as the former siding joins the up line they must, in order to get to the down line, be drawn back to a cross-over which is a few yards further from Troon than the Bellfield siding. In point of fact the coals from the Wellington pit were invariably, and the coals from the Bellfield pit were usually taken to a place on the further side of the Hurlford station where the trains were marshalled, and after this was done they were despatched from the Hurlford station to Troon.

The Bellfield pit and the Wellington pit are both situated within the same mile from Troon—that is to say, they are both more than miles and less than miles from that place.

The defenders contend that the question arising under the 83rd section must be determined by reference to the point at which the traffic actually reached their line. They maintain that their contract was to carry it from that point to Troon, and that inasmuch as the pursuers' coals reached the railway at a point some 400 yards further from Troon than the point at which the coals from the Wellington pit reached the railway, they were not carried "over the same portion of the line of railway." They admit that as matters now stand, and as they stood during the period to which the action relates, the Wellington coal could not get on the down line without being drawn back to the cross-over which I have mentioned. They further admit that in fact both sets of traffic were usually marshalled on the further side of the Hurlford Station, and despatched from that station. But they say that all this was for their own convenience only, and that in a question with the pursuers and the Portland Colliery the coals of each company are to be held as having been carried to Troon from the point at which they respectively reached the railway.

If this argument be sound there is great difficulty in seeing how any coal company could benefit by the provision of the Act. It is hardly conceivable that any two pits should be so situated as that the coals raised therefrom should reach the railway at points precisely equidistant from the place of destination. The argument implies that in order to be within the statute the traffic must be carried over exactly the same portion of the rail-

way, and the defenders did not hesitate to contend that if the traffic were despatched from different parts of the same station to the same destination the statute would not apply. I cannot adopt an argument which would deprive the statute of all its power, and which is supported neither by reason nor authority.

The pursuers urged that the traffic in question was to be regarded as having been carried between Hurlford Station and Troon, and therefore that it was carried over the same portion of the railway. It is true that it was not received at Hurlford Station. As I have said, the Wellington pit coal was invariably despatched from that station, and though in some cases the Bellfield coal was carried on to Troon from the siding at which it reached the railway, it was usual so to marshal it that it was despatched from Hurlford Station. Consequently if the Wellington coal be considered as despatched from Hurlford it passed over the same distance as the pursuers' coal, or in some cases over a longer distance. This is a reasonable view, for it cannot be doubted that the two classes of coal were, in the fair sense of the phrase, traffic between Hurlford and Troon.

There is, however, another argument which was advanced by the pursuers, which in my opinion furnishes a safer ground of judgment. The coal from each pit reached the railway within the same mile from Troon, and apart from any favour shown to the one over the other, the charge for carriage would be the same. For the defenders charge a certain rate per mile, and every part of a mile counts as a mile. The 83rd section of the Railway Clauses Act is intended to provide for equality of charge. It enacts that all tolls shall be charged equally to all persons, and after the same rate for all goods of the same description passing over the same portion of the line. As every part of a mile may be charged for as a mile, I think that I may hold that every mile and every part of it is, within the meaning of the section, one and the same portion of the railway whether the traffic passes over a larger or smaller part of it. In short, each mile is to be considered as a unit in determining the portion of the railway over which the traffic passes just as it is considered as a unit in fixing the charges which the railway company are entitled to make. Such a construction, which I think does no violence to the language of the statute, is consistent with its purpose, and preserves its efficiency. I prefer it to that maintained by the defenders, which in my opinion would make the statute a dead letter in regard to traffic of the kind with which we are here concerned. In this view, both classes of coal were carried over the same portion of the railway, and therefore the complaint of the pursuers is well founded.

Lord Young and the Lord Justice-Clerk concurred.

Lord Lee was absent.

The Court pronounced the following interlocutor:—

"Find in fact and in law in terms of the findings of the Sheriff-Substitute contained in his interlocutor of 29th June 1887, which are held as herein repeated: Therefore dismiss the appeal and affirm the said interlocutor except in so far as the sum concluded for in the petition and decerned for is erroneously stated to be £190, 0s. 3d. instead of £178, 16s. 9d., and to that extent and effect alter the said interlocutor: Of new repel the defences and ordain the defenders to make payment to the pursuers of the said sum of £178, 16s. 9d., with interest thereon at the rate of five per cent. per annum from the 1st day of September 1885 till paid: Find the pursuers entitled to expenses in the Inferior Courts and in this Court.

Counsel for the Appellants—Balfour, Q.C.—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Respondents—Asher, Q.C.—Low. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Tuesday, February 26.

FIRST DIVISION.

STEWART *v.* KENNEDY.

(*Supra*, p. 338).

Process—Petition for Leave to Appeal to the House of Lords.

In an action against an heir of entail in possession, the pursuer sought to have it declared that the defender had entered into a valid contract for sale of the estate, and to have the defender ordained to implement that contract. The Court unanimously found that a valid contract of sale had been entered into between the pursuer and defender, and appointed the pursuer to lodge in process a draft disposition by the defender of the estate in favour of the pursuer. Petition for leave to appeal against these judgments to the House of Lords *refused* on the ground that further questions of importance might arise between the parties, and that the pursuer had an interest to have the case finally disposed of before appeal was taken.

This was a petition by Sir Archibald Douglas Stewart, the defender in the above case, for leave to appeal to the House of Lords against the interlocutor of Lord Trayner of 21st December 1888, and the interlocutor of the First Division of 8th February 1889.

As the judgment of the Court had been unanimous, and as the conclusions of the summons were not exhausted, the petition was presented in terms of the Act 48 Geo. III. cap. 151, sec. 15.

The pursuer in the action had lodged the draft disposition in accordance with the interlocutor of 8th February. He appeared and opposed the petition.

Argued for the petitioner—The Court had decided what was the main question between the parties, and the petitioner desired leave to appeal against that decision. Till it was finally settled that there was a valid contract entered into between the parties, it would be premature to compel the petitioner to implement the contract. There would be no ground for an appeal in the later stages of the case.

Argued for the respondent—An appeal at the present stage would merely cause delay, and that might be most prejudicial to the respondent. There might in that case be several appeals as there were various matters still to be decided, about which disputes might arise between the parties.

At advising—

Lord President—The case in which this application has been presented was an action for enforcement of a contract of sale contained in missive letters—the subject being the estate of Murtly—and the pursuer concluded for specific implement, and alternatively for damages. The defender resisted the action upon two grounds—the first resting upon a construction of the personal contract of sale, and the second being that it was not a case in which specific implement was the appropriate remedy. We repelled both pleas and appointed the pursuer to lodge in process, within 14 days, the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer, in fulfilment of the contract of sale constituted by the missives of sale, dated 19th and 20th September 1888, founded on by the pursuer.

The disposition so appointed to be prepared has been lodged and accordingly the case is now in such a position that the draft disposition may be adjusted. But there is a great deal to follow upon that, because when the deed has been granted and executed, it will be necessary to apply to the Court to have the sale confirmed under the Entail Amendment Act of 1853. There may then arise questions of very great importance, particularly as regards the manner in which the compensation to the next heir will fall to be adjusted, and its amount. There is therefore a good deal to be done before specific implement can be carried into effect.

In a question of this kind the Court is bound to consider the interests of both parties, and in the exercise of their discretion to say where the balance lies. It has been suggested that the whole merits of the case are substantially exhausted, but I can hardly assent to that. No doubt the case has been finally decided up to this point that the defender is bound by the missives to give specific implement of the contract therein contained. But there may be an appeal hereafter to the House of Lords in regard to other questions, and accordingly we must take into consideration the disadvantage to both parties if there should be more than one appeal. Mr Asher says that there is no ground for an appeal at a later stage. I cannot agree to that. There may be a very fair ground for appeal in the future, and, besides, the pursuer is quite entitled to suggest in a case like this that an appeal may be taken with the object of delay. There is therefore no protection or assurance against the prospect of there being three appeals. That is a very serious consideration.

The alternative of granting or refusing leave to appeal generally depends on a variety of considerations affecting the case in point. It has been a common thing to present an application for leave to appeal against a judgment sustaining a plea of relevancy—the object being to avoid the expense which would have attended an inquiry by proof or by jury trial if it should be held by the House of Lords that there was no relevant case. We have not seen many of these cases lately, but I can recall two of them in which petitions for leave to appeal to the House of Lords was refused, and in both there was ultimately a verdict for the defender. That seems to be a very good practical justification of the refusal of the application. I do not say that they are precisely applicable, but I cannot help thinking that the likelihood of there being more than one appeal is a sufficient reason for refusing this petition.

Lord Adam—There is a good deal of contentious matter still to be disposed of in this case. Your Lordship has said that there may quite well be a *bona fide* appeal at a future stage, and there was the case of General Macdonald in the Dunalastair disentail—*M'Donalds* v. *M'Donald*, March 12, 1880, 7 R. (H. of L.) 41—which was appealed to the House of Lords on the very question of the amount of compensation to be paid to the next heir. I do not think it is at all desirable that there should be a possibility of two appeals—and I think the respondent has a legitimate interest that the case should be disposed of here before an appeal is taken. I accordingly concur with your Lordship.

Lord Lee concurred.

Lord Mure and Lord Shand were absent.

The Court refused the petition.

Counsel for the Petitioner—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent—D.-F. Mackintosh—C. S. Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, February 26.

SECOND DIVISION.

CHEYNE AND STUART *v.* IRVING SMITH AND OTHERS.

Succession—Vesting Subject to Defeasance.

A testator left his whole personal means and estate to trustees to be held in trust for the equal use and behoof of all his children, and the respective heirs of their bodies, and failing any of his said children without lawful issue to the survivors and survivor of them and their lawful issue, share and share alike, "subject always to the uses, control, and disposal hereinafter directed, and declaring that the said shares shall not become vested interests in my children respectively until their respective majorities or marriages." The children upon reaching 25 were to become trustees, and upon the youngest child reaching 21 the trustees other than his children were to cease to act. There was power given to the trustees in certain cases, none of which occurred, to restrict the rights of daughters to a liferent, and to settle the fee of their shares of capital upon their children. At the close of the deed it was

provided that "failing all my children and their lawful issue after the decease of my said beloved wife, my said trustees shall pay and deliver over the whole of my said estate . . . to my nearest heirs, executors, or assignees." The testator died predeceased by his wife and all his sons, and survived by his daughters, all of whom were over 25 at his death. One was then married but had no children; the others all died unmarried. The daughters dealt with the estate as having vested in them equally, and left settlements.

Held that the estate vested in each daughter as she respectively married or attained majority, subject to defeasance in certain cases; that the provision in favour of "nearest heirs" applied only to the case of children "failing" before vesting; and that the settlements of the daughters must receive effect.

Alexander Falconar of Falconhall died on 10th December 1847, predeceased by his wife and all his sons unmarried, and survived by his five daughters, who were all then above 25 years of age. Of these Mrs Jessy Pigou Falconar or Craigie had married before her father's death, and never had children, and the other four were never married. He executed a trust-disposition and settlement, dated 15th May 1820, by which he left his whole estate to trustees. These trustees were four persons named and his children, who were to become trustees as they respectively reached 25 years of age, but upon the youngest of his children attaining the age of 21 the five trustees, who were not of his family, were to cease to act unless unanimously requested by his family to continue in office.

The purposes of the trust were, *first*, payment of the truster's debts, funeral expenses, legacies, and expenses of trust management; *secondly*, payment of certain specific legacies; *thirdly*, delivery of certain ornaments to his wife, and that she should have the use for her life of the "household furniture, silver plate, goods and plenishing, together with such parts of my wines and liquors, carriages, horses and cattle as she may wish to have for the use of herself and our children living in family with her . . . and after her death (my trustees) shall deliver over the same to those of my children who shall continue to live in family together, to be possessed and enjoyed by them so long as any two or more of them shall continue so to live after majority, but no longer." The *fourth* purpose provided for his heritable estate, including Falconhall, going to his sons according to seniority, but in case of the failure of all his sons and their lawful issue, the trustees were to "convert the same and whole proceeds thereof into part of my moveable and personal means and estate, to be invested and divided among my daughters and others in manner hereinafter directed."

The *fifth* purpose gave the classes of investments preferred by the truster, and provided that the "investments shall form an accumulating fund or capital to be added to my means and estate, and to be disposed of as hereinafter directed."

The *sixth* purpose was in these terms—"The whole free amount and residue of my said personal means, estate, and effects, and debts, real as well as personal, together with the free annual proceeds and income of my real estate, until the majority of my eldest son or other person entitled to succeed thereto, but always after deduction as above specified, and also all increase and accumulation of my said means and estate, to be made as above directed, shall be held by my said trustees in trust for the equal use and behoof of all of my sons above named, and of all my daughters, Margaret Jane, Caroline, Louisa Maria, Jesse Pigou, and Charlotte Octavia, and of any other child or children, whether sons or daughters, to be born to me in my lifetime or in due time afterwards, who shall survive me, and the respective heirs of their bodies, and, failing any of my said children without lawful issue, of the survivors and survivor of them and their lawful issue respectively; to whom I hereby give and bequeath the same in equal portions, and share and share alike, the lawful issue of each child respectively having collectively right to their parent's share; but subject always to the uses, control, and disposal hereinafter directed, and declaring that the said shares shall not become vested interests in my children respectively until their respective majorities or marriages."

In the *seventh* purpose the truster expressed his earnest wish that his wife and his children should continue to live together in family as long as possible, until the marriage of his daughters or the prospects of his sons made that impossible, and he directed his trustees to pay £1500 a-year for the maintenance of the family, with power to make temporary additions if found necessary.

By the *eighth* purpose power was given to pay to any of the sons separately his share of the foresaid annual revenue of £1500, or if thought advisable, to advance and pay to him, if 21, "one-half of his share of the capital of my means and estate," or even "the whole of his said share" upon his reaching the age of 25.

By the *ninth* purpose it was provided that "in like manner, in the event of the marriage of any of my daughters, with the approbation and sanction of their relations, and of my trustees and executors (without which I hope they will never enter into the conjugal state), I hereby direct and appoint that my trustees shall make payment to her separately, by the equal moieties and at the terms above written, of her equal share of the said yearly revenue during all the years and days of her natural life after her marriage, for her sole and exclusive use and benefit, excluding the *jus mariti* and all the other rights, legal and conventional, of her husband. . . . Should, therefore, my said trustees be either unanimously of opinion one year after her marriage or then decide by the aforesaid majority of voices or votes that it would be suitable, proper, and advisable to remove the above restriction in regard to the *jus mariti*; and further that it would be proper to advance to her or her husband in her name and behalf, any part as far as a moiety of her share of the capital of my said means and estate, they are hereby empowered and directed to make such advance accordingly, the lawful interest of any such partial advance being ever after deducted from her share of the foresaid yearly revenue: And I further authorise and empower my said trustees, with the concurrence and approbation of my said daughter, to enable her by their consent, or after the expiration of

interest, and no destination-over, there is nothing to exclude or to postpone vesting, except the declaration that it shall not take place till majority or marriage. And it makes no difference that the gift is subject to restrictions or qualifications, if these are to take effect only on events which may or may not occur, and if these events may be sufficiently provided for by a partial defeasance of a right already vested without keeping the entire right open and contingent."

The claimants Mrs Irving Smith and others reclaimed, and argued—The Lord Ordinary had only looked at clause 6 because the events contemplated by the succeeding clauses had not happened, but the whole deed must be read to see what was the intention of the testator. His great desire was that his children should continue to live in family together as long as possible and be supported by the liferent of his estate. Clause 6 did not govern the succession. It was only a direction to the trustees to hold for certain persons' equal use and behoof, and "subject always to the uses, controls, and disposal hereinafter directed." It did not dispose of the fee. That was done by clause 12. The declaration as to vesting in clause 6 was negative merely and the other side had no right to construe it into a positive declaration. The directions to the trustees about advances, and especially the directions in clause 10 not to advance her share of the capital to any daughter who married without their consent and approbation, were meaningless if each child upon attaining majority or marrying obtained a vested interest in a share of the capital. It was clause 12 which must be looked to as regulating the succession. The clause must be held as extending down to the second word "assignees." It exhaustively dealt with all the three cases that might arise, viz.—(1) Death of children leaving issue (which had not occurred); (2) death of children without leaving issue (*a*) during the lifetime of the mother (which had not occurred) and (*b*) after the death of the mother (which had occurred). In the case which had occurred it was expressly provided that "my said trustees shall pay and deliver over the whole of my said estate . . . to my said nearest heirs, executors, or assignees." The other side and the Lord Ordinary only got over this provision by arbitrarily reading into the clause in two places after the words "failure [and failing] of all my children and their lawful issue" the words "before majority or marriage." The daughters had only a liferent. There had been no vesting of anything, for no advances had been made. Such advances could only have been made in case of marriages and the only married daughter had been married before her father's death. The ulterior destination to the "nearest heirs" as a class must therefore receive effect. That class was to be ascertained at the death of the last liferentrix—*Haldane's Trustees* v. *Murphy, &c.*, December 15, 1881, 9 R. 269; *Murray, &c.* v. *Gregory's Trustees*, January 21, 1887, 14 R. 368. Even if clause 6 conferred the fee there was divestiture by the terms of clause 12. *Lindsay's* case relied upon by the other side was not in point, but was in marked contrast. There the Court were anxious not to decide so as to infer repugnancy in the deed in question. Here there was no such danger.

Argued for respondents—The Lord Ordinary's interlocutor was right. Clause 6 was the ruling clause of the deed, and as all the daughters had attained majority and had died without leaving issue, it was the only clause that needed to be considered. All the subsequent clauses were framed to meet contingencies which had not arisen. Clause 12 dealt with the possibility of the trustees having made partial advances to children who had died leaving issue. It concluded at the words "until paid." The words which followed were general instructions to meet the possibility of there having been no vesting by reason of all the children having died before majority or marriage, and that in the two cases of having predeceased and of having survived their mother. This was a simple case of protected succession in the interests of grandchildren. Clause 6 plainly conferred a fee upon the children on their attaining majority or marrying subject to defeasance in certain circumstances. Controlling words such as those here did not reduce a fee to a liferent. Unless she had a vested interest the provisions in clause 10 restricting the rights of a daughter marrying with the trustee's consent to a liferent were unnecessary—*Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1038; *Smith* v. *Chambers' Trustees*, November 9, 1877, 5 R. 97, and April 15, 1878, 5 R. (H. of L.) 151; *Lindsay's Trustees* v. *Lindsay, &c.*, December 14, 1880, 8 R. 281; *Popham's Trustees* v. *Parker's Executors*, May 24, 1883, 10 R. 888; *Bradford* v. *Young*, July 19, 1884, 11 R. 1135; *Peacock's Trustees* v. *Peacock*, March 20, 1885, 12 R. 878.

At advising—

Lord Justice-Clerk—The late Mr Alexander Falconar of Falconhall executed a trust-disposition and settlement in 1820, by which he left his whole estate to trustees. The trustees were to be four persons named in the deed, and his children who might survive him when each of them should attain the age of twenty-five years.

It was directed that on his youngest surviving child attaining twenty-one years of age the four named trustees were to cease to hold office unless the family should unanimously request them to continue to act. His estate of Falconhall was directed to be conveyed to his eldest son or his heirs, whom failing to his next son or his heirs, and so on, but he directed that if they all failed the whole heritable property was to be sold, and the proceeds to be "invested and divided among my daughters and others in manner hereinafter directed."

By the fifth purpose, after giving directions as to the class of investments in which his means should be placed, he directed that the investments should "form an accumulating fund or capital."

By the sixth purpose he directed that "the whole free amount and residue," and "all increase and accumulation," be held "for the equal use and behoof of" all his sons and daughters and the respective heirs of their bodies, and of the survivors of those dying without issue. The lawful issue of each child was to have collective right to its "parent's share," and it was declared that the shares "shall not become vested interests in my children respectively until their respective majorities or marriage."

By the seventh purpose the testator expressed

his strong desire that his children should live in family, unless in the case of marriage or the advancement of his sons in life, and provision was made for his widow maintaining herself and children in family.

By the eighth purpose power was given to the trustees to advance to any son one-half or the whole of "his share of the capital."

By the ninth purpose the trustees were to pay to any daughter who married with the approval of the family and the trustees, her equal share of the revenue during her life, excluding the husband's *ius mariti* and other rights, and her "share of the capital" was declared not to be "assignable either by law or by her act and deed in favour of her husband," but the trustees were empowered to remove the restriction as to the *jus mariti* one year after marriage, and to advance "any part as far as a moiety" of "her share of the capital" to her or her husband, and further to "enable" the daughter after five years of married life" to settle and destine her full share of the capital" upon herself and her husband, and the issue of the marriage. On the other hand, if the trustees do not approve of some such destination, her share was to be provided and secured to the issue of the marriage.

By the tenth purpose if any daughter married without the consent and approbation of the trustees, no payment of capital was to be made to her, but the trustees were to retain it in trust for her issue.

By the eleventh purpose the trustees were empowered to make special payments for minor children for their education and setting out in life, but these payments it was declared "shall not be imputed against them as any part of their shares of my means and estate."

Lastly, by the twelfth purpose, the lawful issue of children dying were to have share and share alike, "whatever part of their share of the capital" as shall "not have been advanced and paid" before their decease.

There follows a provision for the event, which did not occur, of the failure of all his children and their issue. Mr Falconar died survived by one married daughter, Mrs Craigie, who had no issue, and four unmarried daughters, Margaret, Caroline, Louisa, and Charlotte. None of these four ladies afterwards married. The five sisters and Mr Craigie mutually arranged what should be done with the estate of the father during their joint lives, and various deeds were granted which it is unnecessary to particularise. Mr Craigie, Caroline, Louisa, and Charlotte all died before 1873, and on 19th November 1873 Mrs Craigie and Margaret executed a trust-disposition and settlement by which the real raisers were appointed their trustees, and received a general conveyance of their means and estate for certain trust purposes. Certain codicils were afterwards added. The whole means and estate of these ladies were derived from the estate of their father Alexander Falconar.

The real raisers maintain that under the trust-disposition and settlement of Alexander Falconar Mrs Craigie and Margaret had a vested interest in the estate of their father, and were entitled to test upon it. The claimants, Mrs Irving Smith and others, maintain that as nearest of kin of Alexander Falconar they are entitled to the estate, his lawful children and their issue having failed.

The Lord Ordinary has found that the interests of children surviving Alexander Falconar vested in them by survivance, and has ranked and preferred the real raisers to the fund *in medio*. I am of opinion that the interlocutor is right. The provisions of Alexander's deed, the material parts of which I have quoted, are, speaking generally, all framed with one object, to secure to his children and their issue shares of his means and estate, which is to be "divided" among them. What is provided for each is spoken of throughout as his or her "share of the capital of my means and estate," words in themselves exclusive of the idea of an intention to limit to a liferent, and to exclude the power of disposal by *mortis causa* deed, which would be the effect of the contention of the claimants Mrs Irving Smith and others. The great object which the testator had before him throughout was that the members of his family should as far as possible in their future life act together, and by mutual advice and family concord contribute to the happiness and success of each member. And all the provisions which can be called restrictive are plainly not for the purpose of restricting the right of any child, but rather to protect it in certain events from evil consequences which might follow from others coming into the family by marriage, and obtaining powers over the child's share which might be detrimental to the best interests of the child or its issue. Now, the deed is framed upon the footing that it gives a vested interest to children in their shares, and the only restriction which is put upon vesting is that "the said share shall not become vested interests in my children until their respective majorities or marriages," that is, whichever event should first occur.

It is no doubt true that the trustees under the deed are to have power, in certain events, to settle a daughter's share on her children. But the existence of such a power does not deprive her of what has vested in her. Its virtue depends upon the event, in which alone defeasance of her right in what has vested in her is possible. The occurrence of that event may take away her right, but the contingency that the event may occur cannot effect it. There is no direction in the deed for the disposal of unmarried daughters' shares, or shares of daughters who may be married before the testator's death. In their case nothing can be found in the deed qualifying in any way those words in it, which are to the effect that their shares become vested interests in them at their marriage or majority. To them the directions of the deed to meet cases which may arise have no application. Their right is without any restriction.

This would appear to be the true reading of the will of the testator, and I see nothing in such a reading inconsistent with the principles of our law in regard to vesting, and should have been prepared so to decide upon the case itself. But I do not think that the question is an open one. There have been numerous cases which seem to bear out the view of the Lord Ordinary, and the decision in that of *Lindsay* v. *Lindsay's Trustees* in particular seems to be so directly in point as to constitute a binding authority.

It only remains to notice the contention of the claimants Mrs Irving Smith and others, based upon the last direction as to destination in the

deed. These claimants desire to read this last clause as forming part of the 12th clause, and to be read along with it. I cannot so read it. I hold that the 12th clause ends at the words "until paid," and that what follows is a new and separate clause altogether, framed to meet the case of the whole other and minor purposes of the deed having failed by there being no children or issue of children in whom the estate of the testator could vest after his death. In that event he gifts one-half of his whole property to his widow absolutely, and after her death all that he has is to go to his nearest heirs, executors, or assignees. But the failure which is the condition of this provision is the failure of "all my lawful children and their issue." What is failure in that connection? I take it to be failure before the time for the vesting in them of shares, and that is expressly declared to be the occurrence of majority or marriage. There has not been such failure here, and therefore the event on the occurrence of which alone this last clause was to operate not having happened, the clause itself does not come into operation.

On these grounds I would move your Lordships to adhere to the interlocutor of the Lord Ordinary.

Lord Young, Lord Rutherfurd Clark, and Lord Lee concurred.

Counsel for the Real Raisers (Respondents)—Cheyne—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Counsel for the Claimants (Reclaimers)—Balfour, Q.C.—Ure. Agents—Melville & Lindesay, W.S.

Wednesday, February 27.

FIRST DIVISION.

[Sheriff of Inverness, Nairn, and Elgin.

LORD MACDONALD *v.* CAMPBELL.

Landlord and Tenant—Condition in Landlord's Favour—Tenant not to Sell or Retail Spirits upon the Premises without Consent—Revocation of Consent.

A building lease contained a clause prohibiting the tenant, *inter alia*, from selling or retailing "spirits upon the premises without the express consent of the proprietor, or his factor for the time being," the proprietor, "or the factor for the time, being the sole judges of all such matters." The tenant erected buildings and carried on business as a general merchant. Thereafter, with the factor's consent, he obtained a grocer's licence to sell malt liquors on the premises. For the purposes of his whisky trade he erected at the end of his house a store-shed of the value of about £50, and he was allowed, without opposition on the part of the landlord, to obtain for seven years a renewal of his licence. In consequence of irregularities in the conduct of the spirit business the landlord sought to put in force the prohibition in the lease.

Held that the consent which had been given was limited in its nature; that nothing had followed thereon which gave to that consent a permanent character; that it was revocable on cause shown; and that the evidence showed sufficient justification of its withdrawal.

Opinion (*per* the Lord President and Lord Lee) that the consent could not have been withdrawn capriciously, or from enmity, or within the year in which it was granted.

Opinion (*per* Lord Adam) that as, by the terms of his lease, the landlord, or his factor, was the sole judge, it was not essential, in withdrawing a consent, to assign a reason therefor.

The Right Honourable Ronald Archibald Lord Macdonald, Armadale, Isle of Skye, raised an action in the Sheriff Court of Inverness against Samuel Campbell, merchant, Broadford, Invernesshire, to have the defender interdicted from selling or retailing spirits in the shop, store, or other premises occupied by him at Broadford.

In the proof allowed by the Sheriff-Substitute the following facts were established—By building lease, dated 2nd October 1875 and 2nd March 1876, entered into between the pursuer and defender, the pursuer let to the defender, and his heirs and assignees, for ninety-nine years from and after Whitsunday 1875, a piece of ground at Broadford measuring 2436 square yards or thereby, with the dwelling-house erected or to be erected thereon. By the lease it was expressly provided and declared that the defender or his foresaids "shall not sell or retail spirits upon the premises without the express consent of the proprietor, or his factor for the time being, the said Lord Macdonald, or the heirs of entail in possession of the said lands and estate, or the factor for the time, being the sole judge of all such matters." In the premises erected on the ground the defender carried on business as a fish-curer, meal merchant, and general dealer. In September 1876 he applied for a grocer's licence, after receiving the consent of the then factor, Mr Macdonald of Tormore, who, at the request of the defender, addressed the following circular letter to the licensing Justices in support of the application:—"My dear Sir,—As it is likely you will be one of the acting J.P.'s the day the Court is held at Portree for considering the applications for licences, I will be obliged if you will support the application of Mr Samuel Campbell, merchant, Broadford, for a grocer's licence to sell malt liquors, the same being approved by the proprietor." The factor deponed that he had no doubt that the consent of Lord Macdonald had been obtained before he wrote this letter. The defender succeeded in obtaining a grocer's licence. For the purposes of his whisky business he erected at the end of his house a shed of stone and lime of the value of about £50. In January 1883 the pursuer's factor wrote to the defender in the following terms:—"Sir,—I beg leave to bring under your notice that you are at present infringing upon the terms of your lease by selling whisky in direct contravention thereof, on the premises occupied by you at Broadford. It will be for Lord Macdonald to consider whether your selling whisky in this way is or is not for the benefit of his tenants and the people of the district generally. In the meantime I have to inform you that in my opinion, as

factor for Lord Macdonald, it certainly is not for their benefit, but the contrary." In April 1884 the defender failed to lodge an application for renewal of his licence, against which, at the same time, a petition was presented, signed, among others, by all the clergymen of the district. The licence was not renewed.

On 21st May 1884 the defender received from the pursuers' law agents Messrs John C. Brodie & Sons the following letter:—"Under the building lease of subjects at Broadford by Lord Macdonald to you, and dated 2nd October 1875 and 2nd March 1876, you are aware that it was provided and declared that spirits should not be sold or retailed upon the premises let without the express consent of the proprietor or his factor for the time being.

"We understand that, by permission of Lord Macdonald's former factor, you have for some time been selling and retailing spirits within the premises erected by you on the ground held from his Lordship under the above-mentioned lease. Lord Macdonald has recently had the matter under consideration, and he is of opinion, on public grounds, that a continuance of the permission granted to you to sell and retail spirits is unnecessary for the requirements of the district, besides being hurtful to the inhabitants, most of whom are his Lordship's tenants. We are therefore instructed to intimate to you that any permission granted to you under your lease to sell and retail spirits is now withdrawn, and we have to request that you will write us acknowledging receipt of this letter, and undertaking to discontinue the traffic in spirits within the premises erected on the ground leased to you by Lord Macdonald, within a month from this date."

In April 1885 the pursuer's law agents wrote to the Clerk to the Justices for the Skye district of Inverness-shire in the following terms—"We understand that Mr Samuel Campbell, merchant, Broadford, Skye, has presented an application to the Licensing Justices of the Skye district of Inverness-shire for a grocer's licence, with the intention of carrying on traffic in spirituous liquors in his premises at Broadford. As agents for and on behalf of Lord Macdonald, we object to the granting of a licence to Mr Campbell, on the ground that it is totally unnecessary, and indeed would be absolutely injurious to the public interest in the district. There is already a licensed house in Broadford, which is amply sufficient for the requirements of the place. Moreover, the shop in which Mr Campbell proposes to carry on his trade is erected on ground held from Lord Macdonald on a long lease, one of the conditions of which is that Mr Campbell shall not sell or retail spirits upon the premises without the express consent of Lord Macdonald. Mr Campbell has not obtained Lord Macdonald's consent, and consequently for this reason also his application ought to be refused. We are sending a copy of this letter under a registered cover addressed to Mr Campbell, and a certificate to that effect is subjoined hereto. We have to request that you will communicate to the presiding Justices our objections on behalf of Lord Macdonald to the granting of the licence when Mr Campbell's application comes on for hearing."

Application for renewal of the licence was regularly made down to the date of this action and invariably refused. The defender continued to sell spirits under what was termed a "wholesale licence" obtained direct from the Excise without a certificate from the Justice of the Peace Court, and the agents for the pursuer accordingly wrote him the following letter on 25th May 1885:—"We wrote you on 21st May 1884 informing you that Lord Macdonald objected to the sale of spirits being carried on in the premises held by you under a long lease from him, and withdrawing any permission previously granted to you to do so. We understand that you are still carrying on a traffic in spirits notwithstanding the intimation that has been made to you, thus defying Lord Macdonald and ignoring his rights, and we now write to ask you to be so good as inform us in course of post whether you are to continue the sale of spirits, and are prepared to maintain your right to do so." As the defender continued to sell spirits in the manner above described the pursuer presented the present application for interdict in October 1885.

As to the circumstances which induced Lord Macdonald to withdraw the consent thus given, the defender's shopman deponed as follows—"(Q) While Mr Campbell had a grocer's licence do you know if people drank whisky in the stable or outhouses?—(A) I do not know that. (Q) Did they bring glasses out with them to drink it with?—(No answer). (Q) Did people sometimes drink in the shop?—(A) They were not allowed to drink whisky in the shop. (Q) Did they sometimes do it whether they were allowed or not?—(A) Not with our orders. (Q) Did they do it with or without orders?—(A) Mr Campbell often gave labourers who were working for him a glass of whisky in the shop. (Q) Did people sometimes drink the whisky which was sold in the shop?—(No answer). *Cross-examined*—The stable is about 150 or 200 yards from the shop, and as I am not in the habit of attending the stable I cannot say what takes place there. As far as I was concerned, people were never allowed to drink in the stable, nor in the shop as far as I could prevent it."

The Rev. Donald Mackinnon, D.D., deponed as follows—"I know Mr Campbell's premises at Broadford. I remember of an application being made by him for a licence—I think in 1872 or 1873. To the best of my belief the first application was made in October 1873, but I can only speak of the time when the licence was granted.... I felt strongly in the matter, not because I had any objection of a personal character to Mr Campbell, but because I had formerly seen grocers who held wholesale licences get them converted into retail licences at Broadford, and saw such evils follow, that I determined to prevent a repetition of these evils in the future. Men and women and children, who would not have been seen going into a hotel, got whisky so freely that I objected to it. I was opposed to the principle of granting these licences entirely. . . . Mr Campbell said he thought he was keeping the place very well. I said I had a different opinion. Mr Campbell asked my reasons for objecting to his licence, and although I was not obliged to tell him my reasons, I said I had seen people drinking and drunk upon his premises. He asked me when and where. I said I had

seen them in the end shed, and in the stable, and that such things were too common on the public road."

The pursuer pleaded—"(1) It being provided by the defender's lease that he shall not sell or retail spirits upon the premises let without the express consent of the pursuer, and the defender not having such consent, the defender is not entitled to sell or retail spirits on the said premises."

The defender pleaded, *inter alia*—"(3) The pursuer is barred by *mora* and acquiescence from insisting in the present action. (4) The prohibition founded on by the pursuer being in the circumstances vexatious and contrary to public policy, is not enforceable. (5) The prohibition founded on having been discharged by the pursuer's factor, and *rei interventus* having followed on the said discharge, the pursuer is not now entitled to revive and enforce the prohibition, and the *interim* interdict already granted ought to be recalled, and the action dismissed, with expenses."

On 10th April the Sheriff-Substitute pronounced the following interlocutor:—Finds in point of law that the pursuer by assent and acquiescence in the defender's use of the premises in question for the sale of excisable liquors from the 31st October 1876 to 15th April 1884, must be held to have discharged the prohibition founded on, and to have lost the right to enforce it: Therefore to that extent and effect sustains third and fifth pleas-in-law for the defender, and recals the interdict formerly granted, and assoilzies the defender from the conclusions of the petition, and decerns: Finds him entitled to expenses, &c.

In his note the Sheriff-Substitute, after stating the facts set forth and explaining the grounds on which his judgment was based, proceeded as follows:—"The agent for the defender pleaded at the debate that in consequence of the acquiescence by the pursuer for seven years and upwards in the actings of the defender, the prohibition could only be enforced by an action of declarator and interdict, and not by interdict only; but in the view I have taken of the evidence it is unnecessary to determine this plea. I may, however, refer to the cases below, as those upon which the defender mainly relies in support of it.

"Pursuer's authorities—*Gold* v. *Houldsworth*, 8 Macph. 1006; *Ewing* v. *Campbell*, 5 R. 230; *Earl of Zetland* v. *Hislop and Others*, *ut supra*; *Burnett* v. *Great North of Scotland Railway Company*, 11 R. 375, and 12 R. (H. of L.) 25; *Auld* v. *Glasgow Working Men's Provident Investment Building Society*, 12 R. 1320, and 14 R. (H. of L.) 27;

"Defender's authorities—Obligation passed from acquiescence—Rankine on Leases, 216; *Young, Ross, Richardson, and Company*, 2 S. 793 (N. E. 655), also 1 W. & S. 560; *Park* v. *Matthews* 1887), L. R., 3 Eq. 515; *Campbell* v. *Clydesdale Bank*, 6 Macph. 943; *Stewart* v. *Bunten*, 5 R. 1108; *Anderson* v. *Aberdeen Agricultural Hall Company*, 6 R. 901; *Lamb* v. *Mitchell's Trustees*, 10 R. 640. Interdict not proper remedy—*Fife Fary Trustees* v. *Magistrates of Dysart and Others*, 6 Shaw, 265; *Lord Lovat* v. *Fraser*, 8 D. 316; *Porterfield* v. *Macmillan*, 9 D. 1424; *Blackburn* v. *Finlay and Others*, 10 D. 590; *Dickson* v. *Lanark and Dumbarton Road Trustees*, 11 D. 115; *Lawson's Trustees* v. *Lamond*, 3 Macph. 53; *Calder* v. *Adam*, 8 Macph. 645; *Weir* v. *Macdonald and Dempster*, 10 Macph. 94; *Begg and Others* v. *Jack*, 1 R. 366; *Johnstone* v. *Thomson*, 4 R. 868; *King* v. *Hamilton*, 6 D. 399."

The pursuer appealed to the Sheriff, who on 19th May pronounced the following interlocutor:—". . . Finds (3) that the defender has failed to prove that the pursuer has discharged the said prohibition, or that he has, by acquiescence or otherwise, lost his right to enforce it; (4) that at the date when the present process of interdict was raised, and for some time previously, the defender was selling spirits upon the said premises, which were erected on the said piece of ground not only without the consent of the proprietor or his factor, but in opposition to their frequent remonstrances: Finds in law that the defender is not entitled to sell or retail spirits on the said premises without the express consent of the pursuer or his factor, and that the pursuer is entitled to interdict as craved: Therefore repels the defences, grants interdict in terms of the prayer of the petition, and decerns: Finds the pursuer entitled to expenses, &c.

"*Note.*—The prohibition against the defender's selling spirits without the express consent of the pursuer or his factor is clearly established by his lease. Further, it is not disputed that the defender has since 1884 been selling spirits on his premises without the consent of the pursuer or his factor. He maintains, however, that he is justified in doing so, on the ground that the pursuer, by his acts from 1876 to 1884, must be held to have discharged the prohibition in question, or at all events lost by acquiescence his right to enforce it. The *onus* of proving this admittedly lies on the defender, and in the Sheriff's opinion he has failed to substantiate it. Assuming it to have been proved—which the Sheriff thinks it has not—that the defender sold spirits on his premises from 1876 to 1884 with the express consent of the pursuer or his factor, this would by no means establish the defender's proposition that the pursuer had discharged the prohibition in question, or had, by acquiescence, lost his right to enforce it. The object of the pursuer in restricting the sale of spirits on his property around Broadford was no doubt to promote the best interests of the neighbourhood, and to secure for ninety-nine years at least that such a sale should be conducted by persons in whom he had confidence, and in a manner that would not be prejudicial to the well-being of the district. So long as he had confidence in the defender, and the latter conducted the business in a manner approved of by him, it was only reasonable that he should refrain from enforcing the prohibition without losing his right to enforce it in the event of the defender selling the premises to another, or of the defender himself conducting the business in an improper manner. For some time prior to 1884 the defender appears to have conducted his business in such a manner as to give offence to a large number of persons resident in the neighbourhood, and in April of that year, in consequence, *inter alia*, of certain objections taken to the renewal of the defender's licence, it was refused by the Justices at Portree. The defender having appealed to the Quarter Sessions at Inverness, a petition was presented against the renewal of the licence, on the ground that its continuance would be prejudicial to the welfare of the district. This petition was signed

by the Rev. Donald Mackinnon, Established Church minister of Strath, the Rev. Alexander Grant, Free Church minister, and the Rev. Donald Boll, Baptist minister there, and between three and four hundred other residents in the parish. The defender's application for a licence was therefore refused at Inverness, and it has since been renewed by the defender and refused by the Justices regularly every year since 1884. The Rev. Donald Mackinnon when asked what his objections were to the licence, said that he 'had seen people drinking and drunk upon his premises, . . . in the shed, and in the stable, and that such things were too common on the public road.' Seeing that there was a good and well conducted hotel at Broadford, where spirits could at all times be obtained by the inhabitants; that in consequence of the manner in which the defender had conducted his business, strong objections had been taken to the continuance of his licence by the parties above mentioned; and that the Justices, in consequence of these objections, have seen fit to refuse a renewal of his licence, the Sheriff cannot but consider that the pursuer not only acted within his legal rights, but also exercised a wise discretion in enforcing the prohibition in question by raising and insisting on the present action."

The defender appealed to the Court of Session, and argued—1. As to his present position—Since he lost his grocer's licence he held a wholesale licence under the Spirit Act 1860 (23 and 24 Viet. cap. 114), sec. 168, and such a licence was not prohibited by the terms of the lease. What was prohibited was to "sell or retail spirits;" the word "retail" was expository, and what was prohibited was selling by retail. 2. On the question of consent—The factor's letter to the Justices and the landlord's acquiescence in the defender obtaining, and for seven years continuing to obtain, a grocer's licence, barred him from now, as far as the defender was concerned, withdrawing his consent, on the faith of which the defender had laid out considerable sums of money, and made structural alterations on the buildings. There were three objections to the action of the pursuer—(1) He was personally barred; (2) he had acquiesced in what had been done; (3) the permission granted was irrevocable. The present question was raised in the interests of private parties and not in the interests of the public.—*Earl of Zetland* v. *Hislop*, March 18, 1881, 8 R. 675 and 9 R. (H. of L.) 40. The alterations on the building had proceeded unchallenged under the landlord's eye, and were ostensibly for the purposes of his trade; the landlord's non-interference showed acquiescence —*Cairncross* v. *Lorimer*, 3 Macq. 827; *Young*, 1825, 1 Wil. & Sh. App. Cas. 560. There was nothing in the way in which this business was carried on to cause a nuisance—*Skeene* v. *Maberly*, March 2, 1822, 1 Sh. 412. The consent once given was irrevocable as regarded the present tenant.

Argued for the pursuer—The object of the insertion of such a clause in the lease was to reserve to the landlord some control over the drink traffic in the public interest. In cases like the present there was always a *delectus personæ*, and a consent such as was given here was given, not to the premises, but to the individual, and was revocable if a change of circumstances demanded it. It was not likely that the landlord would first insert a clause like this in the lease, and then give an unlimited consent to sell spirits, regardless of the person to whom the permission was given or of the manner in which the business was carried on. All that the landlord agreed to was that the defender should obtain a grocer's licence which had to be renewed yearly; this was a limited consent and could never be interpreted as a discharge for all time coming of the prohibition in the lease. There was nothing here of the nature of acquiescence—*Cowan* v. *Kinnaird*, December 15, 1865, 4 Macph. 236—in the proper sense of the word; there was more; there was a consent renewed each year by non-opposition, and which could be withdrawn on cause shown, and was properly withdrawn in the circumstances of the present case, both on public and private grounds.

At advising—

Lord President—The question here relates in the first place to the construction which is to be put upon a clause in a building lease; and second, to the effect which is to be allowed to a consent on the part of the landlord to dispense with the conditions contained in that clause in the lease.

First, then, as to the provisions of the clause in the lease. These so far as they go distinctly expressed a prohibition against the tenant selling or retailing "spirits upon the premises without the express consent of the proprietor or his factor for the time being, the said Lord Macdonald or his heirs of entail in possession of the said lands and estate, or the factor for the time, being the sole judge of all such matters." Now, looking to the language of this clause it is quite plain that without the consent specified the tenant cannot lawfully sell spirits upon the premises under any form of licence whatever, but he may lawfully sell spirits provided he obtains from the parties duly authorised the necessary consent. Now, the consent in this case was given verbally in 1876 by the then factor with Lord Macdonald's consent, and there is no dispute about the extent of this consent, which was that the tenant should apply for and obtain, if he could, a grocer's licence to sell malt liquor, and the factor at the same time supported the tenant's application to the justices by writing a circular letter asking them to support the tenant's application for such a licence.

The licence was granted, and it was renewed each year without any objection being taken on the part of the landlord for a period of six or seven years. There was thus, on the part of the landlord, an implied consent to the tenant selling spirits as a licensed grocer for that period. But the landlord had now changed his mind, and the question comes to be, whether the consent which Lord Macdonald gave through his factor in 1876 to his tenant obtaining a grocer's licence is revocable as regards the present tenant. There can be no doubt that a case might quite easily occur in the construction of a clause like the present, and when a consent similar to that which we have now before us had been given, in which the consent would not be revocable, as, for example, if the landlord had told his tenant to establish a public house, and had aided him in getting a licence, and the tenant on the faith of

what had been said and done had erected buildings and otherwise laid out money on the premises, then I think we should be prepared to hold that the arrangement had a permanent character attached to it.

But here there was little or no alteration of the premises required in order to enable the tenant to sell spirits in addition to his ordinary business as a grocer, and so the kind of case to which I have just referred does not give us any assistance in determining what is to be done here. It is, I think, quite clear that the consent once given by the landlord could not be recalled during the year in which it was granted. But is the landlord bound to a consent for any length of period? Certainly the landlord was not entitled capriciously or through enmity to the tenant to terminate his consent, but on the other hand it was intended by the provisions of this clause in the lease to reserve to the landlord a power to revoke any consent which might have been given if any change of circumstances arose warranting such a revocation.

It is expressly provided that the landlord and his factor are to be the sole judges, not only as to whether a consent to sell spirits is at any time to be given to the tenant, but also as to whether that consent is to be continued, and the landlord may certainly under this reserve power withdraw his consent upon cause shown. It is somewhat remarkable that we do not find any change of circumstances averred on record as warranting the landlord in withdrawing his consent. I do not know that this is essential however, as it appears that the tenant received due notice in May 1884 that the consent of the landlord to his continuing to sell spirits was to be withdrawn.

Besides, the evidence of Dr M'Kinnon and others, and especially the tenant's shopman, leaves no doubt in one's mind that, whether through the fault of the tenant or otherwise, the consent to sell spirits had been abused, as the spirits were in various cases being consumed on the premises. Campbell has no doubt acted in good faith and has tried as far as he could to prevent this, but he has not been successful.

Is the landlord not entitled then to terminate this consent in order to stop a nuisance and to promote the interests of the neighbourhood? I think that he is entitled to do this on reasonable cause shown, and that he has proved to us that a reasonable cause for his interference existed.

I am therefore for refusing the appeal.

Lord Adam—The question between the parties depends upon the construction which is to be put on the clause in the appellant's lease, which prohibits him from selling spirits upon the premises without his first having obtained the consent of his landlord or the factor for the time being.

Now, the object of this clause being in the lease at all was just to give Lord Macdonald some control over the selling and retailing of spirits in these premises. But I hold, as was pointed out by the Dean of Faculty, that this selling of spirits was a continuing act which required a continuing consent. The consent which was first given by the landlord was a consent to the tenant applying for a grocer's licence, and when it was given the tenant was well aware that it might be recalled at any time, and neither party understood that the consent thus obtained was to be held as in any way controlling the terms of the lease.

We are not called upon to decide here whether a consent which was in its nature terminable could be capriciously withdrawn by the landlord without cause shown, but it may be observed that there is nothing said in the lease about the landlord assigning a reason for the withdrawal of his consent, because by the express terms of the clause he is to be the sole judge of all such matters.

The landlord was satisfied that there were good reasons for withdrawing his consent, and certainly the proof justifies the course which he adopted. It is a matter of no importance whether the irregularities which took place were carried on with the defender's consent or not, provided that he was unable to prevent them.

I can see no room for the doctrine of aquiescence in the present case, because while we have sufficient evidence of the landlord's consent having been obtained to the appellant obtaining a grocer's licence, it is plain that the consent was limited in its character and was terminable at the landlord's pleasure.

If the acts which had followed upon this consent had been of such a kind as clearly to show that it was the intention of parties that it was to control the terms of the lease, as, for example, if the tenant had proceeded to erect extensive buildings, or to lay out large sums of money in consequence of the consent, then the question between the parties would have been a much more difficult one to determine, but all that was erected here was a mere shed for storage, and was in its temporary character quite referable to the nature of the consent given.

Lord Lee—I had at first some difficulty about this case, but I have now come to be of the same opinion as your Lordships.

I cannot quite assent to the construction of the provisions of this lease proposed by Lord Adam, and especially as to the view which his Lordship takes of the landlord being entitled without cause shown or reason assigned to withdraw his consent to the selling of spirits on the premises after that consent had once been given. Upon this clause of the lease I prefer the construction proposed by your Lordship, and I am prepared to adopt it.

I agree with your Lordship that there was nothing of the nature of acquiescence in the present case, because there was something more, there was consent, but that consent was limited in its character and amounted to nothing more than this, that Campbell was to apply for and obtain if he could a grocer's licence. This Campbell did, and he sold spirits under it for a period of seven years. Such a consent was not by any means irrevocable, but it was not a consent which I think the landlord was entitled capriciously to withdraw as for example within the year. But it might be withdrawn when this was warranted by a change of circumstances. The question therefore comes to be, whether there is in this case a sufficient change of circumstances alleged and proved to warrant the withdrawal of this consent? I think that the evidence shows that there was, and that the landlord was justified in the course which he adopted in order to preserve the amenity of the locality.

LORD MURE and LORD SHAND were absent from illness.

The Court refused the appeal.

Counsel for the Pursuer—D.-F. Mackintosh, Q.C.—Gillespie. Agents—Dundas & Wilson, C.S.

Counsel for the Defender—R. V. Campbell—Ure. Agents—Wylie & Robertson, W.S.

Wednesday, February 27.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BEGG *v.* BEGG.

(*Ante*, vol. 24, p. 367, February 25, 1887; *supra*, p. 81, November 15, 1888.)

Proof—Perjury—Subornation of Perjury.

On 15th November 1888 the Court pronounced the following interlocutor:—"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord Fraser's interlocutor of 30th June 1888, Recal the said interlocutor *in hoc statu:* Allow the pursuer to amend the record and the defender to answer the amendments, and in order thereto, open up the record, and the amendments and answers having been made of new, close the record as amended: Before further answer, and reserving all questions of expenses, allow the pursuer a proof of her averments with regard to the subornation of Elizabeth Fairbairn and Christina Ramsay Fairbairn: Appoint the same to proceed before Lord Rutherfurd Clark at such time and place as his Lordship shall fix, and grant diligence at the instance of the pursuer against witnesses and havers."

Proof before answer was led, and the Court after considering the proof and hearing arguments, pronounced this interlocutor:—"The Lords having resumed consideration of the cause, with the proof adduced under the interlocutor of 15th November last, Find the averments of the pursuer irrelevant: Dismiss the action: Find the defender entitled to expenses."

Counsel for the Pursuer—Gloag—G. W. Burnett. Agent—Robert Stuart, S.S.C.

Counsel for the Defender—Balfour, Q.C.—Jameson. Agents—Stewart & Stewart, W.S.

Wednesday, February 27.

FIRST DIVISION.

[Lord Trayner, Ordinary.

JAMIESON AND OTHERS (LORD GLASGOW'S TRUSTEES) *v.* CLARK, *et e contra.*

Sale—Sale of Lands—Entry—Rent Due and Payable after Term of Entry.

A disposition of lands provided that the purchaser should have entry at Martinmas 1886, and that he should have right to the rents "due and payable from and after the said term of entry." *Held* that the purchaser was not entitled to a rent which was payable at Whitsunday 1887, but was for a period of possession prior to the term of entry.

Sale of Land—Shooting Rent—Division of Rent between Seller and Purchaser.

The shootings upon an estate were let for the season from 1st August 1886 to 31st March 1887. The lands were sold, the purchaser's entry being at Martinmas 1886. *Held* that the shooting rent fell to be divided, one portion from 1st August to 11th November going to the seller, while the remaining portion went to the purchaser.

By trust conveyance, dated 5th June 1885, the Earl of Glasgow conveyed his whole estates to George Auldjo Jamieson and others as trustees for certain purposes.

On 24th August 1886 the trustees exposed for sale by public roup the lands of Thirdpart and others belonging to Lord Glasgow. The articles of roup provided—"*Tertio*, The entry of the purchaser to the said lands and others shall be at the term of Martinmas 1886, and the purchaser shall have right to the rents to become due for the possession from and after that term, the exposers having right to the rents due for the possession prior to that term, notwithstanding the dates at which the same may be conventionally payable; and the price shall be payable to the exposers by the person preferred to the purchase at the said term of Martinmas 1886, and shall bear interest at the rate of 5 per centum per annum from and after the said term during the not-payment." The lands were purchased at the sale by John Clark, Largs, at the price of £12,500.

By the disposition which followed upon the sale the term of entry was Martinmas 1886. It contained this clause of assignation of rents—"And we, as trustees foresaid . . . assign the rents, feu-duties, and casualties of superiority due and payable from and after the said term of entry."

The lands consisted of two farms, both arable. At Whitsunday 1887 £122, 10s. was due and payable as rent for one of them, and £72, 10s. for the other—in all £195. These rents were payable for the possession prior to Martinmas 1886. Clark claimed these rents, and obtained payment thereof from the tenants.

Lord Glasgow's trustees raised the present action against Clark to obtain repayment of the £195, pleading "(2) the rents of the said farms due and paid at Whitsunday 1887 being for the

possession of the said farms prior to the defender's entry, he has no right thereto."

The defender pleaded—"(1) The rents in question having become due and payable subsequent to the term of the defender's entry, he was entitled to uplift the same. (2) In respect that by the terms of the conveyance in his favour, the said rents belonged to the defender, he is entitled to absolvitor, with expenses."

On 4th July 1888 the Lord Ordinary (TRAYNER) sustained the defences and assoilzied the defenders.

"*Opinion.*—The defender bought the lands of Thirdpart from the pursuers, and he is now infeft therein. By the disposition in favour of the defender the term of entry was declared to be Martinmas 1886, and the clause assigning the rents was expressed thus:—'And we, as trustees foresaid . . . assign the rents, feu-duties, and casualties of superiority due and payable from and after the said term of entry.'

"The rents uplifted by the defender, and which the pursuers seek by this action to recover from him, were due and payable after Martinmas 1886, and therefore, *prima facie*, were assigned to the defender by the conveyance in his favour. But the pursuers maintain that the said rents nevertheless belong to them, because by the articles of roup under which the defender purchased it was stipulated that the purchaser should have right to the rents to become due for the possession from and after the term of entry, and the rents in question, although due and payable after Martinmas 1886, were for the possession prior to that date.

"If the rights of parties were to be held as fixed by the articles of roup I should find for the pursuers. But I am of opinion that the rights of parties are to be determined by the terms of the disposition granted by the pursuers to the defender, that being the ultimate expression of their contract, which cannot be modified or altered by previous writings, negotiations, or conditions of sale.

"Further, by the Statute 31 and 32 Vict. cap. 101, section 8, it is provided that an assignation of rents, in the form there given, shall, 'unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry.' The pursuers, therefore, by using the statutory form, 'We assign the rents,' would have limited the defender's right to that which was expressed in the articles of roup. Instead of doing so, however, the pursuers 'specially qualified' the assignation of rents by adding 'due and payable from and after the said term of entry.' I must suppose that this qualification was intended to have some meaning and effect, otherwise it would not have been expressed, and the only meaning I can give to the qualification is its natural and ordinary meaning as contended for by the defender."

The pursuers reclaimed.

A separate question arose as to the shootings upon the estate. The shootings were let by Lord Glasgow's trustees, at a rent of £100, to a tenant from 1st August 1886 to 31st March 1887. On 21st February 1887 Lord Glasgow's trustees uplifted this rent from the tenants. Clark, as proprietor of the lands, sued Lord Glasgow's trustees for payment of the £100 rent thus uplifted. He maintained that the term of entry to the lands being Martinmas 1886, he had right under the clause of assignation of rents above quoted to the shooting rent because it was payable after his entry. The defenders averred that the shooting rent fell to be apportioned between them and the pursuer, the portion from 1st August to 11th November 1886 effeiring to them, and the remainder to the pursuer.

The defenders pleaded—"(1) The pursuer is only entitled to the portion of the said rents due for the possession of the said lands from and after the term of Martinmas 1886. (2) In terms of the contract between the parties and the provisions of the Apportionment Act 1870 (33 and 34 Vict. c. 35), the said rents fall to be apportioned between the pursuer and the defenders, and the latter are entitled to the proportion thereof effeiring to the period from 1st August to 11th November 1886."

On 4th July 1888 the Lord Ordinary (TRAYNER) decerned against the defenders in terms of the conclusions of the action.

"*Opinion.*—The rents in question, which were for shootings over a portion of the lands of Thirdpart, were due and payable at 31st March 1887. I think they belonged to pursuer, being assigned to him by the conveyance granted in his favour by the defenders. I refer to the opinion expressed by me to-day in deciding the case *Lord Glasgow's Trustees* v. *Clark*.

"The Apportionment Act referred to by the defenders has no bearing upon this case, which is one of contract."

The defenders reclaimed, and argued—The Lord Ordinary had entirely misconstrued the meaning of the clause of assignation of rents. It had the same meaning as the short claim introduced by the Act of 1868, "I assign the rents." This short form was not imperative and it did not follow, as the Lord Ordinary seemed to think, that because the exact language of that short claim was not adopted the parties must have intended thereby to give effect to some other arrangement. The purchaser was only entitled to the rents payable for possession after his entry, and what the disposition carried was an assignation to rents "due and payable from and after the said term of entry," so by common law as well as by the disposition the purchaser could have no right to any rent, whatever might be the stipulated terms of payment, for possession prior to his entry at Martinmas 1886.—*Penman* v. *Campbell*, June 10, 1828, 6 S. 940. The important word was "due," because though the rent might be "due" it might not be "payable" until a conventional term. The construction of this claim now contended for was a reasonable one and was borne out by the following cases—*Stevenson* v. *Moncreiff*, February 12, 1845, 7 D. 418; *Sinclair* v. *Sinclair*, December 1, 1847, 10 D. 190; *Shand's Trustees* v. *Mackie*, February 15, 1850, 12 D. 739; *Murray's Trustees* v. *Jardine*, May 31, 1865, 3 Macph. 845. As regarded the rents of the shootings it was payable on 31st March after the purchaser had obtained possession, but a portion of the £100 was rent due before the purchaser obtained possession and fell to Lord Glasgow's trustees. There ought to be apportionment—Apportionment Act 1870 (33 and 34 Vict., cap. 35), sec. 2; *Maxwell's Trustees* v. *Scott*, November 5, 1873, 1 R. 122.

Argued for Clark—The rents claimed belonged

to the purchaser. The sellers had not availed themselves of the short form introduced by the Act of 1868, which if it had been adopted would have expressed the same meaning as that contained in the articles of roup. In construing the clause of assignation of rents it was not competent to look at the language of the articles of roup or to refer to the communings of parties. The rents in question were "payable" after the purchaser obtained possession, and by the terms of the disposition they fell to him. That was the intention of parties and was so expressed. The authorities cited by the other side were not applicable as they were all prior to the Act of 1868. With regard to the rent of the shootings, the legal term of payment and the term at which the rent was due were the same. The Apportionment Act was not applicable to a case like the present; the whole rent was due to the purchaser.

At advising—

LORD PRESIDENT—In the case in which Lord Glasgow's trustees are pursuers I cannot agree with what the Lord Ordinary has done. The law and practice of Scotland regulating the rights of sellers and purchasers of land with reference to the rents of land sold is well settled and quite consistent, and even supposing there had been no clause of assignation of rents in this disposition at all, the law has settled how the rights of parties are to be arranged.

The purchaser is entitled to rent for the possession which follows after the term of his entry while the rents for possession prior to that period goes to the seller. No doubt this rule may, in the option of parties, be varied by paction, and it has been urged that that is what has taken place here, but in the construction of this clause of assignation of rents it is to be kept in mind that we are dealing with terms which have a definite meaning attached to them by a long series of decisions. I do not consider it at all necessary to go back to the clause in the articles of roup, because it only expresses the common law upon this subject.

But it has been said that the disposition which followed upon these articles of roup abrogated the ordinary rule, and the words which are relied upon as supporting this view are, "and we assign the rents . . . due and payable from and after the said term of entry." Now, these words are substantially the same as those which are to be found in the articles of roup, and that being so it is not necessary for us to decide whether it is competent to go back to the articles of roup in order to construe the clause in the disposition. Rents due or becoming due clearly mean rents becoming due at the legal term. I do not know any other meaning which can be put upon these words except that expressed in the pursuer's condescendence, and I am not upon that account going to alter the law of Scotland. I think that the case of *Penman* to which we were referred is on all fours with the present case. There the rents became due according to a legal term, though they were payable at a conventional term; here the assignation is to the rents becoming due and payable after the term of entry; therefore whatever portion of the rent became due before that period effeired to the seller, and what became due thereafter belonged to the purchaser.

But it has been said that there was an intention here to depart from the ordinary rule, because the short form of the clause of assignation of rents introduced by the Act of 1868 was adopted. Now, I do not quite follow this. Suppose that this short form had not been adopted, then the claim in the disposition must just have stood or fallen according to the meaning of the terms used. All that the parties have done here is to adopt the short form introduced by the Act, at the same time using certain words to express their meaning, and they have thrown aside the statutory forms. This can in no way alter the rights of parties.

As to the other case in which Mr Clark is pursuer, it is to be decided upon somewhat different principles. The question relates to a rent of certain shootings, and the period covered by it was from August 1886 to March 1887.

The right which the tenant enjoyed was the privilege of entering on and using the lands for a certain definite purpose, namely, for sport. There was no actual or annual profit derivable from the lands as in the case of an agricultural lease, but only the exercise of a personal function. It is a possession which can be measured by time, and accordingly when rents are assigned under a clause of assignation of rents in a disposition that portion of the rent which corresponds with the period of occupation by the tenant after the term of entry belongs to the purchaser, while the portion corresponding with the tenant's occupation prior to the term of entry belongs to the seller. In such a case no question of apportionment arises. Prior to Martinmas the shooting tenant possessed under the seller, but subsequent to that date he possessed under the purchaser. I therefore differ from the view which the Lord Ordinary has taken, and think that the rent in question falls not to be apportioned but divided. This may require some adjustment, but as the total rent is £100 counsel can have little difficulty in settling the exact amount due to each party upon the principle which I have stated.

LORD ADAM—As regards the first case, all I think that we have to do is to construe the clause of assignation of rents in the disposition of November 1886. In my opinion we should not look back at the terms of the articles of roup, because if from any cause the language in the articles of roup and in the disposition differs it must be presumed that it was intended to do so. The words "we assign the rents . . . due and payable from and after the said term of entry" have a fixed and definite meaning—they mean the rents due from the period of possession and payable therefor. After the period of entry the rent went to the purchaser, and prior to that to Lord Glasgow, who then possessed.

It is not necessary to consider what would have been the effect of the use in the disposition of the short clause of assignation of rents, for the simple reason that the parties have not chosen to avail themselves of it.

As regards the other case, I also concur. Shootings are not in the same position as an agricultural lease. The crop is reaped from day to day, and the rent ought to be divided between the seller and the purchaser just in the proportion that the game tenant holds under each.

LORD LEE concurred.

Lord Mure and Lord Shand were absent from illness.

In the case in which Lord Glasgow's trustees were pursuers the Court recalled the Lord Ordinary's interlocutor, repelled the defender's pleas-in-law, and decerned.

In the case in which Mr Clark was pursuer the Court sustained the first plea-in-law for the defenders, and found the pursuers entitled to £57, 12s. 3d., and decerned.

Counsel for Lord Glasgow's Trustees—Low. Agents—J. & F. Anderson, W.S.

Counsel for Clark—Balfour, Q.C.—Ure. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

RIXON *v.* THE EDINBURGH NORTHERN TRAMWAYS COMPANY.

Public Company—Contract—Fraud—Reduction—Action by Single Shareholder.

A shareholder of a public company brought an action of reduction of a contract, alleging that it had been entered into fraudulently and collusively, and that the directors were thereby serving other interests than those of the company. *Held* that as fraud had been relevantly averred, the action could competently be maintained at the instance of a single shareholder, and a plea of no title to sue *repelled*.

The Edinburgh Northern Tramways Company was incorporated in 1884 by Act of Parliament, by which the company were authorised to construct certain tramways mentioned in the Act in the city of Edinburgh and town of Leith.

By agreements between the Town Councils of Edinburgh and Leith and the promoters of the said Act, scheduled to the said Act, and confirmed and made binding upon the company by the 69th and 71st sections thereof, it was provided that all the works to be executed by the company should form the subject of competition and contract.

On 24th October 1884 tenders having been invited by advertisements, a contract was entered into between the Northern Tramways Company and the Patent Cable Tramways Corporation, Limited, for the construction of the proposed tramways. This contract was, in consequence of certain disputes between the parties, subsequently modified by an agreement dated 22nd July 1886, following upon which a portion of the work contracted for was proceeded with.

In July 1886 the contractors made over their whole present and future interest in the concern to the Debenture Corporation, who in turn subsequently assigned it to the Assets Realisation Company, Limited. From time to time during the execution of the works the contractors became entitled to certain payments, and the Tramways Company elected in terms of the contracts to issue to them in satisfaction thereof shares and mortgages of the company to the amount of the engineer's certificates, subject to the retention of a certain percentage provided by the contract. The shares and mortgages were so issued at the request of the contractors to their nominees. It thus happened that at 28th February 1888, out of the 4500 £10 shares and the £10,170 mortgages in and of the Tramways Company, 3190 shares and £6270 mortgages, issued to the contractors' nominees, were held by certain parties, including the present directors of the Tramways Company, for behoof of the said Assets Realisation Company, Limited.

In January 1888 the Patent Cable Tramways Corporation went into liquidation, and Mr John Annan, accountant, London, was appointed official liquidator.

On 15th June 1888 another agreement (supplemental of that of 22nd July 1886 above referred to) was entered into between the Patent Cable Tramways Corporation, Limited, of the first part, the secretary of the Assets Realisation Company of the second part, the Edinburgh Northern Tramways Company of the third part, and Messrs Dick, Kerr, & Company, contractors, 101 Leadenhall Street, London, of the fourth part, with a view to the construction of the remaining portion of the line originally contemplated at a cost of £75,000.

William Augustus Rixon, of 10 Austin Friars, London, raised the present action against the Edinburgh Tramways Company, seeking to have the agreement last above recited reduced.

He averred that he was a debenture and shareholder of the defenders' company, that the works contracted for did not form the subject of competition as provided by the company's Act of incorporation, and were therefore *ultra vires* of the company. He further averred—(Cond. 17) "The said agreement of the 15th June 1888 has been entered into between the said parties wholly irrespective of the interests of the company, and to the prejudice of the pursuer and the other independent holders of shares and debentures. It was entered into by the defenders fraudulently and collusively with the design of obtaining for Messrs Dick, Kerr, & Company a contract on exorbitant terms free from competition, and such contract, should it be carried out, would have the effect of seriously and unjustly depreciating the shares and debentures held by the other independent mortgagees and shareholders of the company. The directors of the defenders were in fact acting in the transaction only as the agents of Messrs Dick, Kerr, & Company, and of the Assets Realisation Company, as mortgagees of the Patent Cable Tramways Corporation, Limited, and not solely, as should have been the case, as the representatives of the defenders' company, which was not independently advised or represented in the preparation or execution of the said agreement. The sum proposed to be paid for the work, even if satisfied by shares and debentures of the company, is wholly disproportionate to the value of the work to be done, that value amounting to no more than the sum of £22,000." He also alleged that the agreement of 15th June 1888 was not a supplemental agreement as stated, but an entirely new contract, and was not submitted to the shareholders of the company in order to prevent them timeously calling it in question.

The defenders admitted the agreement but denied the pursuer's averments.

The pursuer pleaded, *inter alia*—(2) "The said agreement not having been entered into in conformity with the said Act of Parliament, was *ultra vires* of the company, and ought to be reduced, in terms of the conclusions of the summons. (3) The said agreement having been entered into fraudulently and collusively, as condescended on, and being to the prejudice of the pursuer, decree should be pronounced in his favour, as concluded for."

The defender pleaded, *inter alia*—"(1) No title to sue; and (2) all parties not called."

On 10th January 1889 the Lord Ordinary (KINNEAR) sustained the defenders' first plea in law and dismissed the action.

"*Opinion.*—The pursuer is a shareholder of the Edinburgh Northern Tramways Company, incorporated by Act of Parliament, and he brings this action for the purpose of reducing an agreement between the company and certain contractors for the construction and maintenance of a line of tramway. It is not disputed that the line which it is proposed to construct is within the limits of the company's undertaking, but it is said to be *ultra vires* in other respects.

"It is well settled law that a single shareholder can have no title to sue such an action, except on the ground that the contract which he challenges is *ultra vires*, not of the directors only, but of the company as such, or on the ground of fraud upon himself. But the only ground on which it is alleged that the contract in question is *ultra vires* is that it is inconsistent with the terms of two previous contracts between the promoters and the Town Councils of Edinburgh and Leith, which have been confirmed by the incorporating Act, so as to make them binding upon the company. By these contracts it was agreed, *inter alia*, that the works to be executed by the company should 'form the subject of competition and contract;' and the pursuers' ground of reduction is that the works which are contemplated by the contract which he challenges have not been made the subject of a previous competition. I do not think it necessary or proper to inquire whether in the circumstances set forth on record this would be a valid objection at the instance of the Town Council, because it is an objection which the parties to the contracts confirmed by the Act of Parliament are clearly entitled to waive if they think fit. If the parties to these contracts should be of opinion that the stipulation in question has been substantially observed, or that in certain circumstances it would be prejudicial to the interests with which they are charged to enforce it, or that it is undesirable or unnecessary to litigate on the subject, they are at liberty to sanction or acquiesce in an agreement to which they might otherwise have objected. It follows that a failure to comply with the stipulation involves no inherent invalidity in the agreement, and therefore that if it is open to any objection on the ground alleged, it is an objection which no one can have a title to enforce excepting the persons who are entitled to sue upon the contracts which are alleged to have been violated.

"A second ground of reduction is that the terms of the agreement are prejudicial to the company, and that the directors have acted in breach of their duty, against the interests of their shareholders, and in the interest of the other contracting parties. If this be so, it is a wrong done to the company, and not to the pursuer as an individual. If the pursuer thinks the agreement objectionable on the ground alleged, his proper course is to bring the matter before his fellow-shareholders. He cannot appeal to the Court to set it aside until the views of the shareholders have been ascertained, because if it is not in itself illegal it may be supported by the majority. The case of *Orr* v. *The Glasgow and Monklands Railway Company*, 3 Macq. 799, is directly in point. The ground of action in that case was that the directors were also directors of a rival company, and that they had acted in the interests of this latter company to the prejudice of the shareholders of the first. The action was dismissed on the ground that although the transaction complained of was beyond the powers of the directors, it was competent for the shareholders to sanction it, and therefore that a single shareholder, or a minority, had no title to sue. Again, it is said that the agreement has not been submitted to the shareholders, and that certain of the directors are disqualified. Neither of these grounds will support an action of reduction. They are not objections to the legality of the agreement in itself, but to the manner in which it has been concluded. I do not inquire whether the directors ought to have laid the agreement before the company, or whether it was not in their power to make contracts for the execution of works without consulting the shareholders, because I think it clear that the company may sanction and adopt what has been done, assuming that they would not be bound by the action of the managing body alone. The rule is fixed that the Court will not interfere in such circumstances at the instance of a single shareholder. The principle is stated by Lord Justice Mellish in *M'Dougall* v. *Gairdner*, L.R., 1 C. D. 13—'If something has been done irregularly which the majority could do regularly, or if something has been done illegally which the majority could do legally, the majority are the only persons who can complain.' There are many cases to the same effect. I am of opinion therefore that the plea to title must be sustained, and that renders it unnecessary to consider the other pleas stated in defence. But I must add that even if the pursuer had had a good title to sue, the action could not have been entertained in the absence of the contractors. They have a material interest in the agreement challenged, and it is manifestly impossible to set aside a contract made by the directors on behalf of the company without calling into Court the persons with whom they have contracted."

The pursuer reclaimed, and argued—The contract sought to be reduced was (1) *ultra vires* of the company, (2) fraudulent. A reduction was the pursuer's only remedy. The contract had been privately arranged by the directors, and its existence had been kept concealed from the shareholders. All contracts were by the terms of the defenders' Act to be open to competition, and this one not having been thrown open to competition, that circumstance alone made it reducible by any one interested. The pursuer had an interest, as he should have obtained this contract; he had fraudulently been deprived of it. The sum con-

tracted for was exorbitant and ruinous to the interests of the company, and of the pursuer as one of the shareholders. It was an attempt by a majority of the company personally to benefit themselves at the expense of a minority—*Menier* v. *Hooper's Telegraph Works*, 1874, L.R., 9 Ch. App. 350; *Mason* v. *Harris*, 1879, L.R., 11 Ch. Div. 97; *Athool* v. *Merryweather*, L.R., 5 Eq. 464, note.

Argued for the defenders—The pursuer had no title to call in question the actings of the defenders in the absence of the other parties to the contract. The defenders could in their discretion set aside the stipulation regarding the throwing open of contracts to competition, and that did not of itself necessarily invalidate the agreement, but only left it open to those whose interests were affected to sue upon the contract. The pursuer's interest was identical with the other shareholders, and could not be dissociated from theirs—*Orr* v. *The Glasgow and Monklands Railway Company*, 3 Macq. 799—and no one shareholder or a minority had any title to sue.

At advising—

Lord President—There are two preliminary defences to this action, "no title to sue" and "all parties not called." The Lord Ordinary has sustained the first of these, and to that course I am not prepared to assent. There is a distinct and intelligible ground of reduction stated here, namely, fraud, in respect of which it cannot be said "that one or more of the shareholders cannot sue though the company can do so." I think, therefore, that the Lord Ordinary is wrong. It is probably the fact that the pursuer relied too much on the ground of *ultra vires* in the discussion before the Lord Ordinary, and did not sufficiently attend to the question of fraud.

But, on the other hand, there are other parties to the agreement under reduction who must be called. The pursuer is prepared to call these persons, and the best form of order for us to pronounce would be to repel the first preliminary defence, reserving its effect on the merits, and in respect that the pursuer undertakes to call the other parties to the agreement, to repel the second preliminary defence. I think it premature to go into any examination in detail of the averments, or as to what their effect will be when the case comes to be tried on the merits, particularly if the pursuer amends his record as he says he intends doing.

Lord Adam and Lord Lee concurred.

Lord Mure and Lord Shand were absent from illness.

The Court pronounced the following interlocutor:—

"Recal *in hoc statu* the interlocutor reclaimed against, and sist process till the 12th of March current to enable the pursuer to call as defenders the other parties to the agreement of 15th June 1888 sought to be reduced, viz., The Patent Cable Corporation and the liquidator of that company, and Messrs Dick, Kerr, & Company."

Counsel for the Pursuer—H. Johnston—G. W. Burnet. Agent—A. & G. V. Mann, S.S.C.

Counsel for the Defenders—Graham Murray—Sir L. Grant. Agents—Graham, Johnston, & Fleming, W.S.

Saturday, March 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

JAMES EAGLESHAM & COMPANY *v.* DICKSON AND OTHERS.

Process—Action—Delivery of Stolen Goods.

The owner of stolen goods which have been lodged in the hands of the official custodier for the public interest, may present a petition in the Sheriff Court to have the custodier ordained to deliver them.

James Eaglesham & Company were manufacturers at 128 Ingram Street, Glasgow. Between 5th March and 11th October 1888 a person in their employment named James Patrick stole from their premises a quantity of goods, and on 22nd October he pled guilty under an indictment charging him with the theft thereof. The stolen goods were given into the charge of Adam Dickson, custodier, Central Police Office, Glasgow.

Eaglesham & Company brought an action in the Sheriff Court of Glasgow for delivery to them of the stolen goods as being their property. They called as defenders the said Adam Dickson, and a number of pawnbrokers with whom the goods had been pledged. Upon 1st December 1888 the Sheriff granted warrant to cite the defenders, and ordained them, "if they intend to show cause why the prayer of the petition should not be granted, to lodge in the hands of the Clerk of Court at Glasgow a notice of appearance within the *inducia* of citation hereon, under certification of being held as confessed." No appearance was made for any of the defenders.

Upon 20th December the Sheriff-Substitute (Lees) dismissed the petition, and in respect no appearance had been entered by any person called as defender, found no expenses due.

"*Note.*—So far as my experience goes, cases of this kind are always raised in the form of a multiplepoinding, and there is good ground for such form of action being adopted. The main defender Mr Dickson is custodier under the Glasgow Police Act of property taken possession of in the public interest in criminal cases; therefore the property which he holds in such circumstances comes into his possession in no casual way or under any wish or act of his own, but under the duty imposed on him by a public statute. That being so, it would be an improper addition to his duties to cast on him the *onus* of seeing that the proper defenders have been called into the field, and that he is free from any risk of subsequent question at any party's instance. Now, the form of action adopted here will not give him the necessary protection. It is an action for delivery. But I apprehend it is not for Mr Dickson to decide who is entitled to the goods. It is for the Court to do so, and more than that, I have the very gravest doubts as to the competency of a claim by the pursuer against Mr Dickson for delivery of the goods. The proper form of action is a multiplepoinding. Such an action amounts to an application to the Court to distribute the goods which are the subject of it amongst the parties who may have right thereto, whether they are called to the action or not. In such a form of action the

Court takes such steps as it thinks proper by advertisement or otherwise to find out who may have claims upon the goods, and all the holder of the subject *in medio* has to do is to see that it is correctly stated, and he leaves the Court to take what further steps of procedure it thinks proper. More than that, on simply putting the subject *in medio* into the possession of the Court he gets an order of protection against all possible claims that may be made in the future in regard to the subjects, and he is therefore relieved from any anxiety as to the procedure that may be taken. The only reason assigned for deviating from the usual form of action on the present occasion is that it may save expense; for if Mr Dickson is satisfied, as no other defender has entered appearance, the pursuer will get what he wants. But this amounts to imposing on Mr Dickson a duty that should be discharged by the Court, and, as a matter of fact, if he thought fit to avail himself of the right of bringing a multiplepoinding, the result would only be the extra expense of the present action and further delay. On all these grounds, but mainly in respect of the incompetency of subjecting statutory officials to direct actions against them, I cannot sustain the competency of the present case."

Upon appeal the Sheriff (BERRY) adhered.

The pursuers appealed to the Second Division of the Court of Session. The Court sustained the appeal and granted the application.

Counsel for the Appellants—Ure. Agents—Dove & Lockhart, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, March 4.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner.)

SKENE *v.* FALCONER.

Justiciary Cases — The Vaccination (Scotland) Act 1863 (25 *and* 26 *Vict. cap.* 108), *sec.* 18—*Refusal to allow Vaccination—Previous Conviction—Competency.*

In a prosecution by a parochial board for failure to vaccinate a child in compliance with an order issued under the Vaccination Act 1863, sec. 18, *held* that it was no defence that the accused had been previously convicted of a similar offence with regard to the same child.

James Gentle Falconer, residing at No. 11 Erskine Street, Aberdeen, in the parish of Old Machar and county of Aberdeen, was charged at the instance of Thomas Skene, Inspector of Poor of the parish of Old Machar, before the Sheriff Court of Aberdeen, Kincardine, and Banff, at Aberdeen, upon a complaint which set forth "that he was guilty of an offence within the meaning of the Act 26 and 27 Vict. cap. 108, entitled an Act to extend and make compulsory the practice of vaccination in Scotland, in so far as the said James Gentle Falconer having failed to transmit to the registrar of births, deaths, and marriages of the Aberdeen district of the said parish of Old Machar, in terms of the said last-mentioned Act, a certificate of vaccination of Margaret Sim Falconer, a child aged twenty-one months or thereby, born in the said Aberdeen district of the said parish of Old Machar, and of which child the said James Gentle Falconer is the father, the said Parochial Board did issue an order to John Gregory, bachelor of medicine and master of surgery, a vaccinator appointed by them for the said district, to vaccinate the said Margaret Sim Falconer, and gave notice in writing of the said order to the said James Gentle Falconer, said order and notice having been both dated and made on the 19th day of October 1888, the said James Gentle Falconer did, on or about the 2nd day of November 1888, refuse to allow the operation of vaccination to be performed on the said Margaret Sim Falconer, who was then residing with the said James Gentle Falconer at No. 11 Erskine Street, Aberdeen, aforesaid, although the said John Gregory then attended to perform the same in terms of the said order, whereby the said James Gentle Falconer was liable to a penalty not exceeding twenty shillings, and failing payment to be imprisoned for any period not exceeding ten days."

The respondent was cited to appear to answer to the complaint on 30th November 1888. At this diet it was stated, on behalf of the respondent, that he was convicted on 28th December 1887 of an offence under the same section of the statute, and in respect of the same child, as that libelled in the present complaint, and that therefore the complaint was incompetent. The previous conviction was admitted on behalf of the prosecutor.

The Sheriff-Substitute (DOVE WILSON) at an adjourned diet on 18th December 1888 sustained the objection to the competency and dismissed the complaint.

The Inspector of Poor took a case.

The case contained the following opinion delivered by the Sheriff-Substitute in giving judgment.

"*Opinion.*—This is a case which raises a question under the Scotch Vaccination Act, and I have had the advantage of a very able argument upon the subject, and of a great deal of information which the parties have been good enough to get for me as to the practice. The result of that investigation has been that there is no authoritative decision in Scotland on the point involved, and that the practice is of too small and conflicting a nature to throw light upon the construction of the statute. The question that is raised is, whether a person who has been already convicted for an offence under section 18 of the Scotch Vaccination Act of 1863 may again be convicted for failing to vaccinate the same child? That question resolves itself into the two questions, whether the offence consists in the refusal to vaccinate the child, or whether there is under the Act a renewal of the offence on the lapse of every six months during which the refusal to vaccinate the child continues? These questions turn on the construction to be given to the Vaccination Act of 1863. The provisions of that Act, so far as they bear upon the present question, I shall relate. The preamble bears that it is expedient to extend, and in certain cases make

compulsory, the practice of vaccination in Scotland. The child in this case was alleged to be a child susceptible of vaccination, and with regard to such a child the duties that are imposed by the statute are the following—Under section 8 the father of every such child shall, within six months after the birth, cause it to be vaccinated, and the medical practitioner immediately after successful vaccination shall deliver to the father a certificate to that effect, and such certificate shall, within three days, be transmitted to and lodged with the registrar by the father. Under section 17 it is provided that in every case where there is not transmitted to the registrar a certificate within the periods and manner prescribed the registrar shall intimate such failure to the father, and if the certificate is not exhibited by the father to the registrar within ten days, the father so failing shall forfeit a sum not exceeding twenty shillings, and shall pay one shilling to the registrar. Then section 18 provides that the registrar shall once in every six months transmit to the inspector a list of such persons as have failed to transmit or lodge a certificate of vaccination in terms of the Act, and on the receipt of such list the inspector is to lay the same before the parochial board, and thereupon the board is to issue an order to the vaccinator to vaccinate the persons named in the list, and notice in writing is to be given to the father; and in pursuance of that order the vaccinator is to vaccinate the persons named within a prescribed time unless such persons shall have previously been vaccinated and certificate of vaccination lodged with the registrar. And then that section goes on to say that if the father shall refuse to allow such operation to be performed, he shall for every such offence be liable to a penalty not exceeding twenty shillings. Lastly, section 26 provides that it shall be competent to take proceedings for enforcing penalties at any time when the person is in default.

"So far as sections 8, 17, and 26 are concerned no difficulty arises. There is clearly nothing in any of them to make a continuing offence. Section 8 prescribes the duty of the parent to vaccinate within six months, and it provides that if the duty is performed a certificate is to be lodged at a time which, allowing a day for the vaccinator to give a certificate to the father, would be at latest four days after the expiry of the six months, so that the Act there prescribes duties to be performed at particular periods. If these duties be not performed there will be a transgression of the statute, but there is nothing in these provisions to make failure to perform the duties a transgression at any other time than the time which is specified by the statute. Section 17 is the first provision that is made for punishing failure in duty. In it the registrar, 'when the failure occurs, is to intimate to the father that he has failed"—that is, that the registrar at the end of the six months is to give notice to the father that he has not transmitted to him a certificate of vaccination. Upon getting that notice the statute provides that the father is to exhibit a certificate within a certain time. There is a curious instance here of the indirect way in which British statutes often provide that duties are to be done. Instead of saying distinctly that the father is then to vaccinate the child, the only provision made is the indirect one that the father shall exhibit a certificate of vaccination. Of course that implies that he is to vaccinate, but one would have expected that the duty would have been plainly prescribed. Another observation that requires to be made upon this provision is that the phraseology is changed. In section 8 the duty of the father was to transmit or lodge a certificate after the successful vaccination. In this section his duty is made to be to exhibit a certificate. Now, this is a medical statute, and I am aware that the word 'exhibit' in medicine may sometimes mean something that is equivalent to lodge and transmit, but the statute here must be read in the usual sense in which statutes are read, and the word 'exhibit' here is equivalent to the word 'shew.' Then the statute goes on to provide that if the father fails after getting this notice to show a certificate he shall forfeit twenty shillings and the shilling that I have already mentioned. Now, again there is nothing to provide for a continuing offence. The section deals entirely with an offence that, if it is committed at all, will be committed at a specific time, namely, on or about the expiry of the first six months of the child's existence, and there is nothing whatever to show in that section that if the duty be not performed at any other time the person failing shall be liable in a penalty. Then I come to section 26, and it provides that the penalties may be enforced at any time during which the defender is in default. That plainly does not apply to a question like the present. That applies to the provisions of the Summary Prosecutions Acts, which provide that in the ordinary cases prosecutions under them must be begun within a certain period, and this section takes away the necessity under the Summary Prosecutions Acts of beginning these prosecutions within a specified period.

"So far the construction of the Act is plain, and it is fortified by an English decision. At the time the Scotch Act of 1863 was passed the matter of vaccination was regulated in England by two Acts, passed respectively in 1853 and 1861. The preamble of the 1853 Act was much the same as that of our Act. The second section of the 1853 Act was analogous to the eighth section of the 1863 Act; the ninth section was analogous to our seventeenth section; and then the concluding part of the second section of the 1861 Act was analogous to our twenty-sixth section; so that the statutory provisions so far much resembled each other. The construction that is to be put upon the English provisions was settled in the case *Pilcher* v. *Stafford*, decided by the Queen's Bench in 1864, and the observations of Chief-Justice Cockburn there are so much to the point that I think it well to read them. In his judgment he says:—'I quite agree that a continuous omission to have a child vaccinated is as much within the mischief intended to be remedied by the statutes as the not doing it within the prescribed time, but this mischief has not been reached by the present Legislation. The second section of the Act of 1853 imposes the duty of having the child vaccinated within three or four months of its birth as the case may be, and the ninth section requires that the registrar shall give notice of this duty, and if the notice be given and the duty not performed within the prescribed time, then this non-performance is an offence arising and punishable under the Act; and when once that

offence is completed and has been dealt with, and the person offending has been punished, no further offence can be committed. It is not enough to say the mischief continues. The answer to that is—the Act does not enact a remedy. If we were to hold otherwise on the present enactment, it would follow that for every day during which an omission to vaccinate a child continues a penalty would be incurred, so that the penalties might accumulate to a very serious amount, which could never have been the intention of the Legislature.'

"These considerations dispose then of three out of the four sections that I have quoted, and lead me to the conclusion, that unless section 18 provides for the creation of a continuous offence, there is nothing in the statute which does. Now, to begin with, section 18 plainly prescribes a remedy additional to the remedy given by section 17, and it is plainly competent both to exact the forfeiture under section 17 and the penalty under section 18. But the question remains, is there power under section 18 to exact repeated penalties? Applying to it the same principles which Chief-Justice Cockburn applied to the other sections, I can find nothing in it sufficient to show that the Legislature intended that there should be a continuous offence. Section 18 begins by providing that the registrar is once in every six months to transmit to the inspector a list of such persons as have failed to transmit or lodge a certificate of vaccination in terms of the Act. Then on receipt of that list certain proceedings are to be taken, but the foundation of all subsequent proceedings is the finding of the name of the person upon the list, and therefore unless there be authority to the registrar to enter the name of an offending person at successive periods upon this list there is no authority under the Act to exact penalties for successive alleged offences. Now, I take it as being a plain construction of such an enactment that where it is stated that a certain list is to be made out every six months, and that upon that list the names of certain persons who have omitted a certain thing are to be entered, that that means, unless the contrary be expressed, that if a person's name be entered once upon that list for the omission, there is a sufficient performance of the duty of making the list. I don't think it could mean that at the lapse of every six months the registrar is not only to enter the names of all those who had failed to transmit certificates within that six months, but also the names of all persons who during all former periods of six months had so failed to transmit. Failure must, it seems to me, unless the contrary be expressed, occur in the six months. Now, the only failure to transmit which could occur within the six months with which the registrar deals is the failure to transmit a certificate immediately after the first six months of the child's existence. There is in the statute no duty imposed upon anyone to transmit a certificate at any other period. The duty imposed by section 17, as I have already said, is the duty simply to exhibit, and although there is a power to the father to transmit under a subsequent portion of section 18, it is merely an option given to him in the case of his being willing to vaccinate; but there is nothing in it putting upon him a positive duty to transmit, because, if he chooses to submit to the vaccination, then there is no obligation by the statute on him to transmit a certificate. I therefore find no distinct statutory duty to transmit imposed upon a parent except at the expiry of the first six months of the child's age, and therefore, unless the statute had imposed upon the registrar the duty to return in his list the names of those who had refused to exhibit certificates, or who had refused to allow their children after notice to be vaccinated, then there is nothing in this statute empowering the registrar to put upon that list the names of persons who have committed what is called repeated offences. I therefore come to the conclusion that while this section 18 permits of one additional remedy to section 17, it does not permit of an additional remedy for every six months that shall elapse, and I find no sufficient evidence that the Legislatutre in passing the Scotch Act had any intention to impose cumulative penalties in that way. If the Legislature had intended that a number of convictions could follow upon section 18, I fail to see any use whatever for a penalty under section 17, and I should certainly have expected that the Legislature would have defined in some way the number of prosecutions that were to be competent under section 18.

"In applying these principles of construction to this Act of Parliament, I am fortified by the consideration that when the Legislature has distinctly intended to impose a continuing penalty it has found little difficulty in expressing its intention. In 1867, when the English Vaccination Acts were consolidated and a new Act was made to regulate vaccination in that country, there was a clause introduced with the intention of making continuous offences, and the clause carried out that intention. It was a much more clear statement of the intention of the Legislature to make a continuous offence than anything that is contained in the Scotch Act, but as showing the reluctance of the judges to create an offence by implication, and to spell out of the terms of a statute the creation of an offence that the Legislature had not distinctly enacted, I may mention that when the construction of that English provision came to be considered in *Allan* v. *Worthy*, decided in the Queen's Bench in 1870, the judges had some difficulty in holding that even under it there was a continuous offence. The best example of the creation of a continuous offence is to be found in the Education Acts, where a provision is made in express words that leave no room for doubt, and where the provision is in such a form as to make the intention of the Legislature certain to be carried out. And I will point out that even if the prosecutor were to succeed in putting the construction on this Act which he thinks right, it would not make it an Act to make vaccination compulsory, because it would still be in the power of any person who did not think that vaccination was good for his children to escape the operation of the statute simply by paying so much every year. In place of being an Act to make vaccination compulsory, it would be more correctly described as an Act to impose a tax upon unvaccinated children. If the Legislature desire to make vaccination compulsory, clearly the Legislature must make an enactment which persons with means shall not be at liberty to disregard,

and that was distinctly done in the Education Acts, where a penalty of imprisonment may follow, as I think quite properly, upon repeated disobedience to the Legislature. All these considerations make it plain to me that while the Scotch Act went further than the original English Acts by providing two remedies for the case of failure to vaccinate—the remedy of a prosecution under section 17, and of a subsequent prosecution under section 18—it does not provide the remedy of a prosecution under section 18 for every six months during which the child shall be unvaccinated. For the purpose of preventing neglect to vaccinate, arising from carelessness and inattention, the provisions of the Scotch statute are reasonably sufficient, and I cannot see that in 1863 the Legislature had any other purpose. I therefore hold that the objection which has been taken to the complaint must be sustained."

The question of law for the opinion of the Court of Justiciary was—"Whether the objection to the competency was rightly sustained?"

The Vaccination (Scotland) Act 1863, section 17, enacts—"In every case where there is not transmitted to the registrar a certificate of the vaccination of any child born within his district, or of the postponement of such vaccination, or of the insusceptibility of such child to vaccine disease, all within the periods and in the manner respectively hereby prescribed, the registrar of the district shall intimate such failure to the father or mother or person having the care, nurture, or custody of such child by a notice transmitted through the post office; and if a certificate as herein provided is not exhibited by such father or mother or other person to the registrar within ten days from the dispatch of such notice, the father or mother or person aforesaid so failing shall forfeit a sum not exceeding twenty shillings," &c.

Section 18 enacts—"The registrar of each district shall once in every six months transmit to the inspector of the poor of the parish or combination in which such district is situate a list of the names and addresses of such persons as have failed to transmit or lodge a certificate of vaccination in terms of this Act, and on receipt of such list the inspector of the poor shall lay the same before the parochial board of such parish or combination, and thereupon the parochial board shall issue an order to the vaccinator appointed by them to vaccinate the persons named in such list, and notice in writing of such order shall be given to such persons, or if children, to their father or mother or the persons having care of them, and in pursuance of such order the vaccinator shall vaccinate the persons named therein, or any of them, at any time not less than ten nor more than twenty days after the date of such notice, unless such persons shall previously have been vaccinated and a certificate of their vaccination or insusceptibility shall have been transmitted to the registrar; and if any such person, or the parent or person having the care of any such child, shall refuse to allow such operation to be performed, he shall, for every such offence, be liable to a penalty not exceeding twenty shillings, and failing payment to be imprisoned for any period not exceeding ten days."

Argued for the appellant—Section 18 of the Vaccination Act provided for the preparation every six months of a list of "such persons as have failed to transmit or lodge a certificate of vaccination in terms of the Act." That list must include persons who have previously been convicted of an offence under the section if they are still in default. The registrar would commit a breach of his duty under the Act if he omitted them. It followed that the parochial board must issue an order for the vaccination of the children in respect of whom such persons were in default, and that if that order be obstructed the statutory offence was committed and the penalty incurred. There was a new offence every time an order to vaccinate was obstructed, and that might happen once in every six months. The case of *Pilcher* v. *Stafford*, 1864, 23 L.J., M.C. 113, decided under the English Vaccination Acts of 1853 and 1861, might be cited by way of contrast, for it turned upon the absence of any such provision as that contained in section 18. The case of *Allen* v. *Worthy*, 1870, L.R., 5 Q.B. Div. 163, which decided that section 31 of the English Act of 1867 had created a continuous offence, might be cited by way of analogy.

Argued for the respondent—There was no express power given by the Act to convict more than once for this offence, and such a power was not to be inferred. The inference from the construction of the section was against such a power. For example, no provision was made for keeping a record of persons in default who might move from one district to another. Again, there was no need for providing, as was done by section 17, a punishment for failure to exhibit a certificate of vaccination within six months of the birth of a child, if section 18 was to be read as the appellant contended. Further, section 18 was not effectual to carry out the purpose to which it was sought to be put by the appellant. It provided for the issue of an order to vaccinate "the persons named in such list," *i.e.*, the persons failing to lodge certificates, not the children in respect of whom the certificates should have been lodged.

At advising—

Lord Justice-Clerk—This case does not to my mind present any real difficulty. Section 18 of the Vaccination Act for Scotland is rather loosely expressed, but its meaning is, I think, quite plain. The statute, in the first place, enacts that any person who fails to have his child vaccinated, or to produce a certificate of unfitness for vaccination, is liable to prosecution. Then by section 18 it is provided that the registrar of each district is once in every six months to transmit to the inspector of poor the names and addresses of such persons as have failed to transmit a certificate in terms of the Act. Of course children cannot so transmit, and the plain meaning of the Act is that those whose duty it is to look after the children are to send the certificates. The registrar is to make out a list of those in default. That is to be laid before the parochial board by the inspector of the poor. Then an order is to be issued by the board appointing a vaccinator to vaccinate such persons. Notice of such order is to be given to such persons, or if children, to their father or mother or persons having care of them, and in pursuance of the order the vaccinator is to perform the operation, and if any person refuses to allow him to do so, such person is liable to a

penalty. I see nothing in this section to justify the registrar in excluding from his list any person still resident in his district whose name appears in the register who is not entered as having been vaccinated. It is said that persons may leave the district, and that no provision is made for such cases. That merely shows that the machinery provided by the Act of Parliament is not absolutely certain in its action. It could scarcely be so. Every conceivable case could not be provided for. But in so far as it is certain there is nothing in this section to indicate that it is not to be carried out to the uttermost. That being so, I think that it is the duty of the registrar in making out his list every six months to include the name of every person not certified as vaccinated, or unfit, without regard to the question whether such person was included in former lists, and that if any person's name so appears in the registrar's list the parochial board are bound to issue the order to vaccinate, and if they do so, and the person, or parent, or guardian refuses to allow the operation to be performed, then the penalty is incurred.

I must therefore move your Lordships to answer the question in this case in the negative, and to remit the cause back to the Sheriff-Substitute.

Lord Adam—This complaint is brought under the 18th section of the Vaccination Act of 1863. The only objection stated to it is an objection outwith the complaint altogether, namely, that the accused had been convicted for the same offence in connection with the same child on the 28th December 1887. The validity of this objection depends upon the construction of the 18th section of the statute, and I concur with your Lordship that upon the construction of that section it very clearly appears that the accused here was not convicted of the same offence upon the 28th December 1887. The section is to my mind quite intelligible though not very well expressed. It lays a duty upon the registrar of each district once in every six months to transmit to the inspector of the poor a list of the names and addresses of "such persons as have failed to transmit or lodge a certificate of vaccination in terms of this Act." I do not understand that it is contended on the other side that the complainer here was not in that position. I have not heard it said that he was not one of those persons who had failed to transmit or lodge a certificate of vaccination in terms of the Act. Therefore, in my view, the registrar had no alternative but to put him in that list. That list is to be sent to the inspector of the poor. He is to lay it before the parochial board and the board is to issue an order to their vaccinator to vaccinate the persons "named in such list," the clear meaning being the unvaccinated persons named in such list. All this having happened by force of the statute the vaccinator is to proceed to vaccinate such persons, and then these words follow—"And if any such person, or the parent or person having the care of any such child, shall refuse to allow such operation to be performed, he shall, for every such offence, be liable to a penalty not exceeding twenty shillings, and failing payment to be imprisoned for any period not exceeding ten days." It is to me clear that that order may be pronounced every six months, and the offence committed every six months. In my humble opinion the offence is committed every time the order is disobeyed. It is, in my judgment, a misreading of the statute to regard the two offences as the same offence. I therefore think the Sheriff-Substitute wrong in sustaining, as a bar to all further proceedings, the conviction for refusal to obey a previous order. But further we have the words used in the section "every such offence." I think these words imply the possibility of more than one such offence. If it had been otherwise the words used would have been "for such offence."

Lord Trayner—I think the question raised by this case is a difficult question, but I have come to be of opinion with your Lordships that the Sheriff-Substitute is in error in sustaining as he has done the objection to the competency of the complaint.

Section 18 of the Act of 1863 has not been very carefully revised, and it contains, on a literal reading of it, a provision of a very startling kind. It appears upon the face of the clause that the registrar is to transmit a list of the names and addresses of the persons who have failed to lodge certificates of vaccination to the inspector of poor, and that the Parochial Board, on the same being laid before them by the inspector, is to issue an order to vaccinate "the persons named in such list." This may be read, undoubtedly, as meaning the persons who have failed to transmit to the registrar the certificate of vaccination; not the child or children to whom the desiderated certificate would apply. But the real meaning of the section is discoverable when it is considered what the certificate when sent to the registrar would bear. The certificate required by the Act would, if duly transmitted, bear the name of the child who had not been vaccinated, and whose vaccination had been postponed. That name—the name of the child—will therefore appear in the list made up by the registrar. The list will contain not merely the name of the defaulting parent or guardian, but the name of the child in regard to whom there has been default. On such a list being transmitted by the registrar, the parochial board is to order the vaccination of the "persons named in said list"—that is, is to order the vaccination of the persons named in that list who are there reported as not having been vaccinated, or rather, of whose vaccination no certificate has been lodged with the registrar. I think the section bears the meaning I have thus put upon it. Any other meaning would render the clause ineffectual in the attainment of the end sought thereby to be attained, and if that be so, we are bound to put such a meaning on the clause (if the words of the clause will bear it) as will make the clause effectual, rather than a meaning which will make the clause nugatory.

The registrar is directed by the Act to transmit his list to the parochial board every six months, and the parochial board is thereupon to order the vaccination of the child. Every such order must be obeyed, until the child's name, as well as its defaulting guardian's name, is removed from the list, and the disobedience of every such order incurs the statutory penalty. I think this is a more reasonable view of the statute than that which the Sheriff-Substitute has taken. In

coming to this conclusion I do not attach much weight, if any, to the use of the words "every such offence," which I regard rather as words of style than as an express direction as to the accumulation of offences and penalties.

Lord Chief-Justice Cockburn's remarks in *Pilcher's* case would have had more force and weight if the Act he was there interpreting had been the same as that now under consideration. but that Act contained no clause equivalent to that under which this complaint is brought.

The Court answered the question stated in the negative, and remitted the cause to the Sheriff-Substitute.

Counsel for the Appellant—Comrie Thomson —Law. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Respondent—Guthrie. Agent —R. C. Gray, S.S.C.

Monday, March 4.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner.)

MACKENZIE *v.* ALLAN.

Justiciary Cases—Sentence—Alteration in Executorial Part—Ambiguity—Sea Fisheries Act 1883 (46 *and* 47 *Vict. cap.* 22), *sec.* 20, *sub-sec.* 2—*Sea Fisheries* (*Scotland*) *Amendment Act* 1885 (48 *and* 49 *Vict. cap.* 70), *sec.* 4.

A sentence convicting an accused person of a contravention of the bye-laws passed by the Fishery Board for Scotland, in respect he had used a beam-trawl for sea fish within prohibited limits, and adjudging him to pay a fine of £20, and in default of payment to suffer thirty days' imprisonment, was pronounced verbally by a Sheriff, and thereafter read out by the Sheriff-clerk from a draft prepared by him during the trial, the written form ending with these words, "without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction." Subsequently on the same day the form of the sentence was altered by the Sheriff to the effect (1) that eight days were allowed to the accused in which to pay his fine, and (2) that warrant was granted for recovery of the fine by poinding and sale of the boat, &c., to which the accused belonged in terms of the Sea Fisheries Act 1883, sec. 20, sub-sec. 2, the return or execution of the poinding to be lodged within twenty days "from the expiration of the period herein allowed for payment under certification of imprisonment for the period of thirty days as before written in default of payment or recovery of the said sum of £20 of fine before the time allowed for such report." The sentence in its final form was read over in Court in presence of the prosecutor and the accused, and signed by the Sheriff.

In a suspension it was objected (1) that the sentence was ambiguous, in respect it contained two different dates on which imprisonment was authorised to follow default of payment of the fine; and (2) that the sentence was void, in respect it was not the sentence pronounced by the Court in the presence of parties.

Held (1) that the sentence was in conformity with the statutory provisions under which it was pronounced, and (2) that the sentence had not been altered after it was pronounced, but only completed as regards executorial matter, and suspension *refused*.

James Mackenzie, fisherman, Branderburgh, was upon 21st December 1888 charged at the instance of Alexander Grigor Allan, Procurator-Fiscal, Elgin, before the Sheriff-Substitute at Elgin with having "contravened the bye-laws passed by the Fishery Board for Scotland, dated 18th April 1887, confirmed by Her Majesty's Secretary for Scotland 27th June 1887, and published 28th June 1887, in terms of the Sea Fisheries Act 1883, as amended by the Sea Fisheries (Scotland) Amendment Act 1885, by which bye-laws it is, *inter alia*, provided that no person, unless in the service of the Fishery Board for Scotland, shall at any time, from the date when said bye-laws came into force (being 4th July 1887), use any beam-trawl for taking sea fish from a point a mile west of the mouth of the Findhorn river, and thence along the coast at a distance of three miles to a point due north magnetic from Kinnaird Head Lighthouse; in so far as the said James Mackenzie, being the master or person actually in command of the boat 'J. Mackenzie,' of Lossiemouth, numbered 191 of the port of Inverness, did on Wednesday 31st October 1888, or about that time, at a part of the sea distant a mile and a-quarter or thereby off Ness Point, near Hopeman, in the parish of Duffus and county of Elgin, use a beam-trawl for taking sea fish, and was not in the service of the Fishery Board for Scotland."

The Sheriff-Substitute found the offence libelled proved, and verbally imposed a fine of £20, and failing payment imprisonment for thirty days. The Sheriff-Clerk thereupon read from a draft which he had prepared during the trial the sentence of the Court. This sentence, after finding the offence proved and imposing the fine and alternative imprisonment, contained the usual warrant to officers of law to apprehend the accused and convey him to prison, and ended with these words, "without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction." Thereafter the form of the sentence was altered by the Sheriff-Substitute to read as follows—"The Sheriff-Substitute, in respect of the evidence adduced, finds that the said James Mackenzie has contravened the bye-laws as libelled, and therefore convicts him of the offence charged, and therefore adjudges him to forfeit and pay the sum of twenty pounds of fine, and in default of payment thereof within eight days from this date, decerns and adjudges the said James Mackenzie to be imprisoned for the space of thirty days, and thereafter to be set at liberty, and for that purpose grants warrant to officers of law to apprehend and convey the said James Mackenzie to the prison of Inverness, thereafter to be dealt with in due course of law; and in respect that no imprisonment can follow in the event of recovery of the fine as after provided, and in terms of the provisions of section 20, sub-

section 2, of the Sea Fisheries Act 1883, adjudges the said fine to be recovered by distress or poinding and sale of the sea fishing-boat to which the said James Mackenzie belongs, and her tackle, apparel, and furniture, and any property on board thereof or belonging thereto, or any part thereof, and grants warrant to officers of Court, in default of payment of the said fine, for poinding of the said boat and other effects above set forth, and summary sale thereof on the expiration of not less than forty-eight hours after such poinding, without further notice or warrant, and appoints a return or execution of such poinding and sale to be made within twenty days from the expiration of the period herein allowed for payment, under certification of imprisonment for the period of thirty days, as before written, in default of payment or recovery of the said sum of twenty pounds of fine before the time allowed for such report, and directs five pounds of said penalty to be applied in or towards payment of the expenses of the proceedings should the penalty be recovered by payment, and ten pounds in the event of it being recovered by diligence." The accused and his agent and the prosecutor were recalled to Court, and in their presence the sentence as altered was read over, and was signed by the Sheriff.

Section 4 of the Sea Fisheries (Scotland) Amendment Act 1885 (48 and 49 Vict. cap. 70) provides, *inter alia*—"Any person contravening a bye-law duly confirmed shall be guilty of an offence under the Sea Fisheries Act 1883, and shall be liable on summary conviction to a fine not exceeding £100, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction."

Section 20, sub-section 2, of the Sea Fisheries Act 1883 (46 and 47 Vict. cap. 22) provides as follows:—"(2) Any fine or compensation adjudged under this Act may be recovered in the ordinary way, or if the Court think fit so to order, by distress or poinding and sale of the sea fishing-boat to which the offender belongs, and her tackle, apparel, and furniture, or any property on board thereof or belonging thereto, or any part thereof; provided that where the boat is a foreign sea fishing-boat the Court may order that in lieu of any such distress the boat may be detained in some port in the British islands for a period not exceeding three months from the date of the conviction, and the boat may be detained accordingly, and in such case shall not be distrained."

The accused brought a suspension in the High Court. He pleaded, *inter alia*—"(1) The pretended sentence complained of is illegal, and should be set aside in respect of the informality and irregularity in the proceedings condescended on. (2) Said sentence is void and illegal, in respect it is not the sentence pronounced by the Court in presence of parties and their agents after the hearing of the case. (3) The sentence complained of is illegal, in respect of ambiguity and uncertainty, and should be quashed."

Argued for the complainer—(1) The sentence was null on account of ambiguity. The two parts of the sentence were inconsistent with one another. In the first part imprisonment was ordered to follow a failure to pay the fine within eight days from the date of the sentence; while in the second part it was ordered to follow a failure to pay or recover the fine by poinding within twenty-eight days from the date of the sentence. Further, in the first part of the sentence the imprisonment was an alternative to the whole fine; in the second it was not so. Part of it might be paid or recovered and imprisonment might follow as well. (2) The sentence was void because it was not the sentence pronounced by the Court in the presence of parties—*Henry* v. *Young*, July 21, 1846, Arkley 105; *Hume* v. *Meek*, July 13, 1846, Arkley 88; *Clarkson* v. *Muir*, July 19, 1871, 2 Coup. 125. Section 20, sub-sec. 2, of the Sea Fisheries Act of 1883, which authorised poinding of the boat, &c., was a very special provision. The diligence did not follow upon a sentence as a matter of coarse but only if "the Court think fit so to order."

Argued for the respondent—The sentence read out immediately after the trial was incomplete in so far as the executorial part of it was concerned. It contained the words "without prejudice to diligence by poinding or arrestment, if no imprisonment has followed the conviction." In the sentence as finally adjusted this last clause was amplified, but the sentence was essentially the same. The only detail in which it differed was that eight days were allowed the accused for payment of his fine instead of immediate payment being ordered. That was no prejudice to the accused. The sentence of a Court was that which was signed by the judge—Hume's Comm. ii. 477.

The Court intimated that they did not desire to hear argument on the complainer's objection to the sentence on the ground of ambiguity.

At advising—

Lord Justice-Clerk—There is no step of criminal procedure which ought to be more safeguarded than the pronouncing of sentence, and absolute security is required that after a sentence is duly pronounced it shall not in any substantial particular be altered by the judge or by the officials of court. It would be a most dangerous thing to suffer it to be supposed that when a sentence has been duly adjusted and announced it can afterwards be interfered with in any substantial particular. But in this case it appears to me that there is no ground for coming to the conclusion that any such thing was done. The substantial parts of this sentence so far as the complainer is concerned are two; the first, that he is to forfeit the sum of £20, and the second, that if he fails to pay that sum, and it is not made good otherwise, he is to go to prison for 30 days. It seems that at the trial the Sheriff-Clerk had made out a draft sentence leaving blank the amount of the fine and the period of imprisonment. That draft was before the Sheriff, who, after having made up his mind to convict, determined that the amount of the fine should be £20, and the alternative period of imprisonment of 30 days, and accordingly announced that that would be his sentence upon the complainer. The Sheriff-Clerk following that up read from his draft the sentence, which embodied these two things and the usual warrant to officers of Court to convey the accused to prison, and also an addendum that the sentence was without prejudice to diligence by poinding or arrestment if

no imprisonment had followed on the conviction. After that draft had been read out the Sheriff saw cause to remodel the form of the sentence, not in any essential particular in so far as regarded the complainer, but solely as regarded the executorial part of it, and particularly as regarded the power given to the prosecutor (which it was by the statute competent for the Sheriff to grant), to recover the fine, not from the complainer, but from the property to whomsoever it belonged by which the mischief had been done, namely, the boat and gear. Further, in order to give time for the payment of the fine, or recovery of the amount by poinding, he modified the executorial part of the sentence by inserting in it that the default of payment was not to operate against the complainer at once, but only after the expiry of eight days from the date of the sentence. It does not appear to me that in these circumstances there is any ground for the complaint made in this bill of suspension. The action of the Sheriff did not in any way interfere with the sentence to the prejudice of the complainer. All that was done was to bring out in the sentence more fully the procedure in regard to diligence by poinding and arrestment which in the first draft had been stated generally, and to give eight days to the complainer in which to pay his fine. The final form of the sentence was read out in presence of the prosecutor and accused, and signed by the Sheriff. I think this narrative of the facts discloses no ground for complaint against this sentence, and that the suspension ought to be refused.

LORD ADAM—There are various matters of disputed fact as to what took place in the Sheriff Court when this sentence was pronounced. But I think we have sufficient facts before us to enable us to sustain the sentence. So far as the form of the sentence is concerned I see no objection to it. It seems to be in conformity with the fourth section of the Act of 1885, and the twentieth section of the Act of 1883. But it is said that this is a different sentence from that pronounced by the Sheriff in open Court, and that the Sheriff had no right so to alter his sentence. I do not think it necessary to consider the question as to the extent of a judge's powers in such a matter, because I think the admitted facts in this case exclude the necessity for such a consideration. The facts admitted are, that after the Sheriff had heard the evidence in the case he read out to the parties as the sentence the words laid before us in a draft sentence which had been prepared during the course of the trial. Now, on comparing that with the sentence which was ultimately pronounced I find no discrepancy between them. All that I find is that the words in the draft sentence, "without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction," are amplified into the more extended form in which they now appear.

I think it is impossible to say that the sentence now before us is a different sentence from that which was first pronounced, and I have no hesitation in concurring with your Lordship.

LORD TRAYNER—I agree in the result at which your Lordships have arrived. I think the sentence complained of is the same as that admittedly pronounced by the Sheriff, and read over by him in open Court. For my own part I should be very sorry to say anything which would seem to countenance the right or propriety of a Judge who has pronounced sentence coming into Court one hour or many hours afterwards and pronouncing a different sentence. I am satisfied that no such thing happened here, and that the sentence complained of is really the sentence pronounced by the Sheriff.

The Court refused the suspension.

Counsel for the Complainer—Orr. Agents—Guild & Shepherd, W.S.

Counsel for the Respondent—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Monday, March 4.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner.)

CHALMERS *v.* BAIN AND IRVINE.

Justiciary Cases—Salmon Fisheries Act 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 21—*Annual Close-Time.*

The Salmon Fisheries (Scotland) Act 1868, sec. 21, provides—"Any person who shall . . . have in his possession any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close-time which is in force at the time for any district shall be liable to a penalty." . . .

Held that the words "annual close-time" mean the time during which net fishing is illegal. Therefore, that a complaint was relevant which charged the accused with having salmon in his possession during close-time although at the date libelled rod-and-line fishing was open in another district.

This was an appeal at the instance of William Chalmers, solicitor, Perth, as authorised to prosecute on behalf of the Tay District Board upon a case stated against a decision of the Justices of the Peace of the county of Perth dismissing a complaint at his instance against Charles Bain or Bayne and Edward Erwin or Irvine charging them with having contravened The Salmon Fisheries Scotland Act 1868, and section 21st thereof, in so far as upon Thursday the 29th day of November 1888, or about that time, the said Charles Bain or Bayne and Edward Erwin or Irvine had in their possession salmon or fish of the salmon-kind taken within the limits of the said Act between the commencement of the latest and the termination of the earliest annual close-time then in force for any district in Scotland, and that in East High Street, Crieff, and had in their possession on said occasion a bag containing two salmon or fish of the salmon-kind which were seized in terms of said Act, and the said Charles Bain or Bayne had been twice, and the said Edward Erwin or Irvine once previously convicted under said Act.

The case set forth that it was objected on behalf of the said Charles Bain or Bayne that no valid offence was alleged, in respect that the

alleged contravention on 29th November 1888 took place when the district of the river Tweed was open for rod-and-line fishing, the annual close-time for that time being between 30th November and 1st February. The said Edward Erwin or Irvine failed to appear. The appellant answered that what is meant by annual close-time in the section of the Act founded on is the annual close-time for net-fishing, and that the annual close-time for net-fishing in the district of the river Tweed is between 14th September and 15th February.

The Justices sustained the objection, and dismissed the complaint.

The question of law for the opinion of the Court was—"Whether the words 'annual close-time,' in section 21 of the Salmon Fisheries (Scotland) Act 1868, include the extension of time for rod-fishing."

The Salmon Fisheries (Scotland) Act 1868 (31 and 32 Vict. cap. 123), sec. 21, provides—"Any person who shall buy, sell, or expose for sale or have in his possession any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close-time which is in force at the time for any district, shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding two pounds for every salmon so bought, sold, or exposed for sale, or in his possession, and any salmon so bought, sold, or exposed for sale, or in his possession, shall be forfeited, and the burden of proving that any such salmon was caught beyond the limits of this Act shall be on the person selling or exposing the same for sale, or having the same in his possession." Section 22. . . . "And no salmon caught by rod and line during the annual close-time for net-fishing shall be shipped," &c.

The Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. cap. 97) provides—Section 6. "The Commissioners shall have the powers and perform the duties hereinafter specified—that is to say," . . . Sub-section 5. "To determine, subject to the provisions of this Act, at what dates the annual close-time for every district shall commence and terminate, and at what periods subsequent to the commencement and prior to the termination of the annual close-time it shall be lawful to fish for and take salmon with the rod and line." Section 7. The annual close-time for every district shall continue for 168 days." Section 8. "The annual close-time shall be applicable to every mode of fishing for or taking salmon in any river, lake, or estuary, or in the sea, except by means of the rod and line for the periods in each district to be fixed by the Commissioners subsequent to the commencement and prior to the termination of the annual close-time during which it shall be lawful to fish for and take salmon by means of the rod and line."

Argued for the appellant—Annual close-time meant the period during which net-fishing was prohibited. Although during part of that period fishing by rod and line was permitted, it was nevertheless close-time within the meaning of the Act. Section 6, sub-section 5, gave power to the Commissioners under the Act to fix the annual close-time for every district, and at the same time to determine during what periods, subsequent to the commencement and prior to the termination of close-time, it should be lawful to fish with rod and line. Section 7 fixed the duration of annual close-time at 168 days. That provision would not be fulfilled if the time during which rod-fishing was permissible was deducted from close-time. Section 8 provided expressly that annual close-time should be applicable to every mode of fishing except by rod and line during the periods subsequent to the commencement and prior to the termination of the annual close-time in which rod-fishing might be lawful. In the case of *Blair* v. *Shepherd*, April 12, 1871, 2 Coup. 28, it was held to be a good defence to a prosecution under sec. 21 of the Act that the salmon in question had been actually captured by rod and line. That decision did not apply to the present case. In *Wilsone* v. *Harvey*, Nov. 18, 1884, 5 Coup. 518, Lord Young had expressed an opinion contrary to the appellant's contention, but that expression of opinion was *obiter*, and the question had not been argued. The decision in *Chalmers* v. *M'Glashan*, Feb. 2, 1886, 1 White 1, proceeded entirely upon the ground that at the date of the alleged offence the Tweed district was still open for net-fishing.

Argued for the respondents—(1) No conviction could be obtained under section 21 of the Act, because its terms were self-contradictory. It required an accused person in exculpation to prove that salmon taken within the limits of the Act were taken beyond the limits of the Act—Lord Young and the Lord Justice-Clerk in *Chalmers* v. *M'Glashan supra*. (2) No conviction could be allowed under sec. 21 of the Act unless at the time of the alleged contravention every district in Scotland was closed for net and rod fishing. Though the case of *Chalmers* did not decide the question involved in this case the principle involved in that decision was against the appellant's contention. Were it otherwise a person might be punished for possessing salmon lawfully captured by rod and line. The distinction between close-time for both net and rod fishing was recognised by sec. 22 of the Act, which prohibited the exportation of salmon caught by rod and line during the annual close-time for net-fishing.

At advising—

Lord Justice-Clerk—The sole question in this appeal is whether the prosecutor in this complaint has stated a relevant case under the Salmon Fisheries Act. The complaint is that on 29th November 1888 the accused "had in their possession salmon, or fish of the salmon kind, taken within the limits of the said Act, between the commencement of the latest and the termination of the earliest annual close-time then in force for any district in Scotland, and that in East High Street, Crieff, and had in their possession on such occasion a bag containing two salmon, or fish of the salmon kind, which were seized in terms of the said Act." Now, the question whether that is a relevant charge turns upon the answer to this other question, What is "annual close-time?" For it is conceded that if the expression "annual close-time" does not cover 29th November 1888 then the complaint would not be relevant. It is not suggested by the respondent that there is any other ground on which the complaint must be held to be irrelevant except that, according to his contention, the 29th November is not "close-time." What, then,

does annual close-time mean? I am satisfied, after considering the provisions of the Act of 1862, that annual close-time means the period beginning in autumn and terminating in spring, when no fishing for salmon is permitted otherwise than by rod and line only. I think that the terms of the Act itself make that clear. Thus in section 6 we find that the Commissioners under the Act "shall have the powers and perform the duties hereinafter specified; that is to say (subsec. 5), to determine, subject to the provisions of this Act, at what dates the annual close-time for every district shall commence and terminate, and at what periods subsequent to the commencement of the annual close-time it shall be lawful to fish for and take salmon with the rod and line; provided that the number of days during which such annual close-time shall continue shall be the same as regards every district." Again, section 7 declares that the annual close-time shall continue for 168 days, which would be impossible if the extra time allowed for rod and line fishing were excluded from the close-time. Lastly, sec. 8 shows that annual close-time applies to every mode of fishing except rod and line, for it provides that "the annual close-time shall be applicable to every mode of fishing for or taking salmon in any river, lake, or estuary, or in the sea, except by means of the rod and line, for the periods in each district to be fixed by the Commissioners subsequent to the commencement and prior to the termination of the annual close-time during which it shall be lawful to fish for and take salmon by means of the rod and line."

Now, whatever may have been said *obiter* in other cases, I have no hesitation in holding that the words of the statute indicating what is the annual close-time are not affected either as to the commencement or as to the termination of it by considerations as to whether or not rod and line fishing is legal. Permission for rod and line fishing is indeed an exceptional favour granted to the angler, entitling him to fish within, it may be, the annual close-time, but by that method only. Such exceptional permission is only necessary because of the establishment of the close-time, and it allows rod-fishing during the close-time. I think that that is sufficient for the decision of the question. But there was a question raised by the respondent in argument which is indeed not, properly speaking, one of relevancy, but requires to be noticed. The respondent raised the question whether or not it would be a good defence if the accused proved that the fish were caught by rod and line. It is not necessary to give any opinion on that point now. It will be for the Judge who tries the case when he hears it to give his decision. But I need not conceal my own view, which is that it would be a good defence if a person accused under such a complaint were to prove that the salmon were taken by rod and line.

This appeal is, on the grounds I have stated, well founded, and we must sustain it, and remit the cause to the Justices to proceed.

Lord Adam—The accused were charged with a contravention of sec. 21 of the Salmon Fisheries Act 1868, in so far as they had in their possession on 29th November 1888 salmon taken within the limits of the Act, "between the commencement of the latest and the termination of the earliest annual close-time then in force for any district in Scotland." On the face of it that appears a relevant complaint. But it appears from the case that "after hearing a statement by Mr M'Cash on behalf of the accused, to the effect that no valid offence was alleged, in respect that the alleged contravention took place when the district of the river Tweed was open for rod and line fishing," the Justices dismissed the complaint. Now, it is obvious that the material date is 29th November 1888. It is admitted that on that date the Tweed district was open for rod-fishing, and that being so it is said that the complaint is irrelevant, and, indeed, it would be so if that were the proper interpretation of the phrase the "annual close-time." If annual close-time means simply the time during which all net-fishing is prohibited, then the complaint is relevant, but if it means the time during which rod-fishing also is prohibited, then the complaint is irrelevant. Now, I do not propose to go over a second time the various sections to which your Lordship has alluded in order to answer the question, What is annual close-time in the sense of the Salmon Fisheries Act 1868 libelled on? I shall only say that I think it clear beyond doubt that the expression means that period when net-fishing is prohibited.

If we come to that conclusion, it follows from it that the complaint is relevant. If so, the question whether it is an answer to such a complaint as is before us, that the salmon was taken by rod and line, is a question which may arise on the defence. It may arise in this case or it may not. It is not necessary to anticipate what may be a good defence; I reserve my opinion upon it. I have no hesitation in concurring with your Lordships in holding that the "annual close-time" is the time during which net-fishing is prohibited.

Lord Trayner concurred.

The Court answered the question in the affirmative, and remitted the case to the Justices.

Counsel for the Appellant—Ure. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Respondents—Craigie.

Monday, March 4.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Trayner.)

CAIRNS *v.* LINTON.

Justiciary Cases — Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap.* 132), *secs.* 261 *and* 333 — *Citation out of Jurisdiction — Unsound Meat — "Possession as or for Human Food."*

Held that by virtue of section 333 of the Edinburgh Municipal and Police Act 1879, the warrant of the Judge of Police is sufficient within Scotland for citing or apprehending any person charged with committing an offence which may be tried by him, or for citing witnesses for the trial of such an offence, if such warrant be endorsed by the

Sheriff of the county of Edinburgh or Midlothian, or any of his Substitutes.

A farmer in Perthshire despatched a carcase for sale in the ordinary course of business on 29th March 1888, addressed to the Dead Meat Company, Fountainbridge, Edinburgh. The carcase had been dressed in his presence "as or for human food" by the butcher who slaughtered it. It arrived in the market on the following day. In consequence of its appearance the manager of the market had it examined, and it was condemned as unfit for human food. The farmer was charged before the Police Court of Edinburgh under sec. 261 of the Edinburgh Municipal and Police Act 1879, with having the carcase in his possession in Edinburgh as or for human food, the same being unsound, and was convicted.

Held, upon an appeal, that facts had not been proved sufficient to infer that the accused had the carcase in his possession in Edinburgh as or for human food, and conviction *quashed*.

John Cairns, residing at Gleneagles, Perthshire, was charged before the Judge of the Police Court of Edinburgh upon a complaint which set forth "that, contrary to the Edinburgh Municipal and Police Act 1879, section 261, upon the 30th of March 1888, he had in his possession as or for human food, in Fountainbridge Street, Edinburgh, and at some other place or places within the limits of the Edinburgh City Police to the prosecutor unknown, Five hundred and ninety-six pounds weight of butcher meat, *videlicet*, beef of an unsound and unwholesome description, and in a state unfit and unsuitable for human food."

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. 132), sec. 333, provides —"When any person charged with having committed any crime or offence which may be tried by the Judge of Police, or any witness, is beyond the burgh, the Judge of Police shall grant warrant for apprehending or citing the offender, and for citing and, failing appearance after due citation, for apprehending the witness; and any such warrant shall be sufficient within Scotland for citing or apprehending such offender or witness, and for conveying such offender or witness as shall be taken into custody in terms of the warrant, to be dealt with according to law, if such warrant be endorsed by the Sheriff or by the Sheriff of the county where the same shall be executed, and such warrant or citation may be executed by a sheriff-officer, messenger-at-arms, or constable."

Section 5 provides, *inter alia*, "The word Sheriff shall mean the Sheriff of the county of Edinburgh or Midlothian, or any of his Substitutes, excepting where specially provided to the contrary."

The accused was cited at Gleneagles, in the county of Perth upon a warrant of citation granted by the Judge of Police, and endorsed by the Sheriff-Substitute of the Lothians and Peebles. He objected to the jurisdiction of the Court, but the objection was repelled. Evidence having been led the judge found the complaint proved, convicted the accused, and fined him seven pounds sterling, with the option of ten days' imprisonment. Cairns took a case. The facts held to be proved were set forth therein as follows:—"That the appellant was a farmer residing at Gleneagles, in the parish of Blackford and county of Perth. That on the 23rd March 1888 he had a bull which was suffering from illness; that he called in the veterinary surgeon at Auchterarder, who is also inspector under the local authority for that district of the county of Perth; that the veterinary surgeon saw this bull on the 23rd and 26th days of March 1888, and expressed an opinion that it was suffering from 'fardle bound' (an affection of the stomach), and treated it accordingly; that he advised that the animal be at once slaughtered in case it should die from the disease. That the said veterinary surgeon did not see the carcase after the animal had been slaughtered. That the bull was slaughtered by a butcher from Auchterarder, who dressed the carcase and removed part of the membrane from the interior of the animal. It was also proved that the parts so removed were those which would have shown the symptoms of pleurisy most distinctly, that being a disease from which the animal was proved to have been suffering when slaughtered. That the carcase was dressed in presence of the appellant and the butcher in the usual manner as or for human food, and thereafter despatched by the appellant for sale in the ordinary course of business, from Crieff Junction, on the 29th of March aforesaid, addressed to 'The Dead Meat Company, Fountainbridge, Edinburgh.' That it arrived at the said market on the day following, and upon being taken out of its wrappings was, in consequence of its appearance, sent by the manager of the said market to the slaughterhouses, where, having been examined, it was at once condemned as unsound and unfit for human food —traces of disease being still quite apparent on the carcase when examined."

The questions of law for the opinion of the High Court of Justiciary were:—"(1) Had the Police Court of Edinburgh jurisdiction in this case? (2) Do the facts proved warrant the conviction complained of?"

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. 32), sec. 261, provides—"Every person who shall sell or expose to sale, or have in his possession, as or for human food, the carcase or any part of the carcase of any animal which shall appear to have died of or been killed in consequence of disease, or any butcher meat, fish, poultry, or other article of provision of an unsound or unwholesome description, or in a state unfit or unsuitable for human food, shall be liable to a penalty not exceeding twenty pounds, and the articles shall be forfeited and disposed of as the Judge of Police shall direct; and every person who shall sell or expose to sale, or have in his possession for the purpose of sale, as or for human food, any blown, stuffed, or pricked veal, lamb, or butcher meat, and every person who shall sell or expose to sale any bull beef without having the words 'Bull Beef' exhibited on a board in Roman letters of at least three inches in length, and of a proportionate breadth, over the stall or place in which it shall be exposed to sale, shall be liable to a penalty not exceeding five pounds, and the articles shall be forfeited and disposed of as the Judge of Police shall direct."

Argued for the appellant—(1) There was no jurisdiction, because the appellant was cited upon

an invalid warrant. The warrant ought to have been endorsed by the Sheriff of the county of Perth. The indorsation of the Sheriff-Substitute of the Lothians and Peebles had no authority outside of his territory. No doubt section 333 of the Edinburgh Municipal and Police Act 1879 might be read so as to give it such authority. But to give it such a meaning would be to run counter to the whole existing law and practice of Scotland in such matters, and a statute ought not to be construed to such an effect where another construction was possible. (2) On the merits—There was no possession on the part of the appellant in Edinburgh of unsound meat "as or for human food." The carcase in question was not in the possession of the appellant after it was despatched by him from Crieff Junction. Possession in a penal statute did not include constructive possession as in civil questions. In the analogous provision of the Public Health (Scotland) Act 1867, sec. 26, the expression used was "to whom such meat, &c., belong, or in whose custody the same are found." The word "possession" in the statute under consideration was equivalent to custody.

Argued for the respondent—(1) The citation was in conformity with the statute, and was valid. Section 333 of the statute provided that the warrant of the Police Judge might be endorsed not only by the Sheriff of the county where it was executed, but also by the "Sheriff," *i.e.*, the Sheriff of the county of Edinburgh or Midlothian. The reference to the Sheriff in that section would be meaningless if the construction proposed by the appellant were adopted. (2) On the merits—The carcase was undoubtedly dressed by the appellant for the purpose of being used as human food. The question was, whether it was in his possession in Edinburgh on the date libelled? Actual manual possession was not necessary. It was in his possession so long as it was on his farm. It was in his possession while upon the railway. And in the same way, when it came to Edinburgh, and delivery was tendered to a person who as agent was to hold it and expose it, it was still in his possession. If the accused had sent a servant with the meat into Edinburgh to sell it, there would be no doubt about the possession and liability to prosecution. The same principles applied where instead of a servant there were a carrier and an agent.

At advising—

Lord Adam—This is a case stated by the Judge of the Police Court of Edinburgh. The complaint against Cairns is "that contrary to the Edinburgh Municipal and Police Act 1879, sec. 261, upon the 30th of March 1888 he had in his possession as or for human food in Fountainbridge Street, Edinburgh, and at some other place or places within the limits of the Edinburgh City Police to the prosecutor unknown, five hundred and ninety-six pounds weight of butcher meat, *videlicet*, beef of an unsound and unwholesome description, and in a state unfit and unsuitable for human food." The section of the Act referred to, omitting the words which do not apply to this case, enacts that "Every person who shall sell or expose for sale, or have in his possession, as for human food, . . . any butcher meat, fish, or poultry, or other article of provision of an unsound or unwholesome description, or in a state unfit or unsuitable for human food, shall be liable to a penalty not exceeding £20." After stating the facts the case sets forth that the Judge "found the complaint proved, convicted the appellant, and fined him seven pounds sterling, with the alternative of ten days' imprisonment." Two questions are stated for our consideration—"(1) Had the Police Court of Edinburgh jurisdiction in this case? and (2) Do the facts proved warrant the conviction complained of?"

Now, with reference to the first question, the answer depends upon whether the appellant was duly and sufficiently cited to the Court. If he was duly cited, then there is no ground for questioning the jurisdiction. The proceedings bearing upon this question are set forth in an appendix, and make part of the case. They are the complaint, the citation of the defender, and the minutes of procedure. The complaint sets forth that the accused is beyond the burgh of Edinburgh, and craves that warrant be granted for summoning the accused and for citing witnesses. On 5th April 1888 warrant was granted to summon the accused and cite witnesses. Of the same date the Sheriff-Substitute of the Lothians and Peebles granted his concurrence to the execution of this warrant by indorsation. Then we have the citation, which bears that the accused John Cairns, Gleneagles, Blackford, county of Perth, was regularly summoned by an officer of police on 6th April 1888 to answer the complaint.

It is obvious upon the face of these proceedings where the objection, if it is a good one, lies. The citation of the accused, who is resident in the county of Perth, is done under the authority and warrant of the Sheriff-Substitute of the Lothians and Peebles. I think there can be no doubt that that is not in conformity with the usual law and practice in Scotland with reference to citations, because it implies that the warrant of the Sheriff of the Lothians and Peebles is of authority in the county of Perth. So far as I know this is altogether unknown in our practice. The jurisdiction of a Sheriff is limited solely in the ordinary case to his own county. The question here accordingly is, whether or not this proceeding, which is contrary to the usual practice, is justified by the provisions of the 333rd section of the Edinburgh Police Act, and the answer in my view depends entirely upon the construction of that section. Omitting superfluous words, that section bears—"When any person charged with committing any crime or offence which may be tried by the Judge of Police . . . is beyond the burgh, the Judge of Police shall grant warrant for apprehending or citing the offender, . . . and any such warrant shall be sufficient within Scotland . . . if such warrant be endorsed by the Sheriff, or by the Sheriff of the county where the same shall be executed, and such warrant may be executed by a Sheriff-officer, messenger-at-arms, or constable."

Now, we have the warrant here by the Judge of the Police Court, and there is no question about its regularity. The question is, whether it be sufficient under this Act that it be endorsed by the Sheriff-Substitute of the Lothians and Peebles? The words of the Act are, "if such warrant be endorsed by the Sheriff, or by the

Sheriff of the county where the same shall be executed." In section 5 the Sheriff is said to mean the Sheriff of the county of Edinburgh or Midlothian, or any of his Substitutes. So that the 333rd section will read thus—"Such warrant shall be sufficient if such warrant be endorsed by the Sheriff of the county of Edinburgh or Midlothian, or any of his Substitutes, or by the Sheriff of the county where the same shall be executed." I think no one can doubt that that is the literal meaning of the clause, and that the warrant shall be sufficient if endorsed either by the Sheriff of Edinburgh or by the Sheriff of the county. Taking the clause in its literal sense it would appear to be sufficient to justify these proceedings. But it is said, and in my opinion with a great deal of force, that the clause must be read with reference to the existing law and practice with regard to the power and authority of the Sheriff within and beyond his own district, and, as I have said, in the ordinary case no Sheriff has jurisdiction out of his own territory, or power to cite out of his own territory, and if we sustain the literal meaning of the statute it comes to this, that we are sustaining the authority of the warrants of the Sheriff of Edinburgh over the length and breadth of Scotland. I certainly cannot come easily to such a reading. But on the other side it is said with equal force that in construing a statute you must give effect, so far as is possible, to all the words of it, and if that be so, it is clear to my mind that if we do not sustain this citation we are giving no effect to the words "endorsed by the Sheriff of Edinburgh." The words "the Sheriff of the county where the same shall be executed" would necessarily include the Sheriff of Edinburgh. Therefore, if we take the view of the statute urged by the appellant we render the first part of this clause altogether without meaning. I quite feel the force of the appellant's argument, but on the whole matter, though with a great deal of doubt, I think we ought to read this clause in its literal meaning, and to hold that the warrant is valid if endorsed either by the Sheriff of Edinburgh or by the Sheriff of the county where the same is executed. I have therefore come to be of opinion that the Judge of the Police Court in Edinburgh had jurisdiction in this case, and that the first question ought to be answered in the affirmative.

The question remains upon the facts. The facts as set forth seem to be shortly these—On 23rd March 1888 the appellant had a bull suffering from illness. He sent for the inspector, and had the bull examined. The inspector pronounced it to be suffering from a disease called "fardle bound," and advised that it should be slaughtered. What followed is thus set forth—"That the said veterinary surgeon did not see the carcase after the animal had been slaughtered; that the bull was slaughtered by a butcher from Auchterarder, who dressed the carcase, and removed part of the membrane from the interior of the animal. It was also proved that the parts so removed were those which would have shown the symptoms of pleurisy most distinctly, that being the disease from which the animal was proved to have been suffering when slaughtered; that the carcase was dressed in presence of the appellant and the butcher in the usual manner as for human food, and thereafter despatched by the appellant for sale in the ordinary course of business from Crieff Junction on the 29th of March aforesaid, addressed to 'The Dead Meat Company, Fountainbridge, Edinburgh.'"

If it had been necessary in this case that the guilty knowledge of the appellant must be held to be proved, it might or might not be that the facts stated would have been sufficient to infer knowledge that the meat was unfit for human food. But it seems to me that that is not the only fact that must be proved here. I think it must also be proved that the meat was in the possession of the appellant at Fountainbridge, Edinburgh. If that is not so, it appears to me that no conviction can follow. The facts upon that part of the case immediately follow. It is stated that the carcase "arrived at the said market on the day following, and upon being taken out of its wrappings was, in consequence of its appearance, sent by the manager of the said market to the slaughterhouses, where, having been examined, it was at once condemned as unsound and unfit for human food, traces of disease being still apparent on the carcase when examined." It appears to me, in the first place, very clear that the meat was not in the actual possession of the appellant in Fountainbridge, Edinburgh. The last time it appears to have been in the actual possession of the appellant was when forwarded by him from Crieff Junction in the county of Perth. The only person in whose possession it was in Edinburgh, so far as appears from the facts stated, was the manager of the Dead Meat Company. I am far from saying that it may not be possible that although not in the actual possession of the appellant it may notwithstanding have been constructively in his possession sufficiently to warrant a conviction under this statute. It might be in the hands of a shopman of his or a mere servant. But it humbly appears to me that if that was to be the case made against the appellant facts should have been proved to the Judge going to show that this meat, although not in the actual possession of the appellant, was yet constructively so, so as to warrant a conviction. I find no facts stated which would lead to this inference. It rather appears that the facts lead to a contrary inference, because it would appear that the manager of the Dead Meat Company assumed that he had the full control of the meat after it came into his possession. He did what was proper and right. He sent the meat to be examined, and it was condemned. That indicates that this manager had the entire control. It may be that the appellant may have thought that those in Edinburgh would be better able to judge of the soundness of the meat than himself, and may have sent it with no intention that it should be exposed for human food without examination. That is the state of the facts as stated, and I am unable to concur in this conviction. I therefore think we should answer the second question in the negative.

Lord Trayner—On the first question I agree with Lord Adam. It seems to me impossible to hold that the accused was not duly summoned if we give effect to the words of the 333rd section of the Edinburgh Police Act. I concur in thinking it an unusual clause, and I doubt whether the Legislature intended to confer upon the Sheriff of Edinburgh the power to cite in every

part of Scotland. But we have no concern with that; I think we are bound to give effect to the plain words of the statute.

Upon the second question I also agree with Lord Adam, but not without hesitation. I have great doubt whether the possession on the part of the manager of the Dead Meat Company was not constructively such possession on the part of the accused as would make him responsible, but my doubt is by no means so strong as to induce me to take a different view, and I therefore concur in thinking that the second question should be answered in the negative.

Lord Justice-Clerk—I concur with your Lordships upon both points. I think that in dealing with a statute we are bound to take the literal meaning of the words, and the literal meaning of the section in question is that the warrant of the Judge of the Police Court in Edinburgh is to be sufficient beyond the burgh, if endorsed by the Sheriff of Edinburgh or any of his substitutes, or by the Sheriff of the county in which it is executed. And whether the Legislature intended it or not, one can see that there is great convenience in the Sheriff of the jurisdiction where the burgh is situated having authority to assist the Police Magistrate in making citations throughout the country. Such a provision does no doubt, to a certain extent, give jurisdiction to the Sheriff beyond the limits of his county, but it is conceivable that reasons of public convenience might render that expedient, and a Sheriff being looked upon as an official of a superior grade might very well have such a jurisdiction conferred upon him—a jurisdiction which applies only to the bringing up of the accused for trial.

As regards the question on the merits, I think the view which Lord Adam has stated is a perfectly sound one. If the manager of the Dead Meat Company had authority to do what the facts set forth show that he did do, I think it is plain that the meat was in his possession and not in the possession of anyone else, because he seems to have had full control over it and power to deal with it as he liked.

The phrase used in the statute with regard to possession is, as applicable to this case, a peculiar one. The phrase is "shall sell, or expose for sale, or have in his possession as or for human food." The meat was never sold or exposed for sale. Was it, then, in the possession of anyone "as or for human food." These words rather seem to indicate that to constitute a contravention of the statute something must be done which commits the person doing it to having overtly dealt with the meat as being presented to the public as being for human food. For example, if a contractor was caught in the act of delivering diseased carcases at a butcher's door, it might very reasonably be held that he had them in his possession "as or for human food." But the case here is different. There was no overt act. There can be no doubt that had the carcase been found in the premises of the appellant there could have been no ground for saying that he had it in his possession "as or for human food." The carcase was quite innocently in his possession, he having killed the animal by advice of the veterinary surgeon. Nor did the sending of it to Edinburgh imply, in my opinion, that his possession was of this character. I think there is great force in what Lord Adam has pointed out, namely, that the appellant sent it to parties in Edinburgh who were judges of such matters, and whose duty and interest it was to inspect the carcase on arrival, and to withhold it from the market if it were in bad condition. It is also to be noted that the appellant did not have this animal slaughtered by his own servants, but by a butcher from Auchterarder, which indicates that he acted in *bona fide*, and did not think the animal had any other disease than that from which the inspector had pronounced it to be suffering, which was not a complaint tending to make it unfit for human food.

Upon the whole matter I think we should sustain the appeal upon the ground that the case does not set forth facts sufficient to infer that the accused had the meat in question "in his possession as or for human food."

The Court answered the first question in the affirmative and the second in the negative, and quashed the conviction.

Counsel for the Appellant—John Wilson. Agent—T. M'Naught, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Boyd. Agent W. White Millar, S.S.C.

COURT OF SESSION.

Tuesday, March 5.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

M'MURCHY *v.* MACLULLICH.

(*Ante*, May 21, 1887, vol. xxiv. p. 514.)

Process—Amendment—Expenses.

In an action of damages for slander, the Court, holding the pursuer's statements irrelevant, assoilzied the defender from the action as laid, and found him entitled to expenses.

The pursuer, without having paid these expenses, raised a new action against the same defender in respect of the same alleged slander, making certain new averments which would have been capable of being added by amendment if he had so moved in the previous action.

Held that he must pay the expenses in the previous action as a condition of insisting in the new one.

In 1887 Donald M'Murchy, sometime Police-Sergeant at Oban, brought an action of damages for slander against Peter Campbell, late Inspector of Police, Oban, and John Campbell Maclullich, S.S.C., Procurator-Fiscal, Inverary.

The ground of action was that the defenders on 19th September 1885, "acting in concert together, or separately, or one or other of them," prepared a report concerning the pursuer which they sent to Colin M'Kay, Chief-Constable of Argyleshire. The report charged the pursuer with immoral and improper conduct when on duty. He averred—"These statements regard-

ing the pursuer are unfounded and malicious falsehoods, and represented the pursuer to have acted as an immoral and dissolute person, and to be unworthy of employment in the police force." The above-mentioned false and calumnious charges against the pursuer were made and circulated by the defenders maliciously and without any just and probable cause. The defenders were actuated by a feeling of ill-will against the pursuer, and a desire to damage his character and deprive him of his situation in the police force.

Upon 25th March 1887, as previously reported, the Lord Ordinary (LEE) found that the pursuer's allegations were not relevant or sufficient to support the action, and found the pursuer liable to the defenders in the expenses of process, and assoilzied the defenders from the conclusions of the summons. Upon 21st May 1887 the Second Division adhered, with additional expenses. The pursuer was charged to make payment of the taxed amount of the expenses to the defenders in the case of Campbell, amounting to £33, 1s. 10d., and in Maclullich's case £32, 8s. The pursuer, however, did not pay these sums, and on 21st September 1888 decree of *cessio* was pronounced against him at the instance of the agents for Campbell.

Upon 5th July 1888 M'Murchy, who had not paid these expenses, raised actions of damages for slander against Peter Campbell and John Campbell Maclullich, the defenders in the former action.

The ground of action was the same alleged slander as in the previous case, but the pursuer stated further in the action against Maclullich that the defender "was, in making said false statement or report, actuated by a feeling of revenge and ill-will towards the pursuer, owing to the pursuer having reported on the 14th September 1885 to the Chief-Constable Peter Campbell, then an Inspector of Police at Oban, for irregularities and misconduct. A copy of said report is herewith produced and referred to, and the said Peter Campbell, who is said to be a relative of the defender, made a complaint at Oban on the 18th September 1885 to defender, who was in Oban on that date, taking precognition in a case of housebreaking and theft, and informed him that he was reprimanded by the Chief-Constable upon the pursuer's report, and the defender undertook to support and aid the said Peter Campbell to obtain the dismissal of pursuer from his situation on the police force by sending the aforesaid private calumnious imputation against the moral character of the pursuer, maliciously and recklessly, for the purpose of aiding said Peter Campbell, and was thus actuated by a feeling of revenge and ill-will against the pursuer with a view of damaging his character and depriving him of his situation on the police force, well knowing the same to be false."

The defender Maclullich pleaded—"(2) The pursuer's averments being irrelevant the action ought to be dismissed. (3) The pursuer being insolvent, ought to be ordained to find caution for expenses."

In the other action against Campbell the defender pleaded—"The pursuer is not entitled to proceed with the present action to any extent until he has paid the expenses awarded against him in the former action.

The Lord Ordinary (WELLWOOD) pronounced the following interlocutors in each action:—

"23*rd November* 1888.—The Lord Ordinary having heard the pursuer and counsel for the defender, in respect the pursuer has not paid the taxed expenses found due to the defender in the action at the pursuer's instance against the defender and John Campbell Maclullich, the summons in which was signeted on 12th January 1887, Refuses *in hoc statu* the pursuer's motion for issues, and continues the cause till the first sederunt day in January next."

"9*th January* 1889.—The Lord Ordinary, in respect that pursuer has not yet paid the taxed expenses found due to the defenders and referred to in the preceding interlocutor, dismisses the action and decerns: Finds the defender entitled to expenses," &c.

The pursuer reclaimed.

The defender (Maclullich) was permitted to add to his defences, on payment of the expenses incurred in the present action, a plea similar to that for Campbell quoted above.

The pursuer argued—This was an action for vindication of character. The pursuer ought therefore not to be barred from proceeding with his action because he had not paid the expenses in a former action—*Buchanan* v. *Stevenson and Others*, December 7, 1880, 8 R. 220. The defenders in this action had already taken out *cessio* against the pursuer; they had therefore used their only legal remedy, and could not in addition make it a condition of his going on with this action that he should pay the expenses of the preceding one. In the former action the pursuer's agent had not carried out the instructions he received, and made up the record without putting in specific allegations of malice; that was the ground upon which the action was dismissed, but the pursuer in this action ought not to suffer from the fault of his agent in previous transactions.

The defender (Maclullich) argued—The defender had been assoilzied in the former action because the averments of the pursuer were irrelevant and insufficient to support his pleas. The same averments were made in this action, the report to which the pursuer objected, the manner of publication alleged, and the allegations of malice were the same; all that the pursuer had done was to say that he had reported a relation of the defender Campbell for misconduct, and that therefore the defender had conspired against him. That did not make the condescendence relevant against the pursuer, but even if it did, the pursuer could not ask for a proof of his averments until he had paid the expenses in the former action. Any change that the pursuer now made in his averments could have been made by new averment upon record in the previous action. That would only have been allowed to be done on payment of the expenses incurred up to the date of amending the record. The same principle ought to apply here, as in fact the cases were the same—*Irvine* v. *Kinloch*, November 7, 1885, 13 R. 172; *Wallace* v. *Henderson*, December 22, 1876, 4 R. 265; *Struthers* v. *Dykes*, February 10, 1848, 8 D. 815; *Macleod*, 3 S. 79. The action was not relevant, as it was laid against a public officer in discharge of his duty—*M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725.

At advising—

Lord Justice-Clerk—The pursuer in this case formerly brought an action against the same person who is defender here, which was dismissed by this Court on the ground of irrelevancy. It may be the fact, but I do not think it matters, that the irrelevancy was not his fault; he says that he gave instructions to his agent, and that it was owing to his agent's fault that the action was found to be irrelevant. But he now brings a new action against the same defender of the same kind and upon the same grounds as before. The only difference is, that there is now an averment as to the malice which he says existed, which was previously wanting. The question is, whether because he has brought a new action such as I have described, with a new averment which he might have added to his previous record, he is entitled to pursue that action without paying the expenses he had incurred to the defender in the previous one.

No case was quoted to us which was quite upon all fours with this one, but when we consider the cases to which we were referred, where the pursuer of an action found it necessary to amend his record for the purpose of making a relevant case, we find that he was usually called upon to pay the expenses previously incurred as a condition to his being allowed to make the amendment. I am unable to see any distinction between what was done in those cases and the principle which I think ought to govern this case. In bringing this action the pursuer is just endeavouring to do what he might have done in the former action by adding averments which he thinks will make a relevant case, and that is what he might have done by amendment in the previous case. I am clearly of opinion that if he had proposed to do that there would have been some conditions as to expenses imposed upon him, and I think that the same principle ought to be carried out here.

I think that the case of this defender in asking that the pursuer should be called upon to pay the expenses of the former action before he can proceed is even stronger than if the request had been made upon an application to amend the record, because it is plain that the defender had been put to greater expense in the one case than in the other. I think we must adhere to the Lord Ordinary's interlocutor of 23rd November.

Lord Young—I am of the same opinion, and I cannot say I regret the result, because I think that it will be beneficial to both parties. During the discussion I indicated that in my opinion a party would not be hindered from pursuing an action against another merely because he was in that other's debt, and I do not think that he would be precluded from suing that other person because the debt that he owed consisted of expenses which he had been judicially ordered to pay by a decree of this Court in another action. When we come to consider the real merits of the question it is this, whether the expenses which had been incurred by the pursuer in the former action ought not to be regarded as substantially expenses incurred in one and the same action as he has now brought. They were held to be so in the case of *Irving*, to which we were referred, and I think that the solution of the question is to be found in discovering whether the previous action might not have been converted into this action by amendment of the record.

What, then, are the facts of this case. The groundwork of it is the same grievance as in the previous case; it is brought against the same defender by the same pursuer, but at that time he did not present it in a relevant manner, as he had no averment of malice, which might have made it relevant, but these could have been added to the record at any time before judgment was pronounced, and if the pursuer had stated on record facts which would have authorised him to make the averments of malice, he might have asked that they should be added, and the Court would have been bound to allow them in order to get at the real matter in dispute between the parties in terms of the 29th section in the Court of Session Act of 1868. Then it is a matter of familiar practice that an amendment of that character, changing the ground of action completely, is only allowed upon condition of paying the expenses incurred by the opposite party as they have thus been rendered useless. That is the general rule. I assume Lord Lee's judgment in the former case, dismissing the action as irrelevant, to have been right, that the case had been reclaimed, and that before judgment had been pronounced affirming the judgment, that the pursuer had asked leave to amend his record by adding these statements of malice, and had been allowed to do so on condition of paying to the defender the expenses he had incurred. Suppose that was so, and the pursuer did not wish to incur that penalty, but allowed the defender to obtain his decree by not paying the expenses, and then said, "I will reach my end by another way; I will bring a new action, and add these averments so as not to have to pay these expenses," I think that the Court would have frustrated such an attempt. It may be very true that the irrelevancy for which the first action was dismissed did not arise from his fault; he may have given his agent proper instructions, which were not carried out, but his adversary must be reimbursed in the expenses which he had expended in defending the action. Therefore, in my opinion, the only condition upon which we can allow the pursuer to continue this action is that he should pay the expenses incurred by the defender in the previous case.

Lord Rutherfurd Clark concurred.

Lord Lee—I am of the same opinion, but I cannot say I am quite clear that in the case as stated by Lord Young the Court would have made the payment of expenses a condition of allowing the amendment to be made if it had been allowed. The provision in the statute is this—Section 29. "The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceedings in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper, and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." The allegation of the pursuer is this—"Admitted that the pursuer in August 1886 instructed an agent to raise an action of damages for slander against the defen-

I think, of the later decision in *Lindsay's* case, a decision pronounced by the two Divisions sitting together. That case I hold to be entirely consistent with *Fulton*, because the Court were dealing with two different things. In *Lindsay's* case it is true you have not a will and a codicil as we have here, but you have two clauses in the same will, which on a first impression appear to be inconsistent with one another, and therefore the question is much the same as if it had arisen in the construction of a will and codicil which were more or less inconsistent.

"Now, the view of the majority of the Court in the case of *Lindsay*, which view seems to me to be in accordance with the best principle of trust interpretation, is that you are to look at the leading intention in favour of the family, and if there is a leading intention clearly expressed in favour of making an out-and-out gift to the family, and there is in a subsidiary clause a direction to make a settlement, you must frame the settlement in such terms as will prevent the share from going over to another family. So strongly fixed is this principle (that the trustees in framing the deed must ascertain the testator's intention from the whole instrument) that in the two other cases that have been referred to—*Ross's Trustees* and *Lady Massy*—the Court directed the execution of a deed in the form of a destination which was unfamiliar to Scotch conveyancers (a very unusual form of destination), because that only was supposed to be capable of carrying out the testator's wishes. Accordingly I come to the conclusion that in the present case the trustees would not have carried out the testator's directions if they had taken heritable security in the precise terms used in the codicil. It would be their duty to take into account the leading direction of the will itself, which is in no way expressly revoked, and which directs a partition amongst the families, giving certain shares to sons and certain shares to daughters. The security to be taken would have provided that in the case of there being no family the share of the deceaser should be divided amongst the surviving children or their issue. I ought to notice that an argument was founded on the closing words of the codicil—'But providing and declaring that my said daughters, or any of them, may, if so disposed, by a writing under their hands, continue the liferent provisions to their husbands.' I do not found much upon that clause, because it is also capable of being read as a limitation of the fee to the daughters. It would rather be in favour of the daughters having a more limited right than one of fee in the event of there being children of the marriage. But then, in that event, the children were to get the fee, and it is only in that case that it is thought necessary to give the wife a power of continuing her liferent to her husband. These words do not seem to me to militate against the theory that in the event of failure of issue the daughter is to have the reversion of the fee.

"The result is that I sustain the claim of Mrs Bannerman's executors."

Ralph Whitehead, the only son of Mrs Isabella Dalglish or Whitehead, one of the defenders, reclaimed, and argued—By the terms of the codicil, as altering the provisions of the 4th clause of the principal deed, the truster Mr Dalglish intended that a bare liferent should be given to his daughters, and that if anyone of them died without issue, then her share should revert to his trustees, and be divided among the other children either according to the accretion clause, or as intestate succession—*Fulton's Trustees* v. *Fulton*, Feb. 6, 1880, 7 R. 566. That case was identical with the present with the exception that here there was a residuary clause, but if the share was not carried by that clause, then it fell into intestacy according to the rule laid down in that case. The case of *Lindsay*, on which the other side relied, was very special, and different from this case in another respect, as there was there only one deed, while here there were two which were inconsistent with each other.

The respondents (Mrs Bannerman's executors) argued—The truster had given the fee of a certain number of shares of his estate to his daughters, these therefore vested in them *a morte testatoris*, although the period of division of part of the estate was not till Mrs Dalglish's death. The direction in the codicil did not take the fee away from the daughters; it only provided for the protection of their possible children. There was no issue of this marriage, therefore the clause in the codicil was inoperative. Mrs Bannerman's share had vested in her, and was at her disposal. The principle of the case had been already decided in the case of *Lindsay's Trustees* v. *Lindsay*, Dec. 14, 1880, 8 R. 281; *Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1039. Mrs Bannerman took an absolute interest in her share, subject only to the constitution of a trust in the event of her having children, and on her death without issue the property passed to her executors—*Bryson's Trustees* v. *Clark*, Nov. 26, 1880, 8 R. 142; *Howat's Trustees* v. *Howat*, Dec. 17, 1869, 8 Macph. 337; *Bradford* v. *Young*, July 19, 1884, 11 R. 1135.

At advising—

Lord Lee—The competition which has arisen in this case depends upon the question whether under the trust settlement of the late Mr James Dalglish his daughter Jane Dalglish or Bannerman, who survived him and died without issue, had a vested right to a share of his means and estate. The Lord Ordinary has decided in favour of vesting as at the testator's death, and I am of opinion that the Lord Ordinary's judgment is right.

The settlement is composed of two parts, the original trust-deed and a codicil. These must be read together, and as the codicil does not expressly revoke any of the provisions of the original settlement I think that it cannot be construed as altering the settlement excepting to the extent necessary to give effect to the directions which it contains.

The leading purposes of the trust are, firstly, to provide an annuity of £400 to the testator's widow; secondly, in case of his daughter Isabella being unmarried at his death, to pay to her a legacy of £500 over and above her share of his means and estate at the first term of Whitsunday or Martinmas after his decease; and thirdly, to divide the residue among his children in certain proportions. It is upon the terms of the deed and codicil as regards this last purpose that the question has arisen.

The provision of the deed is as follows:—"In

the fourth place, I appoint my said trustees to divide the remainder and residue of my said means and estate into twenty-eight equal parts or shares, four of such parts or shares to be paid to each of my four daughters, and six parts or shares to each of my two sons; and on the death of my said spouse, in case she shall survive me, I direct my said trustees to divide the sum set apart for answering her annuity, and the proceeds of the house and furniture liferented by her, among all my children in the same proportions and shares, to be payable to my said children as soon as my estate shall be realised and converted into cash; which provision in favour of my said daughters shall be exclusive of the *jus mariti* or right of administration of any husbands they may presently have or may afterwards marry, and not subject to the debts or deeds of such husbands or the diligence of their creditors, and the same shall be under their entire control and disposal; and in the event of the death of any of my said children before receiving payment of their shares without leaving lawful issue, the share of such deceaser shall be divided among surviving children or their issue in the proportions foresaid; and in the event of the death of any of my said children leaving lawful issue, the share of such deceaser shall be paid to said issue equally, share and share alike."

But by the codicil the testator, in virtue of the reserved powers in his deed of settlement, directed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised and can be invested upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent for their liferent use allenarly, and to the child or children of their bodies, if more than one, equally among them in fee; declaring that said liferent provisions shall be purely alimentary, exclusive of their husbands' *jus mariti*, not attachable for his or their debts, nor assignable by my said daughters: But providing and declaring that my said daughters, or any of them, may, if so disposed, by a writing under their hands, continue the liferent provision to their husbands during their repective lifetimes, burdened with the support of the children in such proportions and under such limitations and conditions as they think proper to impose."

The testator was survived by his widow (who died in 1876) and also by one son and four daughters. The son's share was duly paid to him, but the capital of the shares falling to the daughters was retained to meet the claims of children under the codicil. One of the daughters Jane Dalglish or Bannerman has recently died without issue, but leaving a settlement, and it is her share that is in question.

It is said as against the claim of her testamentary representatives that the effect of the codicil was to suspend vesting, and that her share has either become undisposed of residue or is disposed of by the survivorship clause of the deed.

My opinion is that the codicil was not intended to result in intestacy on the part of the testator with respect to the share of a daughter dying without issue, and I think that its terms do not support a construction of the settlement which shall have that result. It appears to me that the sole object of the codicil is to protect the capital or fee of a daughter's share for her children, if there should be such children. It is settled by the case of *Lindsay's Trustees*, 8 R. 281, that this is a purpose which is not inconsistent with vesting. In that case there was a direction that the £1000 bequeathed to Catherine Bruce Lindsay should be held so as to give "to herself a liferent only thereof, and to the lawful issue of her body equally among them the fee thereof." But the sum was, in the first place, bequeathed to her as a legacy payable six months after the testator's death. It was held that the direction to secure the fee to children was contingent on the existence of children, and there being none, that her right was free of the direction which was applicable only to that contingency. In short, the principle affirmed by that decision was that where a bequest is merely burdened with a trust for children, that burden falls off if children should not exist. The restriction of the parent's right for behoof of his or her children therefore implies no purpose of creating intestacy.

The case of *Fulton's Trustees*, referred to by the reclaimer's counsel, 7 R. 566, was different in one material respect from the present. It was not clear that the terms of the original bequest were such as to confer a fee upon the daughters, whereas in the present case it was conceded by the Dean of Faculty that under the deed of settlement, had it stood alone, the daughter must have taken a fee *a morte testatoris*. But if that case decided the point which is here raised, and which was also raised in the case of *Lindsay's Trustees*, it must be held to have been overruled by the decision in the latter case, which was a unanimous judgment of seven Judges, including all the Judges who took part in the decision of *Fulton's Trustees*.

With respect to the claims founded on the clause of survivorship in the trust-deed two views are presented. For the claim of the son's representatives is founded on the contention that the clause brings in all the children who survived the testator; while the other claims limit its application to those who survived Mrs Bannerman. My opinion is that the time contemplated in the deed was the testator's death, although the actual division and payment of the sum set apart to meet the wife's annuity was postponed till her death. And it was not disputed that if the deed had stood alone vesting must have taken place at that time. But in this view it is clear that there was no postponement of vesting, and that as Mrs Bannerman was one of the children then surviving, she cannot have been excluded by the destination in favour of survivors.

It was not contended that the terms of the trust-deed in this case gave ground for any argument such as was sustained in the case of *Howat's Trustees*, 8 Macph. 337.

The Court adhered.

Counsel for the Reclaimer—D.-F. Mackintosh, Q.C.—Wallace. Agents—Russell & Dunlop, W.S.

Counsel for the Respondents—Graham Murray. Agents—J. & A. Hastie, W.S.

Thursday, March 7.

FIRST DIVISION.

[Lord Trayner, Ordinary.

COOK *v.* WALLACE & WILSON.

Reparation—Damages for Illegal Apprehension—Alimentary Debt—Civil Imprisonment Act 1882 (45 *and* 46 *Vict. cap.* 42), *sec.* 4.

By section 4 of the Civil Imprisonment Act 1882 it is provided that the Sheriff on the application of the creditor may commit to prison "any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent Court . . . but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff . . . that the debtor has not since the commencement of the action in which the decree was pronounced possessed or been able to earn the means of paying the sum . . . in respect of which he has made default, or such instalment . . . as the Sheriff shall consider reasonable."

The agents for a creditor holding a decree for a sum of aliment on which the days of charge had expired without payment, applied to the Sheriff for a warrant to commit the debtor to prison. The Sheriff granted a warrant to search for and apprehend the debtor, and bring him before the Sheriff for examination, and upon this warrant the creditor's agents caused the debtor to be apprehended.

In an action of damages by the debtor against the creditor's agents—*held* that the debtor must fail to satisfy the Sheriff that he is unable to pay the debt as a condition of imprisonment or apprehension under the statute; that apprehension before the condition was fulfilled was illegal; and issues ordered for the trial of the cause.

James Cook junior, medical student in Glasgow, brought this action against Messrs Wallace & Wilson, writers, Glasgow, to recover £500 as damages for alleged illegal apprehension.

The pursuer averred that in the end of the year 1887 an action had been brought by Miss Jessie Adam against him concluding for payment of certain sums in name of aliment and inlying charges attending the birth of an illegitimate child of which she had been delivered in the previous July, and of which she declared the present pursuer to be the father. Cook entered appearance, but did not defend the action, and on 8th December 1887 decree for certain sums in name of aliment, inlying charges, and expenses was pronounced against him. On 5th January 1888 he was charged on the decree, but the sums due were not paid as the pursuer had no funds to meet them. On 19th January the defenders, Wallace & Wilson, as agents of Miss Adam presented a petition signed by David Wilson of that firm, to the Sheriff at Paisley for a warrant to commit the pursuer to prison. Sheriff-Substitute (Cowan) on this application granted a warrant to search for and apprehend the pursuer, and to bring him before the Sheriff for examination. On 24th January the pursuer was apprehended on this warrant in his father's house at Paisley, when the Sheriff-Substitute granted warrant to imprison him for six weeks. He was then removed from the Court in custody, but was shortly afterwards released on his mother paying a sum to account. He averred that the procuring and enforcing of said warrant to apprehend him, and under which he was apprehended, was wrongous and illegal. No notice was previously given to him that such a petition was to be presented, and it was only served upon him at the moment of his apprehension. The petition was a civil Sheriff Court proceeding, while the pursuer was treated worse than if he had been under a criminal charge. He was literally dragged from his bed, taken before a Judge without any opportunity of procuring legal advice, and summarily condemned to six weeks' imprisonment. The statute did not authorise apprehension before an order for imprisonment was pronounced, and the fact that imprisonment was the remedy craved did not imply that the pursuer was to be apprehended at the outset of the proceedings. In obtaining the said warrant to apprehend the pursuer, and giving instructions to enforce the same, and causing the pursuer's apprehension thereunder as aforesaid, the defenders acted wrongously and illegally, and were liable in damages and *solatium* to the pursuer. The pursuer, in consequence of said illegal and harsh proceedings, had suffered, and would continue to suffer, severely in his character, reputation, and feelings, and in view of the annoyance and grief thereby occasioned, the sum sued for was not excessive. The defenders had been called upon to make suitable reparation, but they refused, or at least delayed to do so.

The pursuer pleaded—"(1) The warrant to apprehend the pursuer, and his subsequent apprehension thereunder, as condescended on, being illegal and contrary to the statute, and having caused serious loss and damage to the pursuer, the defenders are liable in reparation as concluded for. (2) The defenders having acted maliciously and without probable cause, in procuring and proceeding under said illegal warrant, are liable to the pursuer in *solatium* and damages, in terms of the conclusions of the summons."

The defender pleaded—"(2) No relevant case."

By the 3rd section of the Civil Imprisonment (Scotland) Act 1882 (45 and 46 Vict. cap. 42) it is enacted that "from and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment." By the 4th section of the same Act it is, *inter alia*, provided as follows:—"Subject to the provisions hereinafter contained, any Sheriff or Sheriff-Substitute may commit to prison for a period not exceeding six weeks, or until payment of the sum or sums of aliment, and expenses of process decerned for, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which

decree has been pronounced against him by any competent Court, provided—(1) That the warrant to commit to prison may be applied for by the creditor in the sum or sums decerned for without any concurrence; (2) That the application shall be disposed of summarily, and without any written pleadings; (3) That the failure to pay shall be presumed to have been wilful until the contrary is proved by the debtor; but that a warrant of imprisonment shall not be granted if it is proved to the satisfaction of the Sheriff or Sheriff-Substitute that the debtor has not since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or the Sheriff-Substitute shall consider reasonable."

The Lord Ordinary (TRAYNER) on 7th February 1889 pronounced the following interlocutor:—"Repels the second plea-in-law for the defenders, and appoints the pursuer within eight days to lodge the issue or issues which he proposes for the trial of the cause: Finds the defenders liable in expenses since the date of closing the record," &c.

"*Opinion.*—In July 1887 the pursuer was decerned, by a decree of the Sheriff of Renfrew and Bute, to make payment to Jessie Adam of certain sums of money as aliment for the support of an illegitimate child of which the pursuer is the father. On 5th January 1888 the pursuer was charged to make payment of the sums contained in said decree; but having failed to implement the charge a petition was presented to the Sheriff under the Civil Imprisonment in Scotland Act 1882, craving the Sheriff to grant warrant to commit the pursuer to prison. On this petition the Sheriff granted a warrant to search for and apprehend the pursuer, and 'bring him before the Sheriff of Renfrew and Bute for examination.' The defenders (acting as law-agents for Miss Adam) put this warrant into the hands of a sheriff-officer for execution. The pursuer was accordingly apprehended by the sheriff-officer and taken before the Sheriff-Substitute at Paisley, who, after hearing the pursuer, committed him to prison for six weeks.

"The pursuer now avers that the warrant for his apprehension, and his apprehension following thereon, were illegal, and he sues the defenders for damages on the ground that they obtained the same, and gave instructions for the execution thereof. The defenders plead that the action is irrelevant. I am of opinion that plea should be repelled.

"By the Civil Imprisonment Act it is provided that a creditor in a decree for aliment which has not been implemented, may apply to the Sheriff for a warrant to commit the debtor to prison; and on such an application the Sheriff may commit the debtor to prison for a period not exceeding six weeks, unless it is proved to his satisfaction 'that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default.' It is obvious therefore that before a warrant to commit the debtor can competently be granted the debtor must have an opportunity of satisfying the Sheriff that he has not been possessed or been able to earn the means of paying his debt. To enable him to do this he must be brought before the Sheriff. But by what form of procedure is he to be brought before the Sheriff? In answering this question it has to be observed that the whole proceedings are taken under the civil and in no sense the criminal jurisdiction of the Sheriff. Now, the ordinary mode by which a debtor is brought by a creditor before the Sheriff to answer in a civil process for his debt or obligation is by citation. It is not material whether the Sheriff grants warrant for the debtor's citation in ordinary form, or ordains the debtor to appear before him at a certain time. These are but two different forms by which the debtor is called on to appear before the judge.

"In the present case, however, neither of these forms was adopted; the Sheriff granted at once a warrant to search for and apprehend the pursuer—a warrant which was not prayed for in the petition, and a warrant which, in my opinion, was illegal, and *ultra vires* of the Sheriff in the circumstances. The statute does not authorise the Sheriff to issue such a warrant; and I know of no authority anywhere in our law conferred upon a Sheriff in the exercise of his civil jurisdiction by which he is authorised *in limine* of the proceedings before him to grant warrant for the apprehension of any debtor or alleged debtor, unless it be in the exceptional case of a debtor said to be *in fuga*, and even there the warrant to apprehend does not proceed on the mere statement of the creditor, but on proof affording a *prima facie* case that the creditor's statements are true.

"If there is no authority in the law for granting such a warrant as that now under consideration, there is neither authority nor excuse for it in our practice. The statute, indeed, is of too recent date to have had any practice founded on it which could be regarded as in any sense authoritative. Such practice as has followed upon the statute has not been uniform, nor in all cases quite regular. I had occasion in the Bill Chamber to consider a case where the Sheriff, on an application under this statute to commit a debtor to prison, had without notice of any kind to the debtor, or affording him an opportunity of explaining his failure to pay the debt, *de plano* granted warrant for the debtor's committal to prison for six weeks, a procedure which was not only illegal because contrary to the statute, but obviously unfair to the debtor. I do not know what the practice has been in other counties, but in Forfarshire (with which I was officially connected) the practice was to order intimation of the petition to the debtor, and to appoint him to appear to answer to the same at a specified time. This, I think, is the right practice.

"It was said on behalf of the defenders that to give notice of the petition to the debtor would only enable him to abscond. The same thing might be said of the service of a summons, for it gives notice to the debtor of the claim made against him, and enables him to quit the jurisdiction or dispose of his property before any decree can be obtained. Or take the case of an application for breach of interdict. The citation there would enable the respondent to quit the jurisdiction and avoid the penalty due to his offence, yet even in such a case (which is *quasi*

criminal) the respondent is not apprehended, but cited to appear and answer to the complaint. But the proper answer to the objection stated is, that there is no presumption that a law-abiding citizen will fail to render obedience to the citation of a competent Court. The assumption of the power, either by a Sheriff or any other authority, to order the apprehension of any citizen, which is not directly authorised by the law, is not to be allowed; and I think the Sheriff in granting the warrant in question assumed a power which he did not possess.

"If the warrant was illegal there can be no doubt the defenders are liable for instructing it to be executed."

The defenders reclaimed, and argued—It was not intended that the debtor should be cited in applications under section 4 of the Civil Imprisonment Act. If it had been, there would have been a provision to that effect as there was in section 6 with regard to applications for law burrows. The procedure to be followed was regulated by the 6th section of the Personal Diligence Act (1 and 2 Vict. cap. 114). The charge said that if the debtor did not settle within the days fixed he was liable to poinding or imprisonment. He could within these days lodge a *caveat* if he wished to be heard, but the Act certainly did not contemplate any formal citation. The debtor being in default, why should he get any further notice of threatened imprisonment? The Sheriff was a fitting judge of whether a warrant should be granted or not—*Strain* v. *Strain*, June 26, 1886, 13 R. 1029.

The pursuer was not called on.

At advising—

Lord President—I think the view of the Lord Ordinary in this case is unimpeachable. Under the Act 45 and 46 Vict. cap. 42, imprisonment is a competent means of enforcing a decree for aliment. This statute says in section 3 that "no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment." Now, the provisions there referred to occur in the next section, which is divided into several sub-sections. Imprisonment is only competent in the case of a wilful failure to obey a decree for aliment, and in order to obtain a warrant the creditor must apply to the Sheriff. That infers the institution of a sort of summary process, and in that process it is open to the debtor to satisfy the Sheriff, if he can, that he is not able to pay the debt or to earn the means of paying it. It seems to be a condition of obtaining a warrant for imprisonment that the debtor in a decree for an alimentary debt should fail to satisfy the Sheriff that he is unable to pay or to earn the means of paying it. If that be so, imprisonment without fulfilling that condition, and apprehension in the same way, must be illegal, and I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Rutherfurd Clark and Lord Adam concurred.

Lord Mure and Lord Shand were absent.

The Court adhered, and ordered issues to be lodged for the trial of the cause.

Counsel for the Defenders—Wilson. Agents—Macpherson & Mackay, W.S.

Counsel for the Pursuer—Salvesen. Agents—Sturrock & Graham, W.S.

Thursday, March 7.

SECOND DIVISION.

MACPHERSON AND OTHERS (ANDERSON BURSARY TRUSTEES) *v.* SUTHERLAND AND OTHERS.

Testament—Construction—Uncertainty—Bursary—Persons Benefited.

A testator by his trust-disposition and settlement directed certain sums of money to be invested, and the interest paid in bursaries to deserving young men "either residenters in the parish of Alves, or in the parish and burgh of Elgin." Parts of the latter parish lay beyond the burgh, and parts of the burgh extended beyond the parish. *Held* that residenters in any part of the parish of Elgin, or in any part of the burgh, might be benefited.

The late William Anderson, Lossiewynd, Elgin, who died 10th May 1884, by his trust-disposition and settlement directed certain sums of money to be paid "to the ministers of the Established and Free Churches of Scotland in the parish of Alves, the three Free Church ministers and senior Established Church minister in the parish of Elgin, and to Robert Young, solicitor, to be held by the said ministers and their respective successors in office, and by the said Robert Young and his nearest heir-male for the time, who shall be resident in the county of Elgin, in trust to invest the same and to pay the yearly interest thereof for bursaries to . . . young men to be of good character and fair talents, either residenters in the parish of Alves or in the parish and burgh of Elgin, whose parents are respectable and in narrow circumstances (residenters in the parish of Alves to be preferred on equal terms)." A difficulty arose as to the meaning and construction of the words "in the parish and burgh of Elgin." The landward part of the parish of Elgin, which was of large extent and populous, was without the burgh, and on the other hand the burgh of Elgin extended in certain directions beyond the parish of Elgin into the adjoining parishes of New Spynie and St Andrew's. The parish was eleven miles or thereby in length, by an average breadth of about three and one-half miles. At the date of the will the population of the burgh within the parish was returned at 8600, of the burgh outwith the parish about 1100, and of the parish outwith the burgh about 1260. There were in the parish of Elgin in all three Free Churches and ministers, two in the burgh of Elgin, and the third in the landward part of the parish at Pluscarden, six miles or thereby distant from the burgh.

A special case was submitted by the Bursary Trustees of the first part, and by two intending candidates for the bursaries, who resided, the

one in the landward part of the parish of Elgin (outside the burgh of Elgin), and the other in the burgh of Elgin but in the parish of New Spynie, of the second part, and they requested the opinion and judgment of the Court upon the following questions—"Must the persons entitled to the benefits of the bequests falling to be administered by the first parties be residenters in that part of the parish of Elgin which is also in the burgh of Elgin? or, Are the terms of the bequest to be construed so as to include residenters in any part of the parish of Elgin, and also residenters in any part of the burgh of Elgin?

Argued for the first parties—The testator meant that candidates must reside both within the parish and within the burgh of Elgin. If this were a description of land it would certainly need to satisfy both conditions.

Argued for the second parties—This was a charitable bequest and was to receive as liberal a construction as possible. The testator meant to benefit residenters in the parish of Alves, in any part of the parish of Elgin and in any part of the burgh of Elgin. He clearly did not intend to limit the parish of Elgin to that part of it, which was within the burgh, for he made the Free Church minister at Pluscarden one of the bursary trustees, and in case any in the burgh who were not also in the parish should be excluded, he was careful to add "and burgh of Elgin"—*Bogie's Trustees* v. *Swanston, &c.*, ("*Mars*" *Training Ship* case), February 5, 1878, 5 R. 634.

At advising—

Lord Justice-Clerk—It cannot be doubted that the expression used in this will is somewhat ambiguous. These bursaries are to be given to "residenters in the parish of Alves, or in the parish and burgh of Elgin." Giving the words a fair construction I have come to the conclusion contended for by the second parties. The first area benefited is the parish of Alves, and the second area is a parish too. It is difficult to see why the testators should benefit the parish of Alves, and then limit the parish of Elgin to that part of it that lies within the burgh. His idea seems rather to have been to benefit both parishes. Then he puts in "burgh of Elgin" to prevent the burgh being sliced across, and the part which is not in the parish being excluded. That, I think, is the fair interpretation of the deed.

Lord Young—There is nothing here to induce me to think that the testator intended to confine his bounty to residenters in that part of the burgh which is also within the parish of Elgin. He was not partial to one part of the town rather than to another. I am therefore averse to the construction which would limit the bounty to a bit of the town. The other construction is more consistent with his probable intention, but it is also more consistent with the strict and grammatical construction of the words used. He wishes to benefit residenters in any part of the parish of Elgin, but as part of the burgh is outside the parish, and residenters there might be excluded, he adds "and burgh of Elgin."

Lord Lee—This clause undoubtedly requires construction. There is nothing in it to limit the burgh to that part of the burgh which is also within the parish. What the testator was endeavouring to do was to describe the district to which his bursaries should extend, and I think that district is composed of three parts, viz., the parish of Alves, the parish of Elgin, and the burgh of Elgin, and upon that ground I am, like your Lordships, for answering the second question in the affirmative.

Lord Rutherfurd Clark was absent.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First Parties—Glegg.

Counsel for the Second Parties—Orr. Agents Macpherson & Mackay, W.S.

Thursday, March 7.

FIRST DIVISION.

PAROCHIAL BOARD OF FORDOUN *v.* TREFUSIS AND ANOTHER.

Poor Law—Classification—Poor Law Acts, 8 *and* 9 *Vict. cap.* 83, *secs.* 34 *and* 36; 24 *and* 25 *Vict. cap.* 37, *sec.* 1.

By the 36th section of the Act 8 and 9 Vict. cap. 83, it is enacted that where a certain mode of assessment is adopted "it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rates of assessment upon the tenants or occupants of each class respectively as to such boards may seem just and equitable."

A parochial board having adopted the mode of assessment referred to, directed, with the concurrence of the Board of Supervision, the lands and heritages in the parish to be distinguished into separate classes, for which they fixed different rates of assessment. Subsequently the parochial board resolved to discontinue the classification, and to rate all classes of property alike, and to this resolution they adhered notwithstanding the disapproval of the Board of Supervision. In a special case presented for the parochial board and certain ratepayers who objected to the new assessment, *held* that the assessment imposed in terms of the resolution of the parochial board was legal and could be enforced.

At a meeting of the Parochial Board of the parish of Fordoun held on 2nd October 1847 it was resolved as follows—"1st. That from and after the 26th day of November next, or as soon thereafter as may be practicable, the funds for the support of the poor in this parish be raised by assessment. 2nd. That the mode of assessment to be adopted shall be that first narrated in the Act 8 and 9 Vict. cap. 83, namely, one-half of the sum re-

quired shall be imposed upon the owners and the other half upon the tenants and occupants of lands and heritages within the parish. 3rd. Tenants and occupants shall, with concurrence of the Board of Supervision, be classified as under —(1) Tenants and occupants of lands for tillage or grazing, including houses and buildings necessary for their management personally occupied or used by the farmer; (2) tenants and occupants of shops or other premises in which mercantile or manufacturing business is conducted; and (3) tenants and occupants of dwelling-houses, gardens, and pleasure grounds. In reference to each of these classes the following scale of rates shall be adopted—Whatever rate of assessment it may be necessary to impose on class 1st, double that rate shall be imposed on class 2nd, and quadruple the rate charged on class 1st shall be levied on class 3rd." The terms of this resolution were duly communicated to the Board of Supervision, and the Board intimated their approval thereof.

The assessment continued to be imposed in accordance with the said classification of lands and heritages until 3rd August 1888, when at a meeting of the Parochial Board a resolution was carried by sixteen votes to fifteen "that the existing classification for rating of tenants be discontinued, and all classes of property be rated alike," and the inspector was instructed to send a copy of the resolution to the Board of Supervision, and to ask if their consent was required. The Board of Supervision intimated that they could not "approve of the resolution of the Parochial Board." At a meeting of the Parochial Board held on 18th September 1888 it was moved that the said resolution adopted at the meeting of 3rd August should be rescinded as not having met the approval of the Board of Supervision. It was also moved that the former resolution be adhered to. The latter motion was carried by seventeen votes to sixteen, and the inspector was instructed "to forward the resolution to the Board of Supervision." The Board of Supervision intimated that they could not "approve of the resolution of the Parochial Board to impose the assessment without a classification of occupants in terms of section 36 of the Poor Law Act."

The assessment for the year 1888 having been imposed upon all classes of property alike in terms of the above resolution of 3rd August 1888, certain ratepayers in the parish appealed to the Parochial Board against the assessment, on the ground that it was illegal, and the present case was thereafter presented to the Court to determine the question whether the assessment was or was not illegal. The first party to the case was the Inspector of Poor for the parish of Fordoun, as representing the Parochial Board, and certain of the objecting ratepayers were the parties of the second part.

The following question was submitted to the Court—"Whether the assessment imposed in terms of the said resolution of 3rd August 1888 is legal, and can be enforced?"

By the 34th section of the Poor Law (Scotland) Act of 1845 it is enacted—"That when the parochial board of any parish or combination shall have resolved to raise by assessment the funds requisite, such board shall, either at the same meeting or at an adjournment thereof, or at a meeting to be called for the purpose, resolve as to the manner in which the assessment is to be imposed; and it shall be lawful for any such board to resolve that one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands and heritages, or to resolve that one-half of such assessment shall be imposed upon the owners of all lands and heritages within the parish or combination according to the annual value of such lands and heritages, and the other half upon the whole inhabitants, according to their means and substance, other than lands and heritages situated in Great Britain or Ireland; or to resolve that such an assessment shall be imposed as an equal percentage upon the annual value of all lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situated in Great Britain or Ireland; and when the parochial board shall have resolved on the manner in which the assessment is to be imposed, such resolution shall be forthwith reported to the Board of Supervision for approval; and if the manner of assessment so resolved upon shall be approved by the Board of Supervision, the same shall be adopted and acted upon in such parish or combination, and shall not be altered or departed from without the sanction of the Board of Supervision; and if the Board of Supervision shall disapprove of the manner of assessment so resolved upon as aforesaid, the parochial board shall, upon such disapproval being intimated, forthwith meet and resolve upon another mode of imposing the assessment consistent with law, and shall report such resolution to the Board of Supervision; and the manner of imposing the assessment so resolved upon shall be adopted and acted upon in such parish or combination, and shall not be altered or departed from without the sanction of the Board of Supervision." By section 35 of the same Act it is enacted—"That if at the date of this Act an assessment for the poor shall in any parish or parishes be imposed according to the provisions of any local Act, or according to any established usage, it shall be lawful for the parochial board or boards of such parish or parishes to resolve that the assessment in such parish or parishes shall be imposed according to the rule established by such local Act or usage; and such resolution, if approved of by the Board of Supervision, shall continue to be acted upon in such parish or parishes, and shall not be altered or departed from without the sanction of the Board of Supervision." By the 36th section it is enacted—"That where the one-half of any assessment is imposed on the owners and the other half on the tenants or occupants of lands and heritages, it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rate of assessment upon the tenants or occupants of each class respectively as to such boards may seem just and equitable."

By the Act 24 and 25 Vict. cap. 37, entituled "An Act to simplify the mode of raising the assessment for the poor in Scotland," it is enacted—Section 1. "From and after the first day

of January One thousand eight hundred and sixty-two, so much of section 34 of the Act of the eighth and ninth years of Her Majesty, entituled 'An Act for the amendment and better administration of the laws relating to the relief of the poor in Scotland,' as makes it lawful for any parochial board of any parish or combination of parishes in Scotland to raise one-half of the funds requisite for the relief of the poor persons entitled to relief from the parish or combination by assessment upon the owners of all lands and heritages within the parish or combination according to the annual value of such lands and heritages, and the other half upon the whole inhabitants according to their means and substance other than lands and heritages situated in Great Britain and Ireland, or to raise such funds by assessment imposed as an equal percentage upon the annual value of lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance other than lands and heritages situated in Great Britain or Ireland, is hereby repealed; and every parochial board of any parish or combination of parishes now raising such funds in terms of the parts of the said recited Act which are hereby repealed as aforesaid, shall, before ceasing to raise such funds, and within two months after the passing of this Act, resolve to adopt the first mode of assessment specified in section thirty-four of recited Act, and to classify lands and heritages equitably in terms of the thirty-sixth section of the said recited Act, and shall forthwith report such resolution to the Board of Supervision, which is hereby authorised and required to determine whether or not the classification so resolved on is equitable; and in the event of their considering the classification thereby made as not equitable, to vary or alter the same as to them shall seem just; and until the said first mode of assessment so resolved on, with relative classification, shall have been approved of by the Board of Supervision, the assessment for relief of the poor in any parish where the classification may not be approved of shall continue to be raised according to the mode now in operation in such parish; and after the proposed classification in any parish shall have been approved of by the Board of Supervision, it shall not be altered or departed from without the sanction of the said board: Provided always, that nothing in this Act shall be construed to prevent the parochial board of any parish or combination of parishes from collecting any such assessment actually imposed prior to the first day of January One thousand eight hundred and sixty-two according to the mode legally in force in the parish or combination at the date when such assessments were imposed."

It was contended for the party of the first part that the concurrence of the Board of Supervision was not necessary to entitle the Parochial Board to abandon altogether classification of lands. By the 36th section of the Poor Law Act of 1845 it was made lawful for the Parochial Board to classify lands with the concurrence of the Board of Supervision. The Board of Supervision, however, had no power to compel the Parochial Board to make a classification, and the Parochial Board might impose the assessment upon the owners and occupants of lands and heritages without any classification. That being so, it would require express enactment to prevent the Parochial Board abandoning a classification without any concurrence. The provisions of the Act of 1861 (24 and 25 Vict. c. 37) applied only to parishes which at the date of the Act were raising the funds requisite for the relief of the poor in the manner authorised in the 34th section of the Act of 1845, but repealed by the said Act of 1861.

It was contended for the parties of the second part that on a sound construction of the Acts referred to the Parochial Board were not entitled without the concurrence or approval of the Board of Supervision to discontinue or alter or depart from the existing mode of assessment, viz., one-half on owners and the other half on tenants or occupiers, according to rental with classification, and that as the resolution of the Parochial Board altering the existing mode was submitted to the Board of Supervision and disapproved of, the assessments imposed in terms of the said resolution were illegal, and could not be enforced. If the existing classification were regarded by the Parochial Board as unsatisfactory or defective their proper course was to have classified of new, and submitted the amended classification for the approval of the Board of Supervision.

At advising—

Lord President—There is here an anomaly and perhaps an inexpedient anomaly, that in certain cases the classification of lands and heritages is permanent in the sense that it cannot be altered without the approval of the Board of Supervision, and in other cases, according to Mr Low's contention, that the Board of Supervision is not entitled to interfere in the matter of continuing or discontinuing the classification. But anomalies are often produced by Acts of Parliament, sometimes expedient and sometimes inexpedient, and if we find such anomalies in statutes we must give effect to them.

How does the legislation stand on this question. In section 34 of the Poor Law (Scotland) Act 1845 there is a provision that "when the parochial board shall have resolved on the manner in which the assessment is to be imposed, such resolution shall be forthwith reported to the Board of Supervision for approval; and if the manner of assessment so resolved upon shall be approved by the Board of Supervision, the same shall be adopted and acted upon in such parish or combination, and shall not be altered or departed from without the sanction of the Board of Supervision." These are plain and simple words. They do not occupy much space, and are of no doubtful construction at all. In section 35 the same provision is repeated with regard to the assessments with which that section deals.

Immediately after these two sections comes a section providing for the classification of lands and heritages, where the first manner of assessment mentioned in section 34 is adopted. It is there provided that "it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rate of assessment upon the tenants or occupants of each class respectively, as to such boards may seem just and

equitable." Now, it is not said there that that classification once adopted shall be permanent, nor that it is incompetent for the parochial board to alter or depart from it without the sanction of the Board of Supervision. The provision to that effect in the two previous sections are, it seems to me, of set purpose omitted from section 36. Of course it might be contended that the classification once fixed and approved of is permanent, but I am not inclined to adopt that suggestion, for I can hardly conceive anything more inexpedient. The condition of the lands and heritages in a parish may vary very much. The number of dwelling-houses, of houses occupied as farms, and of shops may vary in both directions, and it may become very expedient, almost necessary indeed, that there should be power to alter a classification which has become unsuitable. If this classification is not to be permanent, then it seems to me to be impossible to hold that the power to alter it is vested in anyone in the first instance except in the parochial board; and, if the right to alter it is vested in the parochial board without the approval of the Board of Supervision, it is a necessary result of the construction of the Statute of 1845 that the discretion is in the parochial board without the interference or intervention of the Board of Supervision at all.

If that is clear, as I think it is, how are we to import into that statute the provisions of the Act 24 and 25 Vict. c. 37, which are, I think, distinctly confined in their operation to a certain class of parishes and a certain class of parochial boards. The immediate intention of this latter statute is to abolish all manners of assessment save one, by which one half of any assessment is imposed on the owners, and the other half upon the occupiers of lands and heritages. From the time when this statute was passed, no manner of assessment was left save the first mode mentioned in section 34 of the older Act. All the rest are repealed, and then the statute goes on to provide that "every parochial board of any parish or combination of parishes now raising such funds in terms of the parts of the said recited Act which are hereby repealed"—these parochial boards are the nominative of the sentence, and what is said of them?—"shall, before ceasing to raise such funds, and within two months after the passing of this Act, resolve to adopt the first mode of assessment specified in section thirty-four of recited Act, and to classify lands and heritages equitably in terms of the thirty-sixth section of the said recited Act, and shall forthwith report such resolution to the Board of Supervision, which is hereby authorised and required to determine whether or not the classification so resolved on is equitable. That is the end of the sentence or first member of the clause, and it could hardly be maintained that so far the enactment applies to any parishes save those which previously assessed partly upon the means and substance of the inhabitants, and partly on lands, and which are ordered to assess for the future according to the first mode laid down in section 34 of the old Act, and what they are commanded to do is to assess according to that mode, and to accompany that assessment with a classification made in terms of section 36 of the old Act.

The clause goes on, Mr Kennedy thinks, to become more comprehensive, and to include parishes not contemplated in the earlier parts of it. If it were so, surely we should have had a separate section dealing with those parishes. But there is no separate section, and for the obvious reason that the rest of the section applies to the same subjects as are the nominative of the first section. It goes on—"Until the said first mode of assessment so resolved on, with relative classification, shall have been approved of by the Board of Supervision, the assessment for relief of the poor in any parish where the classification may not be approved of shall continue to be raised according to the mode now in operation in such parish"—*i.e.*, the parish shall continue to levy the assessment according to the means and substance of the inhabitants, or that and the lands, until the provision for converting the mode of assessment into the one now proposed can be carried through, and with it the classification of the lands and heritages. Now, can that clause be applied to any but those parishes which have hitherto levied on means and substance, and are hereby forbidden to do so any longer. Not one word of it can be applied to any other parish but one of that description. Then the section proceeds further—"And after the proposed classification in any parish shall have been approved of by the Board of Supervision, it shall not be altered or departed from without the sanction of the said board"—Can it be said that the whole subjects in the last part of the sentence are so extended as to apply to every parish of Scotland, when down to that the clause has dealt with nothing but parishes of the description already mentioned? I think not.

I am therefore of opinion that there is no benefit to be taken by the objecting ratepayers from the last statute, and we are thrown back upon the first statute. And for the reasons I have already stated, I think the classification of lands and heritages when once adopted must either be permanent—and that I think is a hopeless contention—or it is liable to be altered by the parochial board alone.

Lord Rutherfurd Clark and Lord Adam concurred.

Lord Mure and Lord Shand were absent.

The Court answered the second question in the affirmative.

Counsel for the First Parties—Low. Agent—W. B. Rainnie, S.S.C.

Counsel for the Second Parties — Kennedy. Agent—D. Lister Shand, W.S.

Friday, March 8.

SECOND DIVISION.

STURROCK *v.* DUKE OF BUCCLEUCH.

Police—Street—Footway—Maintenance — Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *sec.* 149—Casus Improvisus.

Section 149 of the Police and Improvement (Scotland) Act 1862 enacts—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct, and shall thereafter, from time to time, as occasion may require, repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground or pertinent of a house."

Held (Lord Rutherfurd Clark *diss.*) that the owner of lands abutting on any street for the continuous length of more than 100 yards was liable for one-third of the cost of upholding the footways before such lands, and no further, so long as the lands remained unfeued and unbuilt upon.

In the beginning of 1887 the Dalkeith Burgh Commissioners caused certain repairs to be executed upon the footpaths in Eskbank Road, Buccleuch Street, and the New Edinburgh Road respectively. All these footpaths faced property belonging to the Duke of Buccleuch, but the property was all unfeued and unbuilt upon, and not laid out as gardens or pleasure-grounds, and it abutted upon such streets respectively for a continuous length of more than 100 yards.

In February 1888 Thomas Sturrock, clerk to the Dalkeith Burgh Commissioners, raised an action in the Sheriff Court at Edinburgh against the Duke of Buccleuch for payment of £72, 12s. 3d., being the total cost of said repairs, for which the pursuer maintained he was liable under the 149th section of the General Police and Improvement (Scotland) Act 1862.

The said section provides that "The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct, and shall thereafter, from time to time, as occasion may require, repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground or pertinent of a house."

A proof was allowed before answer, and thereafter the Sheriff-Substitute (HAMILTON) on 26th June 1888 found that no relevant or sufficient defence had been stated to the action, repelled the defences, and decerned in terms of the prayer of the petition, &c.

"*Note.*—The sums claimed from the defender in respect of the footways in Buccleuch Street and the New Edinburgh Road respectively are clearly due. The defender objects that while the Commissioners called upon him 'to construct' good and sufficient footways in front of his property in said streets, their operations amounted only to 'a repair' of the existing footways. This objection, if it has any meaning at all, is an admission that the Commissioners did only such work as was necessary in order to put the footways—which had not previously been dealt with under the provisions of the General Police Act—in proper order in terms of the 149th section. . . .

"By the section of the Police Act already referred to—the 149th—the whole burden of repairing and upholding a footway within the burgh 'from time to time, when occasion may require,' is laid upon the owners of property fronting the street. This provision is not limited in any way, and must be held to apply to all owners indiscriminately, even though their lands may be unfeued or unbuilt on." . . .

The defender appealed to the Sheriff (CRICHTON), who on 10th August 1888 pronounced the following interlocutor:—"Finds in fact . . . (4) That the footways on the east side of Buccleuch Street and east side of New Edinburgh Road had been originally constructed by the Road Trustees many years ago; (5) that in 1882 the Commissioners of Police of Dalkeith constructed a footway in front of the whole of the property of the defender situated in Eskbank Road; (6) that the lands or premises of the defender front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length exceeding one hundred yards, and are unfeued and unbuilt upon; (7) that the work executed did not consist of constructing new footways, but in repairing those that had already been formed; (8) that the cost of making the said repairs amounted to £72, 12s. 3d., the sum now sued for: Finds in point of law . . . that under section 149 of 25 and 26 Vict. cap. 101, the defender is bound to repair

and uphold said footways, or to pay the expense of upholding and repairing them where the repairs are executed by the Commissioners of Police: Therefore decerns against the defender in terms of the conclusions of the petition, and decerns, &c.

"*Note.*—Two questions of importance and difficulty with regard to the provisions of the 149th section of the Police and Improvement (Scotland) Act 1862 are raised in this case. . . .

"The defender is proprietor of lands within the burgh of Dalkeith, which abut on the three roads or streets mentioned in the petition for a continuous length exceeding 100 yards, and are unfeued and unbuilt on. At two of these roads or streets, viz., Buccleuch Street and New Edinburgh Road, footways had been constructed many years ago. At Eskbank Road a footway was constructed in 1882 by the Police Commissioners, and the defender paid one-third of the expense. These footways having got out of repair the Commissioners in 1886 resolved that they should be put in proper order. Accordingly they served on the defender a notice, calling upon him 'to construct a good and sufficient footway on part of the lands or premises,' of which he was owner in the three roads or streets above-mentioned, according to specifications which were to be seen at the office of the Commissioners. This notice contained an intimation that if the work was not executed by the defender within eight days it would be executed by the Commissioners at the defender's expense. The defender did not execute the work, and it was done by the Commissioners of Police. The cost of this work is sued for in this action. . . .

"The defender maintained that the 149th section of the Act did not impose upon him the burden of repairing footways which had been formed on roads or streets along which his lands fronted or abutted for a continuous length exceeding 100 yards.

"It is clear that under the first part of this section the owners of lands or premises fronting a street for less than 100 yards are bound not only to construct footways, but to keep them in repair and uphold them. The second part of the section relieves the owners of lands which front or abut for a continuous length of more than 100 yards of two-thirds of the expense of the construction of the footways, at least until the lands are feued or built on. It is true that this part of the clause says nothing as to the persons who are to keep these footways in repair after they are constructed. The Sheriff, however, although not without hesitation, has come to be of opinion that the defender is bound to keep them in repair, or, if they are repaired by the Commissioners, to repay them the expense of doing so."

The defender appealed to the Court of Session, and argued—The Act laid upon him the burden of paying one-third of the construction of such footpaths, but nothing more. He had paid that, and was not liable for any part of the cost of repairs. It was only "such footways" as the owners had to construct entirely at their own expense that they had also to keep up. If the Legislature had made no provision as to repairs, the Commissioners should pay for them out of the rates. It was the ratepayers who alone derived benefit from these footpaths. If he was liable at all it must only be in the same proportion as for the construction, namely, for a third.

Argued for the respondent—The burden lay upon the owners of lands abutting upon any street to keep up the footways in every case, whether they had paid the whole original cost of construction or not, and whether their property was of the continuous length of 100 yards or not. That was plain from the first part of the 149th section. The second part introduced an exception, but that exception applied only to construction. Upon that view the provisions of the statute were complete. The appellant desired to make out there was a *casus improvisus* here, which was quite unnecessary—*Police Commissioners of Old Aberdeen* v. *Leslie, &c.*, March 18, 1884, 11 R. 733.

At advising—

Lord Young—The question in this case relates to the liability of the Duke of Buccleuch to repair and uphold certain footways constructed in 1882 by the Police Commissioners of Dalkeith in front of certain property of the Duke in Dalkeith. The answer to it depends on the proper construction of section 149 of the General Police Act 1862. The Sheriff has found in fact "that the lands or premises of the defender front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length exceeding one hundred yards are unfeued and unbuilt on," and though some observations adverse to that finding were made at the debate the parties ultimately were agreed that it is right. The next material finding is that the work executed "did not consist of constructing new footways, but in repairing those that had already been formed," and the next that "the cost of making the said repairs amounted to £72, 12s. 3d., the sum now sued for."

These are the material facts. The question in the case does not regard any of them. It is the question of law whether on these facts the Duke is liable to pay the whole expense of the repairs, or is exempt from liability for them, or is bound to make payment in respect of them, but only to the extent of one-third. We heard argument in support of each of these views, and no other view was urged upon us. Now, the first part of section 149 relates to the construction by owners of footpaths fronting their properties, and the repairing and upholding them when formed. The second part of the section is a *proviso* confined to a case in "which it shall not be lawful for the commissioners of police" to require the owner to construct the footway. It is thus expressed—"Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding one hundred yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground o pertinent of a house."

Now, I think there is no room for ambiguity there. Where it is lawful for the commissioners to require the owner to construct a footway in front of his property he must at his own expense construct and maintain it. That is the first part of the clause. But the second part limits the power of the commissioners to require owners to construct footways in cases contemplated by it. Where the owner's lands front the street for more than 100 yards, and are unfeued and unbuilt on, then it shall not be lawful for the commissioners to require the owner to construct the footway. Now, the operation of this upon the first part of the clause is manifest. The commissioners have unlimited power to oblige the owner to uphold the footway where it is lawful to require him to construct it, but that does not apply where, under the second part of the clause, it "shall not be lawful" for them to force him to construct the footway. Now, according to the findings in fact which I have read, the lands here in question are within the provisions of the second branch of the section. It is "not lawful" for the Commissioners to oblige the Duke to construct the footway opposite to them. But under the section it was lawful for them if they saw fit to construct it themselves, and "forthwith" to recover from such owner "one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out and used as a garden or pleasure-ground or pertinent of a house." The Commissioners constructed the footpath. They were therefore entitled to recover one-third of the expense of construction. The question, however, is, what liability the Duke is under, if any, for the repair of what it was "not lawful" to call upon him to construct? In the second part of the section, unlike the first, there is no provision as to the expense of repairs. But the footpath must be upheld, and there are only two persons —the Duke and the Commissioners—to do it; whether one of them is to do it alone or whether they are to do it between them. The Act says nothing on the subject. Yet a rule must be extracted from it under which the footpaths are to be upheld. I think the fair and reasonable view, and that which must be imputed to the Legislature, is that the cost of upholding the footways should be divided in the same proportion as the cost of constructing them. There seems to be good reason for that, and no reason to the contrary. The two alternatives to that course are, first, that the Commissioners shall pay two-thirds of the cost of construction and all the cost of upholding. I think that alternative is not reasonable, and I reject it. The other alternative is that the owner shall pay the whole expense of upholding. An argument worthy of consideration presented in favour of that alternative is that the first part of the section lays on the owner the whole cost of upholding as well as that of constructing, and that while the second part relieves him to a certain extent of the cost of construction it does not relieve him at all of the cost of maintenance, but says nothing upon that subject. That view does not commend itself to my mind. I think that, taking the first part of the section in connection with the second, the obligation to bear the whole expense of upholding is imposed only with respect to footways which it is lawful for the Commissioners to compel owners to construct. The owners are in that case to repair and uphold "such" footways. I should not be disposed to adopt the view that owners are also liable to uphold footways which it is not lawful for the Commissioners to compel them to construct, even if it were more plausible than I think it is. I should rather, if that were necessary, be ingenious to avoid it, for the reason and equity of the matter are that the cost of constructing and upholding shall be divided between the parties according to the same rule.

I am of opinion that the defender is liable in one-third of the expense of repairs, but no further.

Lord Rutherfurd Clark—I incline to the opinion that the Sheriff is right. I think that the meaning of section 149 is that the police commissioners are entitled to require footways to be constructed in front of all properties within their jurisdiction at the expense of the owners, and that when these are constructed the cost of maintaining them is laid on the owner. In certain circumstances indeed, which occur here, the obligation to construct is not laid on the owner, but the footways may be constructed by the commissioners themselves, and they are entitled to recover from the owner one-third of the expense of construction forthwith, and the remainder when his lands are feued or built upon. But I think that when the footway is constructed the obligation of upholding it rests with the owner. As I read the section the obligation to uphold is without exception; the only exceptional case is that in which the owner is not obliged to construct the footway but the commissioners may do so.

Lord Justice-Clerk—I have had some difficulty in coming to a conclusion as to the interpretation of the clause which rules this case. I confess my first leaning was to the third of the three views to which Lord Young has alluded, and which has not been adopted either by his Lordship or by Lord Rutherfurd Clark. My impression was that the obligation on owners to maintain footways depended on whether they were "such" footways as the Commissioners are entitled to require owners to construct as provided by the first part of the section. Where land is unfeued and unbuilt upon for a length of 100 yards the Commissioners are not entitled to require the proprietor to construct any part of the footway. It is only after they have done it themselves that they can exact one-third of the expense from the proprietor. It seemed to me therefore difficult to read the words "such footpaths"—which refer back to footpaths which the Commissioners can require the proprietor to construct—as applying to footpaths as to which the Commissioners have no such power. But after further consideration I have come to the opinion that the result at which Lord Young has arrived is not only reasonable in itself, but is consistent with the terms of the section, that the measure of the obligation of maintenance is to be found in the extent of the obligation to pay the cost of construction. As the cost of construction is laid upon the owner, so also, and to the same extent only, is the cost of upholding laid upon him. The defender here is liable in one-third of the expense of construction,

and I think it is a fair reading of the statute that he is liable in one-third of the expense of maintenance.

Lord Lee concurred with the Lord Justice-Clerk and with Lord Young.

The Court pronounced this interlocutor:—

"Find in fact (1) that the lands of the defender referred to in the record front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length of 100 yards, and are unfeued and unbuilt upon; (2) that the work in respect of which the sum sued for is claimed by the Commissioners of Police was executed not in making new but in repairing existing footpaths *ex adverso* of the said lands: Find in law that in terms of the second branch of the 149th section of the General Police and Improvement Act 1862 the defender is liable for one-third of the cost of upholding the said footpaths, and no further, as long as the ground opposite to said footpath remains unfeued and unbuilt upon: Therefore recal the judgments of the Sheriff and the Sheriff-Substitute appealed against: Ordain the defender to make payment to the pursuer of the sum of £24, 4s. 1d. sterling, being one-third part of the sum sued for: Find no expenses due by either party to the other, and decern."

Counsel for the Pursuer—Comrie Thomson—MacNeill. Agent—Thomas Sturrock, S.S.C.

Counsel for the Defender—R. Johnstone—C. K. Mackenzie. Agents—Gibson & Strathern, W.S.

Friday, March 8.

SECOND DIVISION.

SIR ARCHIBALD D. STEWART *v.* HIGHLAND RAILWAY COMPANY.

Railway—Lands Clauses Consolidation (Scotland) Act 1845, *sec.* 120—"*Superfluous Lands.*"

Held that a piece of ground, acquired by a railway company under compulsory powers, which had not been used or disposed of by the company more than ten years after the completion of their works, for which they had no immediate use, and which could only be utilised if additional ground were acquired under special Act of Parliament, had become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 19) provides—"With respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:" . . . Section 120. "Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

In the year 1856 the Perth and Dunkeld Railway Company, in pursuance of the Perth and Dunkeld Railway Act 1854, and the Lands Clauses Consolidation (Scotland) Act 1845, gave notice to Sir William Drummond Stewart, heir of entail then in possession of the entailed estates of Grantully, Murtly and others in the county of Perth, that they required to purchase and take for the purposes of their undertaking certain portions of the said estate of Murtly and others, including, *inter alia*, one acre and one hundred decimal or thousandth parts of an acre or thereby, bounded on the south by the public road leading from Murtly to Dunkeld, and on the other sides by the adjacent portions of the said estate of Murtly, all as delineated and coloured red upon a copy of the Ordnance Survey map produced. The amount of compensation payable for the lands so taken having been fixed by a jury and duly paid, the land was subsequently conveyed by Sir William to the said railway company.

The Highland Railway Company were incorporated by the Highland Railway Act 1865 (28 and 29 Vict. cap. 168), and by that Act the Perth and Dunkeld Railway Company was united with the Highland Railway Company, and the latter company acquired the railway lines, stations, buildings, and works which had been constructed and the property which had been acquired by the former company under the Perth and Dunkeld Railway Act 1854. Section 2 of the said Act incorporated the Lands Clauses Consolidation (Scotland) Act 1845. The said land was used by the Highland Railway Company as a spoil bank when they were making their tunnel at Murtly, but it was never required or used by them for the purposes of their undertaking, and was not sold or disposed of by them.

In April 1888, more than ten years having elapsed since the expiry of the statutory period assigned for the completion of their undertaking, Sir Archibald Douglas Stewart, Baronet, heir of entail in possession of the estates of Grantully, Murtly and others in the county of Perth, and duly infeft therein conform to decree of special service in his favour as heir of tailzie and provision of his brother the late Sir William Drummond Stewart, Baronet, dated 22nd May 1871, and with warrant of registration thereon recorded in the division of the General Register of Sasines applicable to the county of Perth, 5th June 1871, raised an action against the said railway company to have it declared that the said piece of ground, not having been required or used by the defenders or their predecessors for the purposes of their undertaking prior to the date of citation to follow thereon, had become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845, and had vested in and become the property of the pursuer as owner of the lands

adjoining thereto in terms of the said Act.

The defenders stated in defence that they had in contemplation the doubling of their line at that part; that they would then require the portion of land in question as a spoil bank for the purpose of diverting the public road; and that they had retained the land in question solely because they saw it would be ultimately required for the purposes of the railway. They admitted, however, that they could not double their line without getting additional lands from the pursuer, which they could only do under a new Act of Parliament.

They pleaded that the land in question was not superfluous land within the meaning of the statute.

The Lord Ordinary (KINNEAR) on 27th July 1888 found, declared, and decerned in terms of the conclusions of the summons, and found the pursuer entitled to expenses, &c.

"*Note.*—The principle upon which it is to be determined whether land is superfluous in the sense of the Lands Clauses Act has been laid down by the House of Lords in the *Great Western Railway Company* v. *May*, L.R., 7 Eng. & Ir. App. 283, and according to that judgment the question to be considered is, whether at the expiration of the statutory period of ten years the land is required for the purposes of the undertaking? The piece of ground in dispute is separated from the existing line of rails by a public road, and it was stated at the bar that it was originally acquired and used by the promoters of the undertaking as a spoil bank, a temporary purpose which has come to an end. But the defenders allege that they have all along anticipated that in the natural development of their traffic it would be required for a more permanent purpose of their undertaking which they expect shortly to carry out, viz., the construction of a double line of rails between Stanley and Blair Athole, because in the event of their doubling the line as they propose, the ground will be required both for the purpose of diverting the public road above mentioned, and also for its former purpose as a spoil bank. It may be doubtful whether the latter purpose is sufficient to satisfy the conditions of the Act of Parliament. But if there was a reasonable prospect at the end of the ten years that the ground would be required for diverting the road in order to lay down a double line of rails, that would appear to me to be a purpose for which the company were entitled to retain it, provided that the construction of such a line were within the scope of the undertaking authorised by their Acts of Parliament. The defenders admit that in order to construct a double line they must obtain land from the pursuer, which they have no means of acquiring otherwise than by agreement with him; or, in other words, that the purpose for which they desire to retain the land is one which they have no power under the existing Acts to carry into effect. But a purpose which they cannot execute in the exercise of the powers conferred upon them by their Acts of Parliament cannot be within the scope of the undertaking sanctioned by those Acts.

"It is said that according to the judgment of the House of Lords in *Hooper* v. *Bourne*, L.R., 5 App. Cas., the burden of proving a title to the land as superfluous lies upon the claimant. But in the admitted circumstances of this case it appears to me that the burden has been discharged. It is admitted that the land has never been used except for the temporary purpose which ceased with the construction of the railway, and that the only purpose for which the company desire to retain it is one which they cannot execute without the pursuer's consent. But works which cannot be executed under the powers conferred upon the undertakers by their Acts are not part of the statutory undertaking. It follows that the purpose for which the land is required by the defenders is not a purpose of the undertaking, and that is sufficient to satisfy the definition of superfluous land."

The defenders reclaimed, and argued—The introductory words to section 120 defined the lands as those "which shall not be required for the purposes thereof"—that is, of the undertaking. So long as the company had any reasonable prospect of requiring them they were entitled to retain possession of them. It lay with the respondent to show that the railway company had no need of the lands here—*Betts* v. *Great Eastern Railway Company*, L.R., 8 Exch. 294, 8 Exch. Div. 182, H. of L. 49 L.J. Exch. 197 (Nov. 4, 1879); *Hooper* v. *Bourne*, February 9, 1880, 5 App. Cas. 1, *per* L.C. Cairns, 9; *North British Railway Company* v. *Moon's Trustees*, February 8, 1879, 6 R. 640. The company were not tied down to one line by their Act, and they had all along contemplated the necessity of making a double line, in which case they would require the land in dispute for the purpose of diverting the public road and as a spoil bank. The case of the *Great Western Railway Company* v. *May*, relied upon by the respondent, was the only reported case in which lands had been held "superfluous," but there the undertaking was complete. "Undertaking" was the whole scheme the company had in view, not the works for which lands might be immediately wanted — *Gardner* v. *London, Chatham, and Dover Railway Company*, December and January 1866–67, L.R., 2 Chan. App. 201, *per* Cairns, L.J., 216. The diversion of the road could be made by arrangement with the Road Trustees.

The respondent argued—He had discharged the *onus* which lay upon him. The lands had vested in him by the expiry of the ten years. The railway company had no reasonable prospect of requiring the lands, which was necessary to entitle them to retain possession of them—*Caledonian Railway Company* v. *City of Glasgow Union Railway Company*, July 2, 1869, 7 R. 956, *per* Lord Barcaple, Ordinary, 961. In the case of *Betts* the lands were found not to be superfluous, because there there were specific purposes unfulfilled which were within the powers of the company. Here the company could not make use of this piece of land as a spoil bank or otherwise without acquiring more land, which they could only do under a new Act of Parliament. The case of the *Great Western Railway Company* v. *May*, June 25 and 26, 1874, 7 Eng. & Ir. App. 283, referred to by the Lord Ordinary, was directly in his favour. It was further said that they required this piece of ground for the diversion of the public road, but that could only be during construction, the period for which had expired, and where "necessary" — Railway

Clauses Consolidation (Scotland) Act 1845, sec. 16; *Queen* v. *Wycombe Railway Company*, January 26, 1867, L.R., 2 Q.B. 310, *per* L.C.J. Cockburn, 320, and Lush, J., 325; *Tiverton and North Devon Railway Company* v. *Loosemore*, March 25, 1884, 9 App. Cas 480, *per* Lord Bramwell, 508.

At advising—

Lord Justice-Clerk—The pursuer in this case asks to have it declared "that the portion of land . . . which was acquired by the predecessors of the defenders from the predecessor of the pursuer for the purposes of their undertaking, not having been required or used by the defenders or their predecessors for said purposes prior to the date of citation, . . . has become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845." The defence set up by the defenders is, that there is a reasonable probability of their requiring the land in question for the purposes of their undertaking. There is no doubt that if that were made out it would be a good answer to this declarator. Now, the only use that has ever been made of it has been as a spoil bank. It has never been used in any other way. It is not in immediate contiguity to the line of railway, but is separated from it by the public road. It is moreover not disputed by the Highland Railway Company that they are unable to make use of this piece of land unless they obtain additional powers and acquire additional land.

In that state of the facts I think the proper view to be taken is that the land, not having been used for thirty years, and not being capable of being used without new powers, and not having been disposed of to others, does fall under the provisions of the Act 1845.

The defenders say, but not when, that they propose to double their line at that place, and that then they will require the ground, not for their line, but for the purpose of diverting the public road; but that, again, is an end which they cannot accomplish without getting fresh powers from Parliament. Even if they did obtain those powers, it is not disputed that they could not accomplish their object without taking additional land from the proprietor, who now wishes to have it declared that this portion of land has reverted to him.

In these circumstances I am of opinion that the pursuer is entitled to the declarator sought.

Lord Rutherfurd Clark—I am of the same opinion. I am satisfied with the judgment of the Lord Ordinary, and with the grounds upon which that judgment is based.

Lord Lee concurred.

Lord Young was absent when the case was argued.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Darling, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.

Friday, March 8.

SECOND DIVISION.

[Sheriff of Dumfries

CRAWFORD *v.* THE PORTPATRICK AND GIRVAN JOINT COMMITTEE.

Reparation—Railway—Custody—Secure Place.

Certain cattle escaped from a yard at a railway station in which they were enclosed until the owner should obtain authority from the local authority to put them on trucks, strayed along the line, and were killed. In an action against the railway company by the owner for damages in respect of their loss, it was proved that the fence of the yard was defective, but that the cattle had been taken from the pens and placed there by the pursuer's own servant, who had left them there for a night notwithstanding that he was warned by the defenders' servants that the yard was not intended for such a purpose. It was further proved that the cattle were under the charge of the pursuer's servant, and not of the defenders. The Court *assoilzied* the defenders.

On the evening of 4th June 1887 Thomas Crawford, cattle-dealer, Belfast, arrived with 56 cattle at Stranraer by steamer from Larne. The railway from Stranraer pier to Newton-Stewart was the property and under the management of the Portpatrick and Girvan Joint Committee. He desired to have the cattle forwarded by rail from Stranraer to Newton-Stewart. It was necessary as a condition to have a permit from the local authority. Crawford sent his son, a lad of nineteen, to get the permit, and he himself left Stranraer by the train. During this time the cattle had been put in pens belonging to the railway company close to the line, and used for keeping cattle in until they were trucked. The son did not return until the last cattle train for the night had left Stranraer. The cattle were then driven out of the pens, and put into an enclosure adjoining them, in which there was water, and in which young Crawford gave them hay. The fence round this enclosure or yard was composed of sleepers, with the exception of a part next the railway, at which it was composed of posts and moveable wooden bars fitting into notches in the posts. Young Crawford having fed the cattle left them, and went away for the night without leaving anyone in charge. During the night a number of the cattle got out of the enclosure and got upon the railway line, with the result that six were killed and two injured by a passing train.

Crawford brought an action against the railway company in the Sheriff Court at Stranraer for £46 as the value of the cattle killed and injured.

The pursuer averred that the defenders had taken possession and charge of the cattle at Stranraer, and put them into their enclosure, and that the cattle escaped in consequence of the defective condition of the fence of the enclosure.

The defenders averred that the yard or enclosure was used only for the loading of horses,

and for driving cattle through into the pens beside the line; it was not intended to be used for keeping cattle in all night, and the pursuer's son had been informed of that fact, and that the cattle were in his charge.

The pursuer pleaded—"(2) The said cattle having been destroyed and injured through the fault of the defenders, decree should be granted as craved. (3) The cattle having been regularly received into the custody of the defenders for transmission to Newton-Stewart, and no other person having any power or authority from pursuer to interfere in any way with them, the defenders were responsible for their safety."

The defenders pleaded—"(2) No contract of any kind having been entered into between the pursuer and the defenders as to the cattle in question, and the said cattle having been destroyed or injured through no fault of the defenders, or of those for whom they are responsible, they are entitled to decree of absolvitor, with expenses. (3) The said cattle having been under the sole control and management of the pursuer, or of those for whom he is responsible, and the damage or injury to said cattle having been caused, or materially contributed to, by the negligence and want of reasonable care on the part of the pursuer, or those for whom he is responsible, the action should be dismissed, with costs."

The Sheriff-Substitute (DICKSON) allowed a proof. The result of the proof was to show that Crawford's son, although he had no special authority from his father on this occasion, and generally acted as a servant, was frequently sent over in charge of cattle from Belfast to Stranraer; that Crawford had left Stranraer before his son returned with the permit of the local authority, and that there was no one else but the son to take charge of the cattle; that the cattle were put into two small pens until young Crawford returned; that the outer door to the pens was locked; that Crawford, with the assistance of the railway servants, drove his cattle into the enclosure; that it was not adapted for keeping cattle; and that they never had been kept there overnight before. There was evidence that young Crawford was told the cattle could only be left in the enclosure at his own risk, and that he should put them in the station park, but this he denied. It was proved the notch in which one of the moveable bars rested was rotten, and that it was at this point that the cattle had broken down the fence and got on to the line.

Upon 19th January 1888 the Sheriff-Substitute issued this interlocutor:—"Finds that on or about 4th June 1887 the pursuer booked 56 cattle at Larne for transmission to Stranraer by the steamship sailing between these places, and that the said cattle arrived safely at the harbour of Stranraer on the evening of the same day, Saturday 4th June: Finds that the cattle were immediately placed by the defenders' servants in the cattle-pens at the harbour: Finds that the pursuer stated to the station-agent at the harbour that he wished to forward the cattle by the cattle train to leave about ten o'clock p.m. that night for Newton-Stewart, whereupon the station-agent informed the pursuer that he could not book and forward the cattle until the pursuer should exhibit a licence for their transmission from the local authority: Finds that the pursuer sent his son Hugh Crawford to obtain such licence, and the pursuer himself left Stranraer by the passenger train at about 8·30 p.m.: Finds that the pursuer's son did not return to the harbour until after the cattle train had left Stranraer, and the cattle could not be forwarded that night: Finds that it does not appear from the proof whether a licence for the transmission of the cattle had been obtained or not: Finds the pursuer's son took upon himself the charge of the cattle, by taking them out of the pens and placing them in the loading-yard, where there was water, and where he laid down hay for them: Finds that the defenders' servants warned him against leaving the cattle in the loading-yard, and that if he insisted in leaving them there all night he did it at his own risk, to which he replied that it was 'All right,' meaning thereby that he accepted the risk: Finds that pursuer's son left the cattle in the loading-yard unattended during the night of the 4th and morning of the 5th of June: Finds that in course of said night or morning the cattle strayed upon the railway line, and that five were killed by a goods train, another was so severely injured that it required to be killed, and two more were seriously damaged: Finds that the pursuer's son Hugh Crawford is nineteen years of age, and that he has been in the habit for four years past not only of accompanying his father in bringing cattle from Ireland, but of bringing cattle by himself alone for his father, and of booking and transacting about their transmission on behalf of his father: Finds that in these circumstances, and in the emergency that arose through the non-production of the licence in sufficient time, for which the pursuer himself had made no provision, the defenders' servants were entitled to look to the pursuer's son as acting for him in his absence: Finds that the pursuer's son did so act for his father, and took upon him the risk attending the leaving of the cattle in the loading-yard, unattended, throughout the night: Finds that there is no evidence sufficient to infer liability upon the defenders for the damage to the pursuer's cattle: Therefore assoilzies the defenders from the conclusions of this action: Finds the pursuer liable in expenses," &c.

The pursuer appealed, and upon the 7th July 1888 the Sheriff (MACPHERSON) recalled the Sheriff-Substitute's interlocutor, and found "that the defenders received from the pursuer fifty-six head of cattle on an inchoate contract to be forwarded, if a licence was produced for their removal, to Newton-Stewart by the train leaving Stranraer harbour at ten o'clock p.m. of Saturday 4th June 1887, being the last train that night; that the defenders placed the said cattle in pens on their premises, and locked the outer gate, the only means by which the cattle could be brought out unless sent by the railway; that the said gate was never unlocked that night; that the pursuer's son, who had been sent for a licence, did not arrive at the station till after the said train had started; that on his arrival he was asked by the defenders' servant, Fisher, what he was going to do with the cattle, and replied that he would leave them where they were; that he was allowed to let the cattle pass from the pens into an immediately adjoining yard, fenced from the railway, in which yard was the only statutory supply of water for animals, and he proposed, although told by Fisher there might be some risk

if the cattle were taken out of the pens, and was allowed to leave them all night in the said yard, and was supplied with hay in it by the said Fisher, who received payment for the hay, though not apparently on account of the defenders; that no person watched the said cattle during the night; that owing to the decayed condition of one of the posts of the fence between the said yard and the railway, on a notch in which a cross spar rested, the said notch gave way, and the said spar fell, in consequence whereof, in the course of the night between the 4th and 5th of June, the said cattle, or some of them, strayed on to the railway, and five of them were killed by a goods train, and another was so severely injured that it had to be killed, and two more were seriously damaged: Finds that the said cattle were destroyed or damaged through the fault of the defenders, or their servants, for whom they were responsible: Therefore finds the defenders liable to the pursuers in damages; assesses the same at the sum of £35 sterling: Ordains the defenders to pay the said sum to the pursuer, with interest as prayed for, and decerns: Finds the defenders liable in expenses."

The defenders appealed, and argued—The accident had occurred through the fault of the pursuer and not of the defenders. (1) The custody of the cattle was not in the railway company at the time the cattle broke down the fencing. When the cattle came from Ireland they were put in charge of the railway company for the purpose of being forwarded to Newton-Stewart, and the railway company fulfilled the obligation upon them by placing them in the proper pens in which they were quite safe. Then the pursuer went away leaving his son to take charge. The son was only 19 years of age, but he had frequently been in charge of cattle for his father before, and if he was incompetent for the charge that was his father's fault. When the son came too late to send the cattle to Newton-Stewart that night, the railway servants gave the charge of the cattle to him. He took them from the pens and put them into this inclosure, which was quite unfit for keeping cattle in for any length of time without a watchman, and the pursuer's son was told that by the company's servants, but he insisted on putting them in there. If any accident happened to them he was liable for it. (2) The railway company were not liable, even supposing the fence was in a rotten condition. Cattle were never allowed by them to be there without some person in charge, and if the pursuer put his cattle in this unsuitable place without anyone in charge, he was liable for any accident.

The respondent argued—The cattle were taken in charge by the railway company, and put in pens. If the pens were safe the cattle ought to have been allowed to remain there, but they were turned out and put into this yard. They were still under the custody of the railway company, and if the place was not safe without a watch, a watch should have been set. The fencing round the yard was proved to be unsafe and rotten. The railway company were bound to see that the fences along their line were proper and safe fences.

At advising—

Lord Justice-Clerk—The facts in this case are simple enough. The pursuer and his son brought over a number of cattle from Ireland to Stranraer, and intended to forward them to Newton-Stewart by the defender's railway. But in order to do this, they had to comply with the regulations of the Privy Council, and procure licences from the local authority that the cattle might be safely transmitted to that place. It appears that both the pursuer and his son attempted to get the licences, but they were unable to do so in time to send the cattle by the Saturday night train, and they had to be left at Stranraer for the night. The pursuer accordingly went on by the train himself, leaving the cattle in the charge of his son. This son was a lad of 19 years of age, who had had charge of cattle for his father before this time, and there is no evidence to show that he was not quite capable of taking the charge. The cattle had been placed in some close pens for the convenience of trucking them, and when it became evident that they could not go on that night, it was necessary to make arrangements for their care during the night. The pursuer's son had some conversation with the railway servants on that subject, and there is some conflict of evidence about the conversation, but I think that the preponderance of the evidence is to the effect that the cattle were allowed to remain in the station enclosure under young Crawford's charge. So long as they were in the pens they were quite safe, but Crawford took them out of these, and put them into the station enclosure, got some hay from one of the railway servants, saw them watered and fed, and then left them. Whether it was the idea of the railway servants that the cattle were to be put back into the pens or not I do not know, but I am satisfied that they were in the charge of Crawford, and were only allowed to remain in that enclosure while they were in his charge, or that of someone else. In the night the cattle broke down part of the fence which formed the enclosure, and got out on to the line, with the result that some of them were killed by a passing train.

I am of opinion that this fence was not intended to keep in cattle which had been shut up for the night, but was merely for the purpose of keeping the cattle together when they were being driven into the pens for the purpose of being trucked. It was composed of posts and moveable bars fitting into notches in the posts which might easily be knocked out by cattle pressing against them, and all the more easily because some of the notches were in a half rotten state. That circumstance would have had to be considered if I had been of opinion that the cattle were under the charge of the railway company when they broke out into the line, but as I have indicated, in my opinion they were allowed to be in that enclosure solely on the footing that someone should take charge of them during the night, and were not in the custody of the railway company at all. I think therefore that the Sheriff-Substitute was right, and that we should reverse the Sheriff's interlocutor and revert to that of the Sheriff-Substitute.

Lord Young and Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor—

"Find that on the arrival at Stranraer of the cattle mentioned in the record they were immediately placed by the defenders' servants in the cattle-pen at the harbour, while, by order of the pursuer, his son Hugh Crawford went for a licence from the local authority for their transmission to Newton-Stewart by a cattle train to leave about ten o'clock that night, the pursuer himself going on by a passenger train about 8·30 p.m., leaving his said son in charge of the cattle; that Hugh Crawford did not return until after his father started for Newton-Stewart, and he thereupon took the cattle out of the pen and placed them in the loading-yard of the railway; that the defenders' servants warned him that they would be at his risk if they remained there, and that he agreed to this; that during the night the cattle broke down part of the fence of the yard and strayed on to the line of railway, where five were killed by a goods train, another so damaged as to render it necessary to kill it, and two were seriously injured; that the damage thus sustained was not caused by fault of the defenders or their servants: Therefore sustain the appeal: Recal the interlocutor of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in the Inferior Court and in this Court: Remit to the Auditor to tax," &c.

Counsel for the Appellant — Asher, Q.C. — Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Respondent — Strachan — M'Lennan. Agent—Robert Broatch, L.A.

Saturday, March 9.

FIRST DIVISION.

BEEDIE *v.* BEEDIE.

Parent and Child—Petition for Custody of Child—Competency—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *secs.* 2 *and* 3.

In an undefended action of separation and aliment by a wife the Lord Ordinary found that the defender had been guilty of grossly abusing and maltreating the pursuer, and decerned for the defender, finding her entitled to the custody of the youngest child of the marriage, who was about four years old. Two months and a-half after this decree had been pronounced the husband presented a petition to the First Division craving the custody of his youngest child The Court *held* that the petition was competent, but in the circumstances *refused* to grant the prayer.

This was a petition by James Beedie, farmer, in the county of Aberdeen, in which he craved the Court to discharge an order pronounced by Lord Trayner finding his wife Mrs Margaret Beedie entitled to the custody of their youngest child Alexander Bartlett Beedie, and discharging the petitioner from interfering with the said child or Mrs Beedie as his custodier, and to find the petitioner entitled to the custody and keeping of the said child. He further craved the Court to restrict the amount of aliment decerned for by the Lord Ordinary, and in the event of their Lordships refusing him the custody craved, he asked for reasonable facilities of access to the child, but with these two latter points it was unnecessary for the Court to deal, as they were made matters of arrangement between the parties.

The petitioner averred that "on 29th June 1888 his wife raised an action against him in the Court of Session concluding, *inter alia*, that it should be found proven that he had been guilty of cruelly maltreating her, and that she had full liberty and freedom to live separate from him, and that she should be found entitled to the custody and keeping of the children of the marriage in pupillarity, viz., Ann Bartlett Beedie and Alexander Bartlett Beedie.

"On 23d October 1888 the Lord Ordinary (Lord Trayner), before whom the cause came to depend, allowed Mrs Beedie a proof of her averments. The petitioner instructed agents to represent him and to defend the said action on his behalf, but no defences were lodged by said agents, and they resigned their agency a few days before the date fixed for the proof. The petitioner, who had no personal knowledge of legal proceedings, was unable after this occurrence timeously to make the necessary arrangements for his being represented at the said proof, and it consequently proceeded in his absence.

"On 10th November 1888 the Lord Ordinary heard proof in absence of the petitioner, and issued the following interlocutor:—'Finds it proved that the defender James Beedie has been guilty of grossly abusing and maltreating the pursuer Barbara Paterson or Beedie, his wife: Therefore finds that the pursuer, the said Barbara Paterson or Beedie has full liberty and freedom to live separate from the defender, the said James Beedie, her husband: Ordains him to separate himself from the said Barbara Paterson or Beedie *a mensa et thoro* in all time coming: Finds the pursuer entitled to the custody and keeping of Alexander Bartlett Beedie, the youngest child of the marriage between the pursuer and defender: Interdicts, prohibits, and discharges the said defender from interfering with the said child, or the pursuer as his custodier, and decerns.'

"After ceasing to be represented by his agents as aforesaid, the petitioner heard nothing regarding the result of his wife's action until 30th December 1888, when Mrs Beedie's Edinburgh solicitor sent him a copy of the said interlocutor of 10th November, and requested him to deliver up the said pupil child. The petitioner then immediately instructed his present agent to investigate the stage which the process in said action had reached, when it was found that the Lord Ordinary's judgment had become final and could not be reclaimed against.

"The petitioner believed and averred that his conduct towards his wife had not only been much exaggerated and misrepresented, both in Mrs Beedie's summons and at the proof, but also that the acts of cruelty alleged by his wife had not been established in evidence so as to justify the remedy of judicial separation, and that had he been represented at said proof Mrs

Beedie would not have obtained decree of separation. The petitioner therefore felt much aggrieved by the said judgment, and particularly in so far as it deprived him of the custody of his pupil son.

"The circumstances under which the application was made were as follows:—The said pupil-child was about four years of age; he had always resided in his father's house, and his father, the petitioner, was deeply attached to him. Mrs Beedie, the child's mother, left the petitioner's house, as already stated, on 4th April 1888, and from that time onwards the care of the said child had devolved entirely on the petitioner. The child had the benefit of an experienced nurse, and was under the supervision and care of a lady housekeeper. The pupil was under her care, and was much attached to her. He also enjoyed the society of his sisters, who were all solicitous for his welfare; and the petitioner believed and averred that the child's health, which at the present time was excellent, would inevitably suffer if he were deprived of the society of his sisters. The petitioner had always treated his said pupil son with the utmost care and affection, and no harm could possibly happen to the child from his remaining in the petitioner's custody. The child was much attached to the petitioner, and would suffer in health and spirits if removed from the petitioner's house."

In these circumstances the petitioner humbly conceived that the Lord Ordinary's order as to custody should be entirely discharged and set aside, and the said pupil left in the petitioner's custody.

Answers were lodged for Mrs Beedie, in which she averred, "in the first place, that this petition was incompetent, and should not be entertained, in respect that it was an attempt to bring under review or set aside a judgment of the Lord Ordinary, which could only be reviewed by way of reclaiming-note, or set aside in a process of reduction. The section of the Guardianship of Infants Act 1886 (49 and 50 Vict. cap. 27) referred to was not applicable to the case of a regular action of separation and aliment, and there had been no application to the Court in virtue of that Act under which the prayer of the present petition could competently be granted.

"Assuming the competency of the petition, the averments of the petitioner as to the relations between himself and the respondent, his conduct towards her, and the petitioner's means, were denied. The facts were truly set forth in the respondent's summons in the action of separation and aliment, and her averments were fully established in the proof which followed thereon, to both of which reference was made. The respondent submitted that the petition should be refused."

By section 5 of the Guardianship of Infants Act 1886 it is, *inter alia*, provided as follows:—"The Court may, upon the application of the mother of any infant [that is, 'pupil' according to the law of Scotland] (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent."

The respondent objected to the competency of the petition, and argued—The order which the Court was asked to discharge was pronounced under the Conjugal Rights Act (24 and 25 Vict. cap. 86), sec. 9. No doubt a decree of the Lord Ordinary in such cases was not of the finality of decisions in ordinary cases, and it was the practice of parties to come back to the Court for new orders. But that judgment could not be reviewed in the present application, which was under the Guardianship of Infants Act, and in which there was no averment of change of circumstances. In all cases where the Court had been asked to vary the amount decerned as aliment, the application had proceeded on alleged change of circumstances. The only remedy of the pursuer was therefore to bring an action of reduction. On the merits of the case the decision of the Lord Ordinary was right. He exercised no jurisdiction under the Guardianship of Infants Act, and had therefore come to that decision without considering the provisions of that Act. Under this application the Court was bound to have in mind the considerations suggested by that Act. It made no difference that the application here was by the father. Otherwise the Court might have to decide such questions on one set of grounds when the application was by the father, and on another when it was by the mother. This might lead to their having to undo to-day what they had done yesterday. Keeping in view the considerations suggested by the recent Act the Court would have no difficulty in holding that the mother was rightly appointed the custodier of the child.—*Mackenzie* v. *Mackenzie*, Dec. 22, 1887, 25 S. L. R. 183.

The petitioner argued—It was admitted that an action of reduction was competent, and everything necessary for the decision of the question could equally well be ascertained and settled under the present application, with the great advantage that the petitioner could thus obtain the redress craved without re-opening the question between him and his wife. Prior to 1886 the Court had, in virtue of its *nobile officium*, a similar though more limited power than what it now possessed under the Guardianship of Infants Act. There was never any finality as to orders for the custody of children. Parties could always come to the Court for a new order—*M'Lachlan* v. *Campbell*, May 25, 1809, F.C., *Macdonald* v. *Macdonald*, July 19, 1881, 8 R. 985; *Lang* v. *Lang*, January 13, 1869, 7 Macph. 445. If it were possible to ask for a variation of an order pronounced before the Guardianship of Infants Act, it was possible to ask for one now. Nothing could divest the Court of its *nobile officium*, which ran from day to day. It was a question how far it was necessary that there should be a change of circumstances. At all events, there was quite a sufficient change in the fact that the application was by the husband, who had not been represented before—*Robertson* v. *Stewart*, February 27, 1874, 1 R. 540 (*per* Lord Gifford). A series of cases established the rules which should govern the Court in questions of this kind, from which it appeared that the Inner House always gave the custody of a child to the father unless he was unfit. The fact that the petitioner had in the judgment of the Lord Ordinary been a bad husband by no means implied that he was an unfit guardian for the child. A man might be a bad

husband and yet a kind father—*Lang* v. *Lang*, *supra*; *Stewart* v. *Stewart*, June 3, 1870, 8 Macph. 821; *Lilley* v. *Lilley*, January 31, 1877, 4 R. 397; *Symington* v. *Symington*, July 15, 1875, 2 R. 974; *Bloe* v. *Bloe*, June 6, 1882, 9 R. 894; *Beattie* v. *Beattie*, November 10, 1883, 11 R. 85.

At advising—

Lord President—I think the prayer of this petition is rather unhappily expressed. It asks the Court to discharge the order of the Lord Ordinary, or alternatively to vary his interlocutor, which is language perfectly applicable if the petitioner was entitled to bring the judgment of the Lord Ordinary under review. But I hold he is not entitled to bring that judgment under review, as it has become a final judgment. I do not wish, however, to stand upon the mere language of the prayer of the petition as making the petition incompetent. In substance the petitioner asks us to reconsider the question as to the custody of his youngest child, and whether it is competent for him to do so without averring a change of circumstances is the first question before us.

Now, I think it must be competent for a petitioner to come at any time to ask the Court to interfere to regulate the custody of his child or children notwithstanding any judgment pronounced in the course of proceedings in the Outer House for divorce or separation. The question comes to be what the Court is to do. We cannot alter the Lord Ordinary's interlocutor, and find that it should not have been pronounced. I take it to have been very properly pronounced. But it is open to us to consider on any grounds put before us whether the present arrangements for the custody of the child are the most beneficial and most in accordance with the previous equitable rules regulating the proceedings of the Court in such matters, and to arrive at a conclusion on that question with the aid of these rules.

Again, if the judgment here had been the other way, and the custody had been given to the father, it cannot, I think, be imagined that the mother would not have been entitled to present an application to the Court under section 5 of the Guardianship of Infants Act, because by that Act she is entitled to submit to the Court considerations which would be irrelevant before a Lord Ordinary. Section 5 provides, *inter alia*—"The Court may, upon the application of the mother of any infant [that is, 'pupil' according to the law of Scotland] (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent." By that section authority is given to the Court to consider or to "have regard," to use the words of the Act, to several things to which it could not competently attach weight before the passing of the Act. Now, this petition is at the instance of the father, because the judgment of the Lord Ordinary gave the custody of the child to the mother. But if we sustain it so far as to find that it is competently brought, we should be at once compelled to have regard to all the considerations contained in sec. 5 of the Guardianship of Infants Act, because, although the petition is not brought on behalf of the mother, it would be most anomalous to consider a question between a husband and wife without regarding the things which are suggested for our consideration by the recent statute. That would mean that we are called upon to administer the law in one way when the petition is by the mother, and in another way when it is by the father.

The fact that we are entitled to have regard to all the considerations suggested in the recent statute puts the petition in a very different point of view than it would have been in before the statute. It might then have been contended that there was no suggestion of a change of circumstances save that the child was three months older, which was not a sufficient ground for entertaining this application. If, however, I am right in the view I take of the effect of the recent statute it puts us in a very different position altogether than the Lord Ordinary was in, who had no jurisdiction under the recent statute. We have jurisdiction, and upon a consideration of the things suggested in the Act it might occur that we would arrive at a different conclusion from the Lord Ordinary. I am therefore of opinion that the petition is competent.

On the merits of the question I must say that a consideration of the petition has not led me to think that the present arrangement for the custody of the child is an improper one. We see quite enough to enable us to conclude that it is much more expedient and a most reasonable and proper arrangement that for the present the child should remain in the custody of his mother.

Lord Adam—There is no doubt that there were petitions to the Court before the recent Act to regulate the position and custody of children, and it is possible to consider the petitions in the abstract so to speak. But we must now consider the provisions of the Guardianship of Infants Act, and deal accordingly. I think that a petition presented to regulate the custody of a child is competent.

The only question in this petition which we have to decide is the question which relates to the custody of the child. I agree with your Lordship in holding that we must consider the mother to be entitled to defend the custody she has got by all considerations in her power, not only those present to the Lord Ordinary's mind, and which he alone could consider, but by all the considerations suggested in the Guardianship of Infants Act, and among other things the wishes of the mother, which the Lord Ordinary could not consider. If that be so it would be a very anomalous result that in the petition presented to us we were not entitled to take into consideration the circumstances mentioned in the Guardianship of Infants Act, but were obliged to go on the old law. If that were so it might lead to our granting an application by a father, and next morning we might have an application from the mother, and might have to undo to-morrow what we had done to-day. Whenever the petition is by the father, the mother, who must be presumed to have the custody of the child, is entitled to defend her custody by all the considerations

in the Guardianship of Infants Act.

In these circumstances I come to the same conclusion as your Lordship—a conclusion at which the Lord Ordinary has also arrived without taking these circumstances into consideration. On the merits of the case, and on consideration of these circumstances, I have no hesitation in concurring with your Lordship.

Lord Lee—I concur on both points. But I do not wish it to be understood that the Lord Ordinary, in my opinion, though he had no jurisdiction under the Guardianship of Infants Act in disposing of the merits of the case with regard to the question of the custody of the child, was not entitled to take into consideration any consideration affecting that question, including the conduct of the parents. By the general principles applicable, independently of the Act of 1886, I think he is entitled to consider all the circumstances relative to the welfare of the child.

Lord Mure and Lord Shand were absent.

The Court refused the petition so far as relating to the custody of the child.

Counsel for the Petitioner—Balfour, Q.C.—M'Lennan. Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Gillespie. Agent—Alexander Morison, S.S.C.

Tuesday, March 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SIM *v.* THE NATIONAL HERITABLE PROPERTY COMPANY (LIMITED).

Process—Expenses—Fees to Counsel when not sent along with Instructions—A. of S., 15*th July* 1876, *sec.* 6.

The defenders of an action were represented at the closing of the record and at the discussion in the procedure roll both by senior and junior counsel, but at the proof which followed no fee was sent to junior counsel along with his instructions. In the defenders' account of expenses this fee was entered and claimed before the Auditor.

Held that this was not a "higher or additional" fee in the sense of section 6 of Act of Sederunt 1876, and the Auditor's report on the account, including this item, *approved*.

In an action by John Sim, 8 Balfour Street, Leith, against the Scottish National Heritable Property Company (Limited), the Court on 1st March 1889 assoilzied the defenders from the conclusions of the summons and remitted the accounts to the Auditor to tax and report.

When the Auditor's report of the account of expenses came up for approval a special report was submitted by the Auditor in which he stated that he had "taxed the defenders' expenses at £210, 19s. 3d., reserving for the determination of the Court the question of the right of the defenders to recover from the pursuer the fee stated in the account for junior counsel for attendance at the proof and previous consultation, amounting, with clerk's fees and agent's instruction fees, to £23, 16s. 8d." . . .

The Auditor appended to this report the following note:—"At the audit the defenders' agent stated that while the fees entered in the account for junior counsel prior to 5th June 1888 had been paid, the fees entered under that date and on 7th and 21st June had not been paid. It is provided in the general regulations, No 6, appended to the table of fees 1876 that 'a party shall not upon any account be allowed to pay a state higher or additional fees to counsel after he has been found entitled to expenses than were actually paid at the time.' But this rule does not apply either to cases on the poor's roll or to such as have been conducted gratuitously by the agent and counsel on account of the poverty of the party. Had the fees of counsel been wholly unpaid I should, in conformity with my practice, have passed the fees in question without remark but having regard to the terms of the regulation above quoted I think it best to reserve the question for the Court. If the Court shall be of opinion that the regulation is to be strictly interpreted, there will fall to be deducted from the taxed amount now reported £23, 16s. 8d., leaving £187, 2s. 7d. as the sum to be decerned for."

Argued for the defenders—The regulation cited by the Auditor did not touch the present question; the fee to junior counsel for the proof was not sent at all, consequently it could not in any sense be termed a "higher or additional" fee. The Court ought to be guided by the following cases—*Tough's Trustees* v. *The Dumbarton Water Commissioners*, May 14, 1874, 1 R. 879; *Batchelor* v. *Pattison*, July 15, 1876, 3 R. 1086; *Young* v. *Wright*, May 19, 1880, 7 R. 760.

At advising—

Lord President—The provisions of the Act of Sederunt regulating the table of fees has frequently been under our consideration, and the cases which were cited have a general bearing upon the present question. I do not think it necessary to go back upon these cases, because what we are here asked to do seems to me to be quite in accordance with these decisions.

When no fee is sent to counsel along with his instructions it may quite competently be forwarded at a later stage of the proceedings, but what the Act of Sederunt specially provides is that when a fee (and presumably a sufficient one) is sent along with instructions the successful party is not entitled, after obtaining a finding of expenses, to send an additional fee at the expense of the losing party.

In the present case no fee for the proof was sent to junior counsel and what we are now asked to pass is not a "higher or additional" fee but the fee which might at the time of the proof have been sent. I am therefore for allowing the fee upon the same grounds on which the fees were allowed in the cases of *Batchelor* and *Young*.

Lord Adam and Lord Rutherfurd Clark concurred.

Lord Mure and Lord Shand were absent from illness.

The Court approved of the Auditor's report of the account of expenses, and decerned.

Counsel for Defenders — Graham Murray. Agent—R. Ainslie Brown, S.S.C.

Thursday, March 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE CALEDONIAN RAILWAY COMPANY *v.* ALEXANDER CROSS & SONS.

Railway—Undue Preference—Difference of Rates over Same Line of Railway—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 83—*Relevancy.*

In an action at the instance of a railway company for rates charged for the carriage of goods, *held* that averments were relevant to entitle the defenders to a proof that the pursuers had charged other traders lower rates for goods of the same description conveyed or propelled by carriages or engines passing only over the same portion of the lines of the pursuers' railway.

Railway—Undue Preference—The Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *sec.* 23—*Process—Railway Commissioners—The Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *sec.* 58.

The Railway and Canal Traffic Act 1854 provides that no railway company is to give an undue preference to any person, company, or description of traffic.

Held (following the case of *Murray* v. *The Glasgow and South-Western Railway Company*, November 29, 1883, 11 R. 205) that interdict is the only remedy in a claim against a railway company for violation of the Statute of 1854; that the defenders' averments that the railway company had granted undue preferences to other traders in violation of the statute were irrelevant; and a motion by the defenders that the case be transferred to the Railway Commissioners *refused.*

Observed that any proceeding before the Commissioners to interrupt the illegal practice of which the defenders complained must be in the form of a complaint to stop illegal proceedings, and not in the form of a claim for payment of money.

This was an action by the Caledonian Railway Company against Alexander Cross & Sons, seed merchants and manure manufacturers, Hope Street, Glasgow, concluding for payment of £1635, being the balance of an account of £3481, which the pursuers alleged that the defenders had incurred to them for the carriage of goods between August 1886 and February 1888.

The action was raised in November 1888. The Railway and Canal Traffic Act 1888 came into operation on 1st January 1889, and judgment in the cause was given in March 1889.

The defenders averred in answer 2 as amended that they "conduct a large business in the manufacture and sale of chemical manures, which contain from 10 per cent. to 50 per cent. of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless the pursuers have conceded to various oil companies, and amongst others to Young's Paraffin Light and Mineral Oil Company, Limited, mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the said oil companies. The pursuers carry goods for the said oil companies and other traders between the following Glasgow stations, viz., Port Dundas, Stobcross, Buchanan Street, Sighthill, and London Road on the one hand, and the following stations on the other hand, viz., Auchterarder, Bridge of Allan, Brechin, Coatbridge, Cumbernauld, Crieff, Stirling, Balerno, Edinburgh, Midcalder, Biggar, and Lanark. The pursuers carry goods for the defenders between the same stations. For carriage of the same description of goods the pursuers have in the account sued for charged to the defenders between these stations, or some of them, higher rates than they have charged to the said oil companies and other traders. In like manner the pursuers have in the account sued for charged higher rates to the defenders than to the said oil companies and other traders as regards carriage of goods between the following Glasgow stations, viz., Eglinton Street and General Terminus on the one hand, and Bishopton, Port Glasgow, Kilmarnock, and Stewarton on the other hand. A statement of the said mileage rates, showing the differences between the rates charged to the defenders and those charged to the said oil companies for carriage from Glasgow to various places in Scotland is herewith produced and referred to. The defenders have applied to the pursuers for more precise information as to the mileage rates charged by them for goods of the same description as those sent for carriage by the defenders, but the information has been refused. Explained further, that the defenders deal largely in nitrate of soda, which is a substance of the same description and used for the same purposes as sulphate of ammonia. And similarly the defenders have been charged in the accounts sued on for the carriage of nitrate of soda, rates largely in excess of those charged to the said oil companies and other traders for the carriage of sulphate of ammonia. In particular, between Glasgow and Coatbridge, the pursuers have charged to Messrs Baird & Company, ironmasters, a mileage rate for the carriage of sulphate of ammonia very much lower than the rates charged in the accounts sued on for the carriage of nitrate of soda. Further, the defenders deal largely in sulphuric acid, which is conveyed by rail in tank waggons. Oil and coal tar are carried in a similar way, and are goods of the same description, in so far as relates to carriage. But the value of oil is about £12 per ton, and of sulphuric acid about £1, 10s. Nevertheless the pursuers carry oil and coal tar for the said oil companies at a mileage rate much lower per mile than they carry sulphuric acid for the defenders, and charge in said accounts." They also alleged —"If the mileage rates charged by the pursuers to the said oil companies and other traders be

applied to the said accounts, then the payments already made by the defenders are sufficient to discharge the same. The defenders refer to the Railway and Canal Traffic Act 1854, and particularly section 2 thereof, the Railways Clauses Consolidation (Scotland) Act 1845, and particularly section 83 thereof, and to the other statutes applicable to railway rates."

The following is the statement referred to by the defenders :—

"STATEMENT of Mileage Rates referred to in Defenders' Statement.

	Miles.	Rates charged to Defenders.	Rates charged to Oil Companies.
From Glasgow to			
Auchterarder	49	10/	6/3
Bridge of Allan	33	7/1	4/8
Brechin	115	15/	11/9
Cumbernauld	18	3/4	2/1
Crieff	56	10/	6/10
Stirling	30	6/6	4/3
Balerno	41	6/8	5/1
Edinburgh	47	6/	6/1
Midcalder	37	6/8	5/1
Bishopton	12	3/	2/
Port Glasgow	19	3/10	2/11
Kilmarnock	24	6/	3/6
Stewarton	18	5/3	2/9
Biggar	41	8/4	5/7
Lanark	30	6/8	4/3

"The mileage rates charged by pursuers for carriage of sulphate of ammonia are as follows—2d. per ton per mile for the first 12 miles; 1½d. per ton per mile for the next 28 miles; and 1d. per ton per mile for the miles beyond 40."

On 11th December 1888 the Lord Ordinary (KINNEAR) pronounced this interlocutor :—"Having heard counsel on the amended record, in respect it is admitted that the averment added by the defenders to their answer to the second article of the condescendence applies only to a portion of the account sued for, Appoints them to lodge in process, within eight days, a statement specifying the particular items of the said account as to which they allege that the rates thereby charged are higher than those charged to other traders for the same description of goods passing over the same portion of line only, stating in each case the point of departure and arrival between which the goods have been carried."

The defenders lodged this minute—"In obedience to the interlocutor of the Lord Ordinary, dated the 11th December 1888, the defenders state that their objection to the charges in the account sued for, on the ground that the rates charged to them are higher than the rates charged to other traders for the same description of goods passing over the same portions of line only, applies to all the items in the said account," &c.

The defenders pleaded, *inter alia*—"(1) The rates charged by the pursuers in the accounts sued on being such as to constitute an undue and illegal preference in favour of other traders, and to the prejudice of the defenders, are not recoverable. (3) The defenders having already paid the whole rates and charges which the pursuers are legally entitled to impose in respect of the carriage of the said goods, are entitled to absolvitor, with expenses."

On 21st January 1889 the Lord Ordinary pronounced the following interlocutor—"Allows the defenders a proof of their averment that the pursuers have charged lower rates to other traders than the rates charged to the defenders for goods of the same description conveyed or propelled by carriages or engines passing only over the same portion of the lines of the pursuers' railway, and to the pursuers a conjunct probation; and appoints the proof to be taken before the Lord Ordinary on a day to be fixed.

"*Note.*—As the record was originally framed the defenders' averments appeared to me to be irrelevant. It was decided in *Murray* v. *The Glasgow and South-Western Railway Company*, 11 R. 205, first, that in order to bring the enactment of 1845, upon which the defenders rely, into operation it was necessary that the traffic carried for different parties should be conveyed for the same distance over the same portion of the line; and secondly, that a complaint under the statute of 1854 is not competent before this Court. The pursuers maintain that the amendment does not remove the defects of the original averment on record. But I think it may be read as meaning that goods for other traders were carried for lower rates between the same points of arrival and departure, and this is the meaning which the defenders' counsel stated that it was intended to convey. The statement lodged in obedience to the last interlocutor is not a satisfactory compliance with the order, but I am satisfied by the explanation at the bar that the defenders ought not to be considered in default, and that it would be too strict a construction of their averments as now amended to hold them irrelevant on the ground suggested.

"The defenders moved that the case should be transferred to the Railway Commissioners under the 58th section of the Railway and Canal Traffic Act 1888. The pursuers maintain that the action is not one of those to which that section applies, and that if it were, the transfer, which is not imperative, ought not to be made. It appears to me that it would be inexpedient to decide either of these questions until it has been finally determined whether the defence is irrelevant, and to what extent."

The Railways Clauses Consolidation Act 1845 (8 and 9 Vict. cap. 33), sec. 83, provides—"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties, it shall be lawful, therefore, for the company, subject to the provisions and limitations herein, and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway, under the same circumstances, and no reduction or advance

in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

The Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), sec. 2, provides that no railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." . . . Section 3 provides—"It shall be lawful for any company or person complaining against any such companies or company, of anything done, or of any omission made, in violation or contravention of this Act, to apply in a summary way by motion or summons in England to Her Majesty's Court of Common Pleas at Westminster, . . . or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such court, . . . and if it be made to appear to such court . . . that anything has been done or omission made in violation or contravention of this Act by such company, . . . it shall be lawful for such court or judge to issue a writ of injunction or interdict restraining such company . . . from further continuing such violation or contravention of this Act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict it shall be lawful for such court or judge to order that a writ or writs of attachment, or any other process of such court incident or applicable to writs of injunction or interdict shall issue, . . . and such judge or court may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies, of such sum of money as such court or judge shall determine, not exceeding for each company the sum of £200 for every day after a day to be named in the order that such company or companies shall fail to obey such injunction or interdict. . . ."

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25), sec. 12, provides—"When the Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which but for this Act such party would have had by reason of the matter of complaint, provided that such damages shall not be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of." . . . Section 58 provides—"Every action or proceeding which might have been brought before the Railway Commissioners if this Act had been in force at the time when such action or proceeding was begun, and is at the commencement of this Act pending before any superior court, may, upon the application of either party, be transferred by any judge of such superior court to the Railway and Canal Commissioners under this Act, and may thereupon be continued and concluded in all respects as if such action or proceeding had been originally instituted before that Commission, provided that no such transfer nor anything herein contained shall vary or affect the rights or liabilities of any party to such action or proceeding."

The defenders reclaimed, and argued—The question between the parties being truly whether the pursuers had or had not given an undue preference in the way of rates to rival traders of the defenders was one specially suited for being sent to the Railway Commissioners in terms of the Railway and Canal Traffic Act 1888, section 58. This Act conferred valuable privileges on the Commissioners who could now award damages and deal with overcharges, while the only obstacle in a trader's way which could prevent him getting redress was if he delayed more than a year to make his application. The Commissioners formed a tribunal which had power not only to investigate, but also to give redress, while if the case was sent to trial before the courts of law the defenders would immediately institute proceedings before the Commissioners, and there could thus be parallel cases going on before two tribunals dealing with the same matter. It was impossible for the pursuers to maintain that their "rights or liabilities" would in any way be affected by the transfer, because these were specially reserved to them; and, as a matter of expediency, it was most desirable that this transfer should take place. In the event of there being a proof the findings of the Commissioners would be applied to the proof. Two questions were raised by the present case, one under the Railways Clauses Consolidation (Scotland) Act 1845, which could competently be tried in a court of law; the other a question under the Railway and Canal Traffic Act 1854, which could only be dealt with by the Commissioners, who had a privative jurisdiction. Upon these grounds the motion should be granted.

Argued for the respondents—No sufficient cause had been shown why this case should be transferred to the Commissioners. As to the powers of the Court in dealing with motions to transfer, it was permissive, and not binding upon the Court to make this transfer. The matter was thus in the discretion of the Court, who would not order such a transfer when, as in the present case, it would be attended with injustice to one of the parties. The matter was in Court, and could be speedily and simply disposed of, whereas the Commissioners were an uncertain body, and it was impossible to say when they would sit in Scotland, and would be ready to deal with such a matter as the present. The whole question was one of simple accounting and evidence, and required no railway skill to determine it. On the ground of expediency and justice to the pursuers it was desirable that a question like the present should not be remitted to the Commissioners.

At advising—

Lord President—This is an action at the instance of the Caledonian Railway Company against Cross & Sons for the sums due for the carriage of goods belonging to the defenders upon the pursuers' railway. I do not know whether there is any serious dispute as to the fact that the goods were carried, and part of the

defence stated is that the amount charged is just enough. However, that matter can go to probation if it is disputed, but the answer which the defenders make to this claim is substantially contained in the answer to the second article of the condescendence.

The first averment there is "that the defenders conduct a large business in the manufacture and sale of chemical manures which contain from 10 to 50 per cent. of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless, the pursuers have conceded to various oil companies, and amongst others to Young's Paraffin Light and Mineral Oil Company (Limited), mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the said oil companies." Now, these averments do not comprehend the averment that the goods of the two parties are carried under the same circumstances and over precisely the same line of railway, or anything else that would bring it within the operation of the 83rd section of the Act of 1845, and therefore it must be held to apply to the provisions of the Act of 1854 against undue preferences. It is quite settled, I think, by the case of *Murray*, that no claim can be brought in this Court against a railway company for the violation of the Act of 1854. The only remedy provided by that Act—the only remedy up to the present date, so far as I know—is that the company which violates that provision shall be restrained from doing so by interdict, and shall also be subjected to a penalty of so much per day. Therefore I think that part of the averment by the defenders is entirely irrelevant. If the party who makes that averment could not in an action in this Court enforce any claim against the railway company, just as little can it be pleaded in defence against an otherwise just claim of the railway company.

But there is another part of the averment which the Lord Ordinary has held to be relevant, and has admitted to probation, and that is the averment founded on the Act of 1845, and we must hold therefore in the form of the Lord Ordinary's interlocutor that what he has done is to refuse a proof of the first part of that averment as being irrelevant, and allow a proof of the second part. The Lord Ordinary has had some doubt, I think, as to whether the averment under the Act of 1845 is quite satisfactory or complete, but that has not been raised before us on any argument. Therefore I see no reason for doubting the propriety of the Lord Ordinary's appointment of the proof in this case, unless we are to deal with the motion of the defenders in this case that it should be sent to the Railway Commissioners under the Act of last year. Now, it does not appear to me what benefit the defenders could very well have by this transference of the case to the Railway Commissioners, because their complaint under the Act of 1854 cannot be made the subject of an action, and just as little can it be made the subject of a claim for money to meet the claim of the pursuers. The question would arise in the same way before the Railway Commissioners, and this averment under the Act of 1854 would be just as irrelevant and just as much regarded so by the Railway Commissioners as it is by this Court, in so far as it is made the foundation of a money claim. It is quite open of course to the defenders to bring some proceeding before the Railway Commissioners for the purpose of preventing the continuance of an illegal practice of which they complain, and whether it is precisely the same under the Act of 1888 as under the Act of 1854 or under the Act of 1873 it is needless to inquire, but it must be in the form of a complaint to stop illegal proceedings, and not in the form of a claim for payment of money. Therefore I am for refusing that motion and adhering to the Lord Ordinary's interlocutor.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent from illness.

The Court adhered.

Counsel for the Pursuer—Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defenders—Asher, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Friday, March 15.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MACKINTOSH *v.* ROSE AND OTHERS.

Entail — Disentail — Expectancy — Surplus — Agreement—Payment in Error.

In a petition for disentail of an estate the heir of entail in possession and the three next heirs agreed that the interests of the latter parties should be valued. In terms of the actuary's report the parties agreed by minute that the surplus funds remaining after valuation should be distributed proportionately to the several interests as already valued, and the surplus was distributed accordingly.

The Court, after remit to a man of business, approved of the proceedings, and disentailed the estate.

Four years thereafter the former heir in possession sued the three next heirs for repayment of the surplus funds, on the ground that the payment had been made in error, and that he had not been properly represented, as the same agent acted for all the parties.

Held that as the payments had been made under an agreement approved of by the Court, and that as the pursuer at the time of the transaction was *sui juris*, and had enjoyed independent advice, the action was incompetent, and the defenders *assoilzied*.

On 10th January 1880 Francis Henry Pottinger Mackintosh succeeded as heir of entail in possession to the estate of Farr, Inverness-shire. The next heirs of entail were Major Rose of Kilravock, and his sons Hugh and John.

In July 1882 Mr Mackintosh communicated

with the next heirs as to their consents to a disentail. They were willing to agree to this course on the value of their interests being provided for. In September 1882 he presented a petition for authority to record an instrument of disentail of the estates. In the proceedings a curator *ad litem* was appointed to each of the second and third heirs, both of whom were in minority.

The parties to the petition agreed to get a valuation of the interests of the next heirs on a statement to be adjusted between them, it being also agreed that neither party should be committed to accept the valuation, and that it should be made on the assumption that the estate was worth £40,000, as Mr Mackintosh, estimated it to be, but that if it were sold for less the values put on the heirs' interests should be reduced in proportion to the price.

Mr Deuchar, actuary, was asked to make the valuation on this assumption. On 14th February 1883 he intimated that he estimated the interest of Mr Mackintosh at £10,155, that of Major Rose at £820, that of Hugh Rose at £8425, that of John Rose at £2800. These sums amounted to £22,200. The actuary intimated that these sums did not exhaust the value of the estate, which, deducting a debt upon it, he took to be £28,000. There was a difference, after making a certain allowance for an annuity on it, of £4500 falling to be distributed among the heirs of entail. The actuary intimated that he "considered it fair that the distribution of this sum should be made proportionately to the interests of the parties" as he valued them. His final adjustment was :—

	As valued.	Additional share of surplus.	Total.
Present heir's interests,	£10,155	£2,056	£12,211
Major Rose's ,,	820	169	989
Mr H. Rose's ,,	8,425	1,707	10,132
Mr John Rose's ,,	2,800	568	3,368
	£22,200	£4,500	£26,700

After certain negotiations, during which another actuary, Mr Wallace, was consulted, it was agreed that the interests of heirs should be taken as they had been first estimated in an original draft report by Mr Deuchar, viz., Major Rose £989, Hugh Rose £10,132, and John Rose £3368. The minute of agreement was signed by Mr Andrew Macdonald as agent for the heir in possession, and Mr David Flett as agent for the consenting heirs.

The estate was disentailed and sold for £32,300 on 29th April 1884. Prior thereto the heir in possession had become bankrupt. His trustee employed Mr Deuchar to calculate the amount payable to heirs in proportion to the price, and on 26th September 1884 paid to the consenting heirs their amounts brought out as due to them, and which were, to Major Rose £707, Hugh Rose £7243, John Rose £2497.

In December 1887 Mr Mackintosh brought an action against Major Rose, Hugh Rose, and John Rose, claiming payment of £2310, in the proportion of £159, 10s. from Major Rose, £1613 from Hugh Rose, and £537, 15s. from John Rose. He stated that Mr Macdonald, his Inverness agent, had employed as agents in Edinburgh in the disentail proceedings the family agents of the defenders, and instructed them to act for him; that the report of the actuary was obtained by them; that the sum paid to the next heirs was grossly in excess of the true value of the defenders' expectancies in the said entailed estate; that he knew nothing of the arrangements, having handed over the whole matter to Mr Macdonald; and being himself unfit from mental weakness at the time to attend to business, that he never consented to the sums being fixed for the defenders' interests, and had been debarred by their agents from having skilled independent advice as to the correctness of the actuary's report; and that certain portions of land were included in the valuation which had not been part of the entailed estate.

He averred that the actuary's report proceeded on the footing that the surplus of the estate which remained after providing for the pursuer's and defenders' interests and other charges should be distributed proportionally among the pursuer and defenders. "The value of the estate was taken at £40,000, or less debts thereon at £28,000. The interests of the different heirs, together with other charges, amounted to £23,500, leaving a surplus of £4500, which was distributed in terms of the said report among the present and next heirs in proportion to their several interests as therein valued. Of said sum of £4500 the defenders were to receive in terms of said report £2444 subject to modification on the estate being afterwards sold, as the selling price was in that event to be taken as the basis of calculation. Out of the sum of £32,300, being the price which the estate actually realised, the defenders received a share of the said surplus amounting to £1768, 5s. in the following proportions:—Major Rose £122, 10s., Hugh Rose £1234, and John Rose £411, 15s. The defenders were not entitled to any part of the said surplus the whole of which legally belonged to the pursuer alone, and should have been allocated to him. He believes and avers, that had his interests been protected by a separate agent in said disentail proceedings, the surplus would have been so allocated according to law. The above sum of £1768, 5s. was thus overpaid to the defenders in essential error as to the pursuer's legal rights to said surplus, or at least under a mutual mistake as to the relative and respective rights of parties in said surplus."

The pursuer pleaded—"(1) The sum sued for having been paid to the defenders under essential error, in fact and in law as condescended on, the pursuer is entitled to repetition of the same. (3) The sum sued for to the extent of £1768, 5s. having been paid to the defenders in essential error as to pursuer's rights, or at least under a mutual mistake as to the respective rights of parties in said surplus, the pursuer is entitled to repetition of said sum."

The defenders produced certain correspondence and documents in order to show that the pursuer's interests were fully attended to by his agent in the disentail proceedings. These writings are referred to *infra* in the opinion of the Lord Justice-Clerk.

They pleaded that the pursuer's averments were irrelevant.

The Lord Ordinary (M'Laren), after hearing counsel on the relevancy of the action, found that the "defenders are not liable to repay so much of the sums received in payment of the value of their respective interests as represents their

shares of the surplus or residual estate remaining after valuation of the four life interests recognised by the statutes, and for this reason, that the sums paid to the defenders were not ascertained on the footing of a remit from the Court, but were settled under an agreement in which the defenders made equivalent concessions to the pursuer."

"*Opinion.*—I have now to consider the relevancy of the pursuer's claim.

"The action is instituted by Mr Mackintosh of Farr, a gentleman who was proprietor of an entailed estate in Inverness-shire, but who acquired the estate in fee-simple, and who afterwards sold it; and the object of the action is to recover from the three expectant heirs, whose interests were valued and paid for, a return of part of the money paid to them on the ground that there was error *in essentialibus*. . . .

"The other ground of claim involves considerations of a different and more complex character. It is said that a mistake, in principle or in law, was made by the actuary. It is not suggested that the actuary in any way failed in the duty which he had to carry out—the duty of valuing the expectancies—but that he erred in the final result brought out by him, by having divided amongst the four persons concerned the residual sum which remained after their respective interests had been valued. Now, that was not an actuarial error, but an error in law, if it were done. It is quite settled by the case of *De Virte*, if indeed there ever was a doubt on the subject, that under the present law whereby the heir in possession can compel consent, or can pay out the expectant heir without consent, he, the heir in possession, takes the whole estate, under deduction of the ascertained value of the life interests of the three heirs, whose interests alone are recognised. There is of course always a residual sum after providing for these interests, because the interests of remoter heirs, however small these may be, must be worth something. But I believe it is not in that way that the residue generally arises. It arises in this way—that it is necessary after valuing the interest of the heir in possession, and before proceeding to estimate the interests of the heirs in what remains, to consider the value of the contingent interest that might accrue to the children of the heir in possession, supposing that he should marry and leave issue.

"Now the value of that contingency may amount to a very considerable sum when the heir is a young man and likely to marry, and it is evidently a sum in diminution of the value of the expectancies of the three heirs actually next in succession. That surplus, whatever it may amount to, is a thing that inures to the heir under the statute. But in this case the surplus, which probably arises in the way I have described (but how it arises is immaterial in my view), was divided amongst the four persons concerned, and that is said to be a mistake which, when pointed out, entitles Mr Mackintosh to repayment. But before such a result is reached two elements have to be considered. In the first place, this was not a valuation by a court of law at all, but a valuation by agreement of parties, which was intended to supersede the necessity of a remit from the Court. And, in the second place, it is to be observed that the arrangement actually made between Mr Mackintosh and the expectant heirs contained a condition very much in his favour, viz., the condition that, while the valuation was to be made upon an assumed sale value of £40,000, yet when the estate came to be sold, if less was realised, the sums to be paid to the expectant heirs were to be reduced proportionally. As it turned out the estate only produced £32,000, and apparently the real difference is greater than these figures indicate, because after deducting heritable debt I rather think the net estimated value of the estate would be only £28,000, and the net proceeds of sale would be only £20,000, so that the reduction that would be made, and was actually made, in virtue of agreement upon the sums prospectively fixed by Mr Deuchar, the actuary, was a very material one, and I will even say that, as far as I can see without making a close calculation, that reduction must have amounted to a larger sum than the part of the surplus that was divided among the three expectant heirs.

"Now, I have observed that this was not a valuation by order of the Court, but by agreement, and when this concession is made by the expectant heirs that they are willing to be dealt with on the footing of the sum that the estate may realise, it is not unlikely that in valuing the interests allowance may be made for this circumstance. If Mr Deuchar valued the estate on the footing that it was to be disentailed by consent, under an agreement which none of the parties was obliged to sign, I am by no means clear that the case of *De Virte* would apply, because I think that under Lord Rutherfurd's Act, when consents could not be compelled but were purchased, the practice of actuaries was to divide the whole estate amongst the four persons interested in the proportions of their interests, and that it appears to me would have been a sound practice as between parties any one of whom could place a veto upon the sale or disentail. But without inquiring too strictly into the principles which ought to regulate the valuation of life interests in cases where the matter is to be regulated by agreement, it is enough for this case to say that the matter was not dealt with on the same footing as if it had been done under a remit from the Court, and that there were variations on the strict rights of parties on both sides. I am not satisfied that the pursuer has suffered any injury from these variations, or that they were things done without his consent. It appears that he was first dissatisfied with Mr Deuchar's report, and then obtained a valuation from another actuary, Mr Wallace, which seems not to have been so favourable to him, and I think that when he eventually agreed to accept Mr Deuchar's report it must be taken that the parties had settled the compensation after due consideration, and notwithstanding the view originally entertained by the pursuer that Mr Deuchar had not given him as much as he had a right to expect. I think that no sufficient reasons have been shown for re-opening the matter with which I am now dealing. Of course I cannot altogether overlook the observations that have been made about the position of Mr Macdonald, the agent in Inverness, who authorised and carried through these proceedings. If there were any real and substantive statement of Mr Macdonald having exceeded his powers for the promotion of the interest of creditors or other persons, that is a

thing that ought to be inquired into. But the pursuer says he left the management of this transaction entirely in Mr Macdonald's hands. Mr Macdonald had no interest except to promote the pursuer's pecuniary concerns to the best advantage, and I think that an agreement signed by an agent who has full powers cannot be set aside upon the mere allegation that the pursuer was not personally consulted, and that the agent acted for him as he could do himself.

"In this connection it is instructive to observe that after Mr Macdonald had signed the agreement accepting the sum that Mr Deuchar had brought out in his report, security had to be given, and the deeds of security over the estate were of course signed by Mr Mackintosh himself. He had the opportunity of objecting to the transaction and stating that he never authorised it, and of taking exception to the deeds, but nothing of the kind was done. The deeds were signed and acted upon without the slightest objection." . . .

The pursuer thereafter pressed before the Lord Ordinary only one of his contentions as to land having been included in the calculation which did not form part of the entailed estate.

On 15th November 1888 the Lord Ordinary (Lord Kinnear for Lord M'Laren) found that the only remaining portion to which that objection applied had formed part of the entailed estate, and assoilzied the defenders.

The pursuer reclaimed. In the Inner House he did not insist in any of the objections that land had been valued which did not form part of the entailed estate.

Argued for the pursuer—Mr Deuchar in preparing his report had proceeded upon a wrong principle in allocating the surplus as he did. It was decided that all the next heirs of entail were entitled to was the value of their expectancies; whatever was the value of the estate over that went to the former heir in possession as the fee-simple proprietor of the disentailed estate—*De Virte* v. *Wilson*, December 19, 1877, 5 R. 328. In this case the actuary had given part of the surplus to the next heirs. He was led into that error by the statements made to him by the agents in the petition proceedings, who had led him to understand that the consents of the next heirs must be valued as if they could have refused to give them, but under the Entail Acts the petitioner could have dispensed with their consents. The agents acted for the petitioner and for the next heirs; they had favoured the latter at the expense of the former. The ground of the Lord Ordinary's judgment was the agreement said to have been signed on behalf of the parties; in the first place, nobody had acted upon it, and secondly, the pursuer was not bound by it as he had had no independent legal advice, and from his intemperate habits and state of health was not able to look after his own interests. If the pursuer signed the agreement, or consented to its being signed on his behalf under the erroneous idea that he was bound to give the defenders the extra payments stated in the actuary's report, he was entitled to get back the over-payments so made, because an error in law of this kind vitiated a deed. There was no case made by the pursuer that the defenders were aware they were receiving a larger sum than their due, but that was not necessary if it was shown there was mutual error—*Baird's Trustees* v. *Baird & Company*, July 10, 1877, 4 R. 1005; *M'Laurin* v. *Stafford*, December 17, 1875, 3 R. 265.

The defenders argued—Although the consents of the next heirs could have been valued by order of the Court, that was not done here, as the parties entered into an agreement as to the way in which they were to be valued. Mr Deuchar took the usual way of dealing with those matters. The way in which the actuary dealt with this surplus was the way approved of in *De Virte's* case, *supra cit.* (Lord Shand's opinion, 336). The word "surplus" was not the proper word to be used here; it was really the final calculation of the actuary as to the next heirs' expectancies. After the actuary had reported all the parties agreed to take his report as correct, and their actings showed that the heirs consented to forego payment in cash, and took a bond and disposition in security for the value of the shares. In the circumstances they actually lost money, because Mr Mackintosh became bankrupt, and the estate had to be sold at an unfavourable time, with the result that only £32,000 was obtained for it, and the heirs got actually less than Mr Deuchar's report gave them, leaving out of account the way in which the actuary had dealt with the surplus. The agents had no doubt acted for both parties in the proceedings for the disentail, but, as the correspondence showed, the petitioner had had independent advice. The whole matter had been arranged and finished, and could not now be gone back upon; there was no question raised of fraud on the part of the defenders.

At advising—

Lord Justice-Clerk—Mr Mackintosh, the heir of entail of the estate of Farr, became embarrassed in his circumstances some years ago, and executed a trust-disposition in favour of his creditors in 1881. The opinion was then formed that it would be a good thing to have the estate disentailed, in order to do which he would have to buy out those heirs who under the Entail Acts were entitled to have their interests considered. The arrangements for the disentail were carried out in an entirely friendly spirit, and all parties concurred in taking Mr Deuchar as their actuary. After the interests of the heir in possession and the next three heirs in succession had been valued it was found that the value of the estate, which was estimated at £40,000, had not been exhausted, but that a sum of £4500 was left over. Mr Deuchar in his report stated that this sum fell to be rateably apportioned among the persons having an interest in the estate, and he accordingly added a sum of £1760 to the value of the interests of the three next heirs. Then, further inquiry was desired and a report was got from Mr Wallace, but ultimately all parties agreed to accept Mr Deuchar's report as the one to govern the matter.

Two questions are now raised—First, was the principle upon which Mr Deuchar proceeded in allocating this surplus of £4500 an erroneous one, and did the heirs get money which they should not have got? and, secondly, the pursuer says that he was not properly represented in the transaction, as the same agent acted for him in

carrying out the disentail, and for the next heirs.

As regards the first of these questions, whether the accountant was right or not in his way of dealing with the surplus, I should be inclined to hold that his opinion was erroneous. I should think that after the calculation of the interests of the next heirs in the estate, including the clause of their children succeeding, and any other rights incident to their position, if there was a surplus upon the estimated value of the estate, that that went to the heir in possession as fee-simple proprietor of the estate. If the fact that Mr Deuchar had taken an erroneous view in his dealing with this surplus had been sufficient for the decision of the case we must have found for the pursuer. But I think the case cannot be decided on that view alone.

Another objection is that the pursuer was not properly represented in the negotiations which resulted in the disentail. These negotiations took place seven years ago, and even upon that ground I would not be inclined to listen to the objection, but I think that it is most effectually disposed by the documentary evidence before us. I think that evidence shows that Mr Macdonald of Inverness did look after the pursuer's interest, and that although Messrs Macrae, Flett, & Rennie did act for both parties, they did so only in the sense of seeing that matters of ordinary form were properly carried through, and as general advisers, but that Mr Macdonald did advise Mr Mackintosh is quite settled. It is stated by Mr Deuchar in his letter of 22nd March 1888—"I have some recollection of a meeting taking place after the issue of the report (and after the parties had got another report from Mr Wallace), when a gentleman from Inverness, Mr Allan of Inglis & Allan, W.S., and a member of Macrae, Flett, & Rennie's firm (whether Mr Flett or Mr Rennie I cannot say) were all present. It took place at my office, and the report was discussed, but I have no notes of what passed; and I think the gentleman from Inverness was Mr Macdonald." I think that we not only have it shown thus, but also in the pursuer's own letter of 27th June 1883, in which he writes to the agents—"Dear Sirs,—Upon the invitation of my agent Mr Andrew Macdonald, solicitor, Inverness, I have come here and considered the terms of your letter of the 23rd inst. to him." In that letter he distinctly states that he has been in communication with his solicitor in regard to the conditions of the disentail. Accordingly these proceedings were incorporated in the petition for disentail; a remit was made by the Lord Ordinary to a man of business, and he reported that everything was in order, and authority was granted to the disentail.

There appears to be nothing in this case out of the usual course of events, but the subsequent proceedings show that this matter was dealt with as one of arrangement, because Mr Mackintosh could have forced these next heirs to take what was found to be their interest in the estate, and he would then be free. They, on the other hand, could have prevented any disentail taking place until they had been paid the money so found due to them. But the parties very properly made a different arrangement. The defenders did not insist upon being paid their shares at once as in the estimated value of the estate, but agreed that if the estate when sold should realise a less sum than the estimated ammount, then their shares were to suffer a corresponding diminution.

That was in fact what took place, for Mr Mackintosh's difficulties increased, his estate was sequestrated, and a trustee appointed. Now, the trustee, whom we must hold to have acted for everybody's interest, the bankrupt's as well as the creditors, carried out what had been done previously. He had power to get legal advice as to the proper mode of proceeding, and no doubt he did so, if he found it necessary, and he so adjusted matters that what took place was this—The estate was sold for £32,000, and the defenders in good faith and in fulfilment of their agreement took from the trustee as their shares in the estate a less sum than they had been found entitled to in Mr Deuchar's report. In point of fact they each received a less sum than Mr Deuchar had brought out in his original calculations without considering their share in the surplus at all. Now, the trustee in 1884 plainly indicated his opinion that the allocation of the sums due to the different persons interested had been come to by a special arrangement, and conducted by Mr Deuchar in the interest of all parties. On 17th July 1884 he writes to Mr Deuchar—"Your calculations were made on the basis of the estate of Farr being worth £40,000, but by agreement of parties the results brought out were liable to modification should the estate fetch a less price when sold." Then he asks him to modify the shares of the three next heirs in accordance with the sum actually received for the estate. The three heirs who by agreement bound themselves to accept of the sums brought out upon an amended calculation got these, and got nothing more.

That is enough to settle this case, because if we are to put aside the agreement, and decide the case upon the strict rights of parties, then the defenders would be entitled to take up the position that in deciding as to their shares the estate had been valued at £40,000, and that they had received no more than had been given to them upon that assumption. All this took place a long time ago, and although I do not say that that would absolutely bar the pursuer from succeeding, I think the lapse of time is of some importance; but in this case it is plain that the parties came to a friendly arrangement, and I do not think we can disturb it.

Lord Young—I am of the same opinion, and after what consideration I have been able to give to the case, I confess I come to that conclusion without any difficulty. I am clearly of opinion that the action is irrelevant, but I may say that I am as clearly of opinion that it is incompetent.

The action relates to certain incidents which took place in a judicial proceeding before this Court before a Lord Ordinary some years ago, with a view to the disentail of the then entailed estate of Farr in Aberdeenshire under the provisions of the Entail Statutes. One incident was that certain persons who had an interest in the estate as being the three next heirs had to be settled with before the petition could be proceeded with. That operation could be done in two ways, either by a judicial remit to an accountant to value their interest, or it could be done outside the Court altogether by arrangement between the parties. In this case the parties

arranged what should be the price taken by the three heirs next entitled to succeed under the deed of entail for giving their consent to the disentail, and they therefore gave their consents upon terms which were satisfactory to them and to the heir of entail in possession of the estate. That was reported to the Court, and the Court after making a remit to a man of business approved of that proceeding, as well as of the rest of the proceedings, and disentailed the estate.

In my opinion it is incompetent to bring an action in which we are asked to say that there was an error in making an arrangement which was reported to the Court, and upon which the Court proceeded. Suppose there had been a judicial remit to Mr Deuchar to ascertain the value of the expectancies of the next three heirs, the parties not having agreed what these should be, suppose that Mr Deuchar had reported in the very same terms we have here, and that the Court had approved of his report, and had afterwards disentailed the estate upon the conditions stated in his report, it is clear that it would be incompetent for us to go back upon the proceeding. The matter had been adjudged of by the Court, and was at an end. The matter was arranged in a different manner, but I think that that makes it all the clearer if the only allegation of error that can be brought forward against the report was that of mismanagement of his affairs by one who was *sui juris*. I disregard all that was said by the pursuer's counsel about his intemperate habits and weakness of mind; he managed his own affairs, and was *sui juris*.

There is nothing ambiguous in Mr Deuchar's report. He proceeded in a manner which I confess I do not think the best manner of proceeding in a case like the present, for he valued not only the interest of the three next heirs in the entail, but also the value of the interest of the heir in possession, that was his chance of continuing to live on. After doing that, the value of the estate was not exhausted; there was a surplus, and with regard to that he says, "In the circumstances I consider it fair that the distribution of this sum should be made proportionally to the several interests of the parties as valued above." Did the parties consider that a fair arrangement? If the pursuer did not think so, then his proper course was to ask Mr Deuchar what circumstances in the case made him think it a fair arrangement. The parties were satisfied with that arrangement, and they made a minute expressing their satisfaction, and do not even ask Mr Deuchar to write out his report; they are satisfied with the draft report.

Is there one word in all these proceedings to oblige us to reduce the whole proceedings in this entail petition, or to call upon the defenders to repay the sum they received as having been erroneously paid to them. I am clearly of opinion there is no reason for such a course.

We are not called upon here to decide whether the question that came before the Court in the case of *De Virte* was rightly or wrongly decided, but I have no hesitation in saying that I think it was rightly decided. The three next heirs of entail are not entitled to more than the value of their expectancies as ascertained; they have no claim to anything more, and the heir in possession is not only entitled to his interest, but to everything that remains after the heirs have been paid off. But I can imagine that after seeing this report of Mr Deuchar, and the statement that the parties were satisfied with it, the Court would not have inquired any further.

But there is an unusual multiplication of circumstances against this application. The heir who had executed the disentail became bankrupt shortly afterwards, a trustee was appointed upon his estate, and the next heirs had to be paid their shares by this trustee. He considered the matter, and did pay them. They had agreed that instead of being paid their shares in cash at once that they would take a bond and disposition in security over the estate of Farr instead. Well, it was the business of the trustee to pay the debt over the estate or not as he thought the claim just or not, so that if we were to disturb the present arrangement we should have to go back not only upon the proceedings in the petition for disentail, but also upon the sequestration proceedings. The matter has been conclusively settled, and I think there is no ground for holding that the defenders got paid more than they were entitled to.

Lord Lee—My view is a short and simple one. I hold that the action is irrelevant, because it is in my opinion an attempt to attack in an incompetent manner the proceedings in the former petition of disentail.

The pursuers attempt is to see if he can make out a sort of *condictio indebiti*, founding upon *De Virte's* case and Mr Deuchar's report. I have no doubt whatever that the decision in *De Virte's* case was a right decision. But the proceedings were not carried out in this case in the same way as in *De Virte's* case. The disentail there proceeded upon consents, and not under the provisions of section 5 of the Act of 1875, by which the Court might dispense with the consents of the next heirs if they would not give them. Nothing of the sort took place here; what was done was a transaction by which the requisite consents were given by arrangement. I cannot find anything wrong in the wording of the agent's letter to Mr Deuchar that consents were required. Consents were required if they were not forced. I agree with the Lord Ordinary that we cannot now go back upon the proceedings.

The Court adhered.

Counsel for the Pursuer — Kennedy — Orr. Agent—J. D. Macaulay, S.S.C.

Counsel for the Defenders — Macfarlane. Agents—Macrae, Flett, & Rennie, W.S.

Friday, March 15.

SECOND DIVISION.

HENDERSON *v.* CARRON COMPANY.

BARRISCELL *v.* CARRON COMPANY.

Reparation—Master and Servant—Negligence—Unsafe State of Master's Plant.

A workman was fatally injured while engaged in putting coal in a furnace. The furnace was at the time, in the knowledge of the employer, liable to send up rushes of flame owing to the caking or "scaffolding" of the fuel and ironstone, and it had been in that condition for about nine months, during which attempts, known by the employers to have been ineffectual, had been made to remove the cause of accident. It would have been possible to remove it by a method which would have been somewhat expensive, and which, after the accident, was resorted to with success. *Held* that the employer was responsible for the accident.

On 10th November 1887 Alexander Henderson, a labourer in the employment of the Carron Iron Company at Carron, was severly injured while putting a barrow load of coal and ironstone into No. 9 furnace there, by an explosion resulting in a rush of flame through the door near the top of the furnace which he had opened for the purpose of pouring in the coal and ironstone. Henderson was so much injured that he died on the following day.

On 31st December 1887 John Barriscell, also a labourer there, was severely burned from the same cause at the same furnace.

An action was subsequently raised by William Henderson, the father of Henderson, against the Carron Company for damages for his death. An action was also raised by Barriscell for damages for the injuries he sustained.

The pursuers averred that the accidents were caused by the negligence of the defenders.

The facts proved were as follow—The cause of the explosion in each case was that the fuel and ironstone in the furnace had "scaffolded"—that is, part of it had adhered to the brickwork on the sides of the furnace, and there had thus been formed masses of overhanging material within the furnace which was burned away, more or less, below, but remained caked above. At intervals when such a condition of the furnace occurs pieces of the overhanging material falls into the burning part, and the result is a rush of flame, which may pass out by the safety-valves, or if the door be open in the course of the work, will more probably pass out by it. "Scaffolding" is a troublesome state of the furnace difficult to cure, and deleterious to the quality of iron produced. The furnace at which the accidents happened, No. 9, was like the other furnaces at Carron, a close-top furnace of a well-known kind. It was charged by a door being opened near the top, and the barrow load of material being throw in upon the burning mass in the furnace. In this respect it was unlike the defenders' other furnaces near it, which were charged by the material being placed upon a "bell" or platform of the shape of an inverted bell which was lowered by machinery into the furnace, and then raised again, the labourer being meantime behind a screen. In the bell furnace accordingly the labourer is not exposed to the same danger from the rush of flame in the event of a slip as in the furnace in question, in which the labourer has to stand close to the open door and without a screen, it being impossible as the defenders maintained to provide a screen for it. The bell furnace, however, according to the defenders' evidence, is liable at times to explosions more serious than those which were likely to occur at No. 9 furnace. It was proved that explosions had occurred at bell furnaces, but there was no proof of injury to workmen from these explosions.

The "scaffolding" at the furnace in question had lasted for a considerable time. It was proved that it had taken place for several weeks prior to the coming to the works on 1st May 1887 of a new manager, Mr Love, that it had then continued for several weeks more before he was satisfied from observation of the furnace that it was taking place. It was also proved that on becoming aware of it he had adopted measures by blowing the furnace down somewhat on at least three occasions before the injuries to Henderson occurred. The means he had taken were in themselves, according to the evidence of men of skill, proper and ordinary means. After the accident to Barriscell the furnace was blown out and cleared and again kindled. The scaffolding in question was proved to be a very bad case in point of degree as well as in the length of time it lasted, and the pursuers sought to show that the proper course in the circumstances was to blow out the furnace altogether and rekindle it after clearing it out. The defenders led evidence to show that to blow out the furnace and rekindle it would have caused great expense, and was not a usual course, though their witnesses admitted it to be the final remedy after all others had failed.

The contentions of the parties and the nature of proof led so far as not above detailed are fully given *infra* in the note of the Sheriff-Substitute (Erskine Murray).

The Sheriff-Substitute pronounced this interlocutor in Henderson's case:—"Finds (1) that the defenders the Carron Company have a close-top blast-furnace, No. 9, charged by doors from above, which was started in the spring of 1887: Finds (2) that a new manager, Love, being appointed in April, found the furnace not working satisfactorily, as 'scaffolds' or adhesions of material took place in it, which caused 'slips,' and deteriorated the quality of iron made: Finds (3) that he had made several attempts to remedy the evil by blowing down the furnace partially, and directing the blast to the root of the 'scaffold,' and on each occasion improved the working of the furnace, but his successes were only partial and temporary: Finds (4) that scaffolding, and its consequence—slipping—are evils of which the true cause and the complete remedy are not yet known: Finds (5) that on 10th October 1887 Alexander Henderson, a young man, son of pursuer, earning about 28s. a-week, who had worked on the top of No. 9 for about eight or ten weeks, but had been away from it for a month, was again sent there to open the furnace doors for men who were putting in the charges: Finds (6)

that when he had opened one of the doors, a slip took place in the furnace, causing an uprush of flame and gas, by which he was burnt severely, in consequence of which he died: Finds (7) that his father, the pursuer, has raised the present action of damages: Finds, on the whole case in law, that pursuer has failed to prove that the death of his son was occasioned by any fault on the part of defenders, or those for whom they are responsible: Therefore assoilzies the defenders from the conclusions of the action, &c.

"*Note.*—Some years ago blast-furnaces for the production of pig-iron were made with open tops. The gases escaped, rushing away with the flames into the atmosphere. Of late years close-topped furnaces have been devised, by which the gases, instead of being allowed to escape, have been turned down and utilised. This is a great gain both for the furnace owners and for the public, the emission of noxious gases being thus minimised. The gain has not, however, been unaccompanied with a certain loss. In blast-furnaces there exists more or less a tendency in the material when partly fused to adhere to the brick-work forming the inside of the furnace. This is termed 'scaffolding,' probably in consequence of the similarity of the adhering masses to scaffolds against a wall. Sometimes it is called 'ringing,' when the material adheres in a ring all round, which it does principally in the lower parts or 'boshes' of the furnace, which resemble an inverted cone. When once a scaffold gets rooted in this manner, the material piled in from above clings to and increases it, and the ore gets unequally fused—the lower parts in the centre nearest the blast being more easily melted, and coming away, leaving gaps under an arch of material like those caused by water in winter under a bank of snow. From time to time, as the superincumbent mass of material gets too heavy, portions of the scaffold or bridge thus made break away and fall down into the fiery gulf below. These are called 'slips,' and are naturally accompanied by a great upward rush of fire and gas. Scaffolding may take place in a furnace whether almost new or growing defective through old age. Science has not yet discovered the cause of it; it is probably the result of a combination of chemical and mechanical causes. Its effect is a deterioration in the quality of iron produced; instead of No. 1 there may only come out No. 3 or No. 4 in consequence of the imperfect and irregular fusion. Now, although scaffolding and slips were not unknown even with the old open-topped furnaces, they have become more prevalent with the close-topped furnaces, and while science has not yet discovered their cause, neither has it discovered a satisfactory remedy for them. The usual method adopted to get rid of scaffolding has been to blow down the furnaces as far as possible, and then by directing the blast on what is supposed to be the root of the scaffold, to melt it away and thus get rid of it. This succeeds generally if the scaffolding has been of short duration, and even sometimes if it has been of long duration, though apparently the longer the scaffolding has existed the more uncertain is the success of this remedy. Still, even if a permanent cure is not thus effected, the furnace is often thus put into good working order for a time, though it may relapse into its bad habits. Failing this remedy, the only other is the complete blowing out of the furnace and allowing it to cool, in the course of which most of the scaffolding comes away, and what remains can be then taken away. But this process is very rarely resorted to for several reasons. In the first place it is very expensive; much material is wasted, much time is wasted, much labour is wasted; several hundred pounds may thus be expended, and after all, though the particular scaffolding then in existence may thus be removed, this by no means ensures that when the furnace is started again the scaffolding may not begin afresh and run a new course. For scaffolding, as has been mentioned, may commence in a newly-started furnace, and as its cause is not known, it is almost impossible to prevent it by antecedent action. So an entire blowing out is a very exceptional matter, and a furnace owner cannot be bound to have resort to it except in very exceptional cases indeed.

"In the present case the scaffolding had commenced very shortly after the furnace had been started, before the witness Love entered on the management. Love made three or four different attempts to get rid of the scaffolding in the usual way by blowing down the furnace as far as possible. On each occasion he improved the working of the furnace, so that for a time it drove all right, but it always relapsed into its bad ways; his last attempt was made after the accident to Henderson, and before that to Barriscell. After that to Barriscell, despairing of success in the usual way, he blew out the furnace entirely at the end of December, got rid of the scaffolding, and started the furnace anew on the 7th February, since which, as yet, it appears to have been 'driving' satisfactorily. Only a month and a-half, however, have yet elapsed.

"The accidents to Henderson and Barriscell happened in much the same way. Henderson on 10th November, and Barriscell on 31st December, were engaged in the operation of aiding at the charging of the furnace No. 9, a close-topped furnace, by opening the charging doors. A door had been opened to charge, a slip happened at the moment, a gush of flame and gas rushed out. Henderson was so severely burned that he died. Barriscell was more lightly injured, but was off work for some time.

"In the first action Henderson's father sues for damages for the loss of his son; in the second Barriscell sues for the damages to himself.

"The pursuers' main contention is that the defenders were in fault in not adopting sooner the remedy of blowing out the furnaces entirely. On the whole, the Sheriff-Substitute is unable to agree with this contention. It was a matter of opinion which remedy was the better to adopt; and the Sheriff-Substitute does not think that defenders were in fault in not adopting sooner the very exceptional and unusual course of blowing the furnace out, which, it must be remembered, would by no means necessarily ensure the future efficiency of the furnace.

"Another ground stated on record is, that the defenders were in fault in the way they charged their furnaces, putting in too much metal in comparison with coal, and thus causing scaffolding. This is abundantly disproved.

"A third ground of liability is, that whereas on some of the blast-furnaces there is a shelter for the men, there was none on No. 9. This arises from

the nature of the furnaces. Some of the close-topped furnaces are on the bell system. In furnaces on this system there is inside the furnace a 'bell' or inverted funnel, which when raised touches with its sides the sides of the mouth of the furnace, so that all round it there is a circular cavity into which material, or as it is technically called, 'burden,' and coals are thrown; while this is being done there is no danger whatever, as there is no opening down to the furnace. But when the outsides of the bell are fully charged the bellman, by machinery at a little distance, lets down the bell; of course all the material falls off into the furnace, and there being so much of it there is necessarily an upward rush through the large opening of flame and gas. To shelter the men on the bell furnaces at the moment of lowering the bell, a screen has been erected. But No. 9 is not charged by a bell, but by four doors. Only one door is opened at once, and thus a comparatively small charge is put in. But thus, while on the one hand there is not the reason, as in the case of the bell furnaces, to expect a fiery rush, there is on the other hand no possibility of sheltering the men, for they must bring the barrow to the door, and empty it right into the open furnace. So a screen in the case of No. 9 would be useless.

"Again, the pursuers contend that there is a defect in the defenders' ways, &c., in their not providing sufficient valves or explosion doors, by means of which the force of the explosion would have expended itself otherwise, instead of rushing through the charging doors at which Henderson and Barriscell were burned.

"But the ordinary valves of No. 9, though not quite so large as those at Gartsherrie, seem large enough for all practical purposes. There are also explosion doors at the ends of the upper cross tube, with the view that if such a heavy explosion were to take place that the gases could not readily enough escape by the valves, they might find a vent without blowing off the machinery. But whether or not the explosion doors had in this case got jammed intentionally or unintentionally is really a matter of little moment, for even had they been in working order the gas would have preferred to rush out by the charging door, which was wide open than to take the trouble of opening a door at all, as it always must follow the line of least resistance.

"On the whole, therefore, the Sheriff-Substitute cannot see that the accidents either to Henderson or Barriscell were occasioned by any fault on the part of the defenders. There was no fault on the part of the men injured, so the fatality must be put down to misadventure."

In the action by Barriscell the Sheriff-Substitute also assoilzied the defenders.

The pursuers appealed to the Court of Session, and argued—That there had been fault in allowing a bad "scaffolding" to exist for nine months uncured. Some time might no doubt be allowed for the endeavours of the manager to cure the evil by partial blowing down, but the time he had taken during which the men were exposed to daily danger was unprecedented and excessive. It was said that the course of total blowing out was expensive and uncertain, but (1) the proof showed that the defenders' estimate of the cost was excessive; and (2) even if the cost had been very great the defenders were not justified in exposing men to the risk for so long a period on the mere ground that it would be a source of expense to remedy it. Further, the fault was the greater that there was not, and according to the defenders could not be, a screen for the protection of the men, and that, as the defenders argued, and as the Sheriff said, the rush of flame was on scientific grounds certain to come through the open door. If so, the men should not have been exposed to the danger. But that danger was not unavoidable. If a bell furnace had been used the men would have had a screen, and would both have been saved.

The defenders supported the interlocutor of the Sheriff-Substitute.

At advising—

Lord Justice-Clerk—Without going into any detail I think this case may be very shortly dealt with. The defenders have certain bell-topped furnaces and other furnaces fed by doors. The case for the defenders is that to feed these latter furnaces it is absolutely necessary the material should be emptied into them by men. I accept that as a fact, and I also accept it as a fact that these furnaces are of the ordinary build and are fitted with all the modern appliances yet devised. But inside all furnaces—since the tops were closed—there is a tendency for the material to cake at the top of the "boshes," by which "scaffolds" of hanging material are formed at the sides.

These "scaffolds" are injurious to the satisfactory output of iron, and are dangerous to those employed in charging the furnaces, because if they "slip" there is a considerable rush of flame upwards, and that goes out at the doors if they are open as the easiest mode of escape. I accept the defenders' statements that science has not yet explained how that "scaffolding" occurs, and that no remedy has yet been devised to protect workmen against such risks. I accept also the statement that there is no means by which coals and ironstone can be admitted without the man feeding the furnace being burnt to death if there should be a rush of flame to the door. That such should be the case is incredible to my mind, but I accept it because it is stated in evidence. The question then is, whether the defenders were entitled to go on struggling with this "scaffolding" for nine months, or whether they were not bound to put an end to it before then by the admittedly competent method of blowing out the furnace? I think their action was not justifiable. Seeing that the danger was unavoidable except by one method they were not entitled to go on for nine months without having recourse to that method. That the danger was considerable is shown by the fact that two very serious accidents occurred within six weeks of each other. I am therefore for recalling both interlocutors and finding both pursuers entitled to damages. I propose that we allow £100 of damages to the workman who lost his son, and £50 to the workman who was himself injured.

Lord Young and Lord Lee concurred.

Lord Rutherfurd Clark was absent.

The Court pronounced this interlocutor in Henderson's case:—

"Find in fact (1) that on the occasion libelled the pursuer's son Alexander Hender-

son, then in the employment of the defenders, was sent by their night superintendent to the top of their furnace No. 9, to open its doors for the men putting in charges of coal and ironstone; (2) that on his opening one of the doors a 'slip' or fall of material adhering to the interior of the furnace took place causing an uprush of flame, by which he was burnt severely, and in consequence of which he died; (3) that the said furnace had been in a dangerous state from the formation of 'scaffolding' therein which had repeatedly caused such slips in the furnace during the previous nine months, and the death of the said Alexander Henderson is attributable to the fault of the defenders in allowing the furnace to be worked for so long a period in the state in which it was, notwithstanding the fact that all efforts to remove the 'scaffolding' had failed: Find in law that the defenders are liable in damages and *solatium* to the pursuer for the loss of his son: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Assess the damages and *solatium* at One hundred pounds: Ordain the defenders to make payment of that sum to the pursuer: Find him entitled to expenses in the Inferior Court and in this Court: Remit to the Auditor to tax," &c.

A similar interlocutor was pronounced in Bariscell's case.

Counsel for the Pursuers—Sym. Agent—W. Cotton, W.S.

Counsel for the Defenders—D. F. Mackintosh, Q.C.—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Friday, March 15.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MILLER & COMPANY *v.* HOGARTH AND OTHERS.

Ship—Charter-Party—Hire—Freight.

In a charter-party there was this provision—"In the event of loss of time from . . . breakdown of machinery . . . whereby the working of the vessel is stopped for more than forty-eight consecutive working hours the payment of hire shall cease until she be again in an efficient state to resume her service." The hire was to be paid monthly in advance. On the voyage her engines broke down so as to render her unseaworthy, and she had to put into a foreign port. There were no means of repairing her injuries in that port. A tug was sent out to bring her home under an agreement between the owners and the charterers, by which the cost of the tug was to be treated as general average. The ship arrived at the port of discharge with the aid of the tug. The charterer paid his proportion of the cost of the tug. In an action for the freight from the time she left the foreign port till her discharge was complete, *held* (*rev.* Lord Trayner) (1) that she was unseaworthy from the time of the breakdown till she arrived, the assistance of the tug not having rendered her seaworthy, and therefore that having in view the terms of the charter-party the owner was not entitled to freight for the voyage under tow; (2) (*dub.* Lord Young) that hire was due for a reasonable time for unloading at the port of discharge although the repairs necessary to make the ship seaworthy had not been completed.

By charter-party dated 26th February 1887 Alexander Miller, Brother, & Company, merchants, Glasgow, hired from Hugh Hogarth, the managing owner, the steamship "Westfalia" on a charter for a voyage to the West Coast of Africa and back, with the option of continuing the hire for another voyage. Hire was to be paid at 8s. per ton per month in advance. The owner undertook to provide officers and crew, and maintain the vessel in stores, and "in a thoroughly efficient state in hull and machinery for the service." It was also provided—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. Quarantine (if any) at charterers' expense. That should the vessel be lost, any freight paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the charterers. The act of God, the Queen's enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the sea, rivers, machinery, boilers, and steam navigation throughout this charter-party always excepted." The ship performed one voyage, and under their option the hirers continued to send her for another voyage. She left the West Coast of Africa with a cargo of kernels and palm oil on the 14th September 1887. On the 30th September the high-pressure engine broke down, by the piston-rod breaking. She made her way to Las Palmas in the Canary Islands under sail, and by the help of her low-pressure engine. She reached Las Palmas on the 2nd October. She was surveyed there, and the surveyors declined to give a certificate of seaworthiness. News of her condition was sent to the owners. It was impossible to repair her without great delay and expense. The surveyors declined to authorise an attempt to proceed home under her low-pressure engine. After certain negotiations between the owner and the charterers an arrangement was come to by which the tug "William Joliffe" was sent to her assistance. The expense of the tug was to be treated as general average, the charterers paying in proportion to the value of the cargo, the owner in proportion to that of the vessel. The tug went out and took the "Westfalia" in tow, and left Las Palmas upon 18th October. She arrived at Harburg, her port of destination, on 31st October, and commenced discharging her cargo. The discharging of the cargo took

until 10th November. Engines and engineers had been sent from England to Harburg, and the repairs to the vessel went on simultaneously with the cargo discharging, but the repairs were not finished until 11th November. She then left for England. The charterers paid their share of the cost of the tug.

The owners brought an action against the charterers for hire for the voyage home from Las Palmas under tow and for the time taken to unload, in all from 18th October to 10th November, which at the stipulated rate amounted to £341, 4s. 8d.

The pursuers averred—(Cond. 4) "Under the said charter-party the rate of hire payable by the defenders to the pursuers for said steamship is 8s. sterling per gross register ton per calendar month. The defenders are due to the pursuers hire at said rate for said steamship for the period from 18th October to 10th November 1887 inclusive, amounting, as per account herewith produced, to £341, 4s. 8d. At least from and after 18th October the said ship was in an efficient state to resume her service; and she was from at least 18th October engaged on her service under said charter and actively pursuing her voyage, and continued to do so till 18th November. If the said ship had not been efficient, and but for the services rendered by her upon and after 18th October, neither she nor the cargo would have reached the port of discharge till long after they did, and the defenders would thus have suffered very serious loss. The value of the services thus rendered by the said ship to the defenders, and the benefit thereby derived by the defenders, who in consequence recovered their full freight and got the said ship ready for another voyage, all precisely as if there had been no accident, amounts to not less than the amount sued for."

The defenders in answer relied on the breakdown clause above quoted. They stated that the ship had broken down, and that they had paid their share of the cost of the tug, £867. They denied further liability.

The pursuers pleaded—"(2) In terms of the charter-party freight being due for the period from 18th October, decree should be granted as concluded for. (3) In respect of the services rendered by the said ship to the defenders on and after 18th October, which benefited the defenders to at least the extent of the sum sued for, the pursuers are entitled to decree as concluded for."

The defenders pleaded—"(2) In terms of the clause of the charter-party quoted, no freight having been due for the period from 30th September to 10th November, the defenders are entitled to absolvitor. (3) The charter-party having between 18th October and 10th November been superseded by the average agreement, and the defenders having paid their contribution under that agreement for bringing the ship and cargo to Harburg as fixed by the average adjuster, are entitled to absolvitor with expenses."

Proof was led. It appeared that the length of the voyage from Las Palmas to Harburg under tow did not much, if at all, exceed an ordinary voyage. The weather was thick but calm. The pursuers led evidence to show that the ship could have come home safely under the low-pressure engine alone. It appeared, however, that the ship did not at least reverse steam easily in her condition, and that she had great difficulty in getting into the harbour when she put into Las Palmas from that reason. The high-pressure engine was quite useless till repaired at Harburg.

Murphy, marine superintendent to the defenders, deponed—"Even if the ship could have been repaired at Las Palmas, it would have taken at least a couple of months to get the machinery sent out and to do the repairs."

Upon 31st October 1888 the Lord Ordinary (Trayner) found the defenders liable to the pursuers in the sum of £320, for which he decerned.

"*Opinion.*—The 'Westfalia' was chartered by the defenders, they binding themselves by the charter-party to pay hire for the steamer at a certain rate per gross registered ton. It was stipulated, however, 'that in the event of any loss of time from . . . break-down of machinery . . . the payment of hire shall cease until she be again in an efficient state to resume her service.'

"The high-pressure engine of the 'Westfalia' broke down on the morning of the 30th September, and the ship put back to Las Palmas where she remained till 18th October, during which time she was surveyed and declared, by some of the surveyors at least, to be unseaworthy. No repairs were executed on the engine at Las Palmas, because there were no means of executing such repairs. The 'Westfalia' left Las Palmas on 18th October under steam, with her low-pressure engine alone working, accompanied, and in some measure assisted, by a tug steamer sent out from England. She arrived at Harburg, her port of destination, on the 31st October, where she delivered the part of her cargo deliverable there. The high-pressure engine was repaired at Harburg, and the 'Westfalia' sailed again for Antwerp with the remainder of her cargo on 11th November.

"The pursuers seek decree for the hire of the steamer for the period between 18th October and 10th November, which the defenders refuse to pay on the ground that the 'Westfalia' was not in 'an efficient state to resume her service' during that period. I think the defenders are wrong. The service which the steamer was bound to render to the defenders under the charter-party was to carry the cargo to the port of delivery. That the 'Westfalia' was in a condition efficiently to render this service is best proved by the fact that she did it. The cargo was carried and safely delivered. The breakdown in the machinery had not rendered the steamer inefficient for her service, although it had made her less efficient than she had been; and had she proceeded on her voyage instead of putting back when the engine broke down (as on the evidence I am prepared to hold she could quite safely have done) I think there would have been no reason for suggesting that her full hire had not been earned.

"The defenders, however, plead that they are not liable for the hire sued for, because they have had to pay more than the amount of the hire on account of the tug steamer sent out to her aid. I think this affords no answer to the pursuers' claim. The tug was sent out because all concerned were desirous of having the 'Westfalia' home as soon as possible, for the reasons stated by Mr Hogarth. Had the expense of the

tug been borne by the pursuers alone, the defenders could plainly not have pleaded that the assistance rendered by the tug had absolved them from their liability for the hire of the 'Westfalia.' Nor in the circumstances can they plead this, although they paid a part of the expense of the tug, for they agreed that the whole expense of the tug should be treated as general average, and it was so treated. But payment of general average, whether the amount be large or small, does not exempt a consignee from liability for freight, nor affect the shipowner's right to his hire which comes to him in place of freight. There is no evidence whatever that the arrangement made as to average was intended to supersede or affect to any extent the rights and obligations of parties under the charter-party.

"It was suggested rather than argued that the 'Westfalia' was unable to earn her hire from Las Palmas because she was declared to be unseaworthy. But an unseaworthy ship may earn freight, of which there was a notable instance in the case of *Turner* (1 Macq. 334), where freight was earned by a ship rendered so unseaworthy that her owners were held entitled to abandon her as a constructive loss. As I have said, the hire of the 'Westfalia' came to her owners in place of freight, and was earned if the service was rendered, whether the 'Westfalia' was seaworthy or not.

"The voyage in question from Las Palmas did not exceed much, if any, the average time occupied by the 'Westfalia' on such a voyage. Yet it does appear from the evidence of the pursuers' own witnesses that the 'Westfalia' did not go at the full speed customary with her when both her engines were working. Whether this, on a strict construction of the charter-party, entitles the defenders to any deduction from the stipulated hire I am by no means clear, but I think they are in equity entitled to some deduction in the circumstances, and accordingly I will allow them £21, 4s. 8d., which is nearly equal to the amount of the steamer's hire for a day and half."

The defenders reclaimed, and argued—This ship sailed not under an ordinary contract of affreightment, but under a special contract of hire. Under the usual charter-party the ship did not earn freight unless she delivered her cargo safely, but here the hire was paid monthly in advance even if no cargo had been procured. For such a contract see *Havelock* v. *Geddes*, February 9, 1809, 10 East. 555; Carver on Carriage by Sea, 117, 54. The only condition on which freight was to be paid was that the vessel remained in a seaworthy and efficient condition. First, was she in that condition during the period for which freight was claimed? It was admitted that from 30th September, when her high-pressure engine broke down, and the 18th October, when she left Las Palmas in tow of the tug, that she was not seaworthy. The owners did not ask for freight for that time. The surveyors would not give her a certificate of seaworthiness. It was alleged by several witnesses that she could have come home with safety working with the low-pressure boiler only, but from the difficulty that she experienced in making Las Palmas that evidence could not be trusted to. The fact was that no attempt was made to navigate her to England by her own power. The ship being thus unseaworthy and inefficient, did the sending out of the tug bring her back to an efficient condition? That could not be allowed. The vessel lay inefficient at Las Palmas. If she was to be repaired there so as to put her into an efficient condition, materials and engineers would have to be sent out there, and the time it would take to perform the necessary repairs would be two months. Instead of that the parties thought that it would be better for all interests to bring this unseaworthy ship to Europe and have her made efficient there. They entered into an agreement to do so, and the vessel was brought home and repaired so as to be efficient at Harburg. It would be hard if the defenders had to pay both for a tug to bring the ship home and also hire, on the footing that she was an efficient ship. The vessel was not made efficient by sending out the tug, as if she had been repaired at Las Palmas. The defenders were willing to pay freight for a period equal to the usual time taken in discharging such a cargo as this. They would allow three days for that. But the putting in of the engines took 11 days and they could not be called upon to pay for the whole time.

The respondents argued—This was not different from an ordinary charter-party in the way suggested by the pursuers. The vessel was hired for a voyage to carry her cargo; she did complete the voyage and brought her cargo safe home, therefore she was entitled to earn freight. Under the charter-party the only thing that the charterers could set-off against or demand for freight was loss of time. To say that the vessel was unfit if she lost no time on her voyage was not an answer to a claim for freight. It was admitted that the vessel was not efficient during the time she lay at Las Palmas, because the surveyors refused her a certificate, but under the arrangement between the pursuers and defenders a tug was sent out. The arrival of the tug made her efficient, just as if the pursuer had sent out engineers and boilers to Las Palmas. The engines of the tug took the place of the engines on board the "Westfalia." The time that was taken to reach Harburg was very little more, if any, than would have been taken to get there by her own steaming. Therefore she was efficient and seaworthy in the sense of the charter-party on her voyage from 18th to 31st October. The agreement was concluded on the basis of general average, and was so looked upon and used by the general adjuster at Harburg. In a general average both parties have to make a sacrifice; here the defenders paid £800 in order to get their goods home in time. The defenders could not put a claim under the agreement of average against a demand for freight by the shipowners. They had agreed to pay their share of the towage on the basis of the value of the ship and the cargo respectively, but that did not supersede the charter-party. If the defenders did not pay the freight, then they did not pay their share of the general average as regarded the value of the cargo. The pursuers claimed hire for the whole time of discharging the vessel—Scrutton on Charter-Parties, pp. 2, 3.

At advising—

Lord Justice-Clerk—This action relates to a claim for a sum of money as the hire of a ship by

the shipowners. The circumstances under which it is made are rather peculiar. The defenders hired the ship "Westfalia" from the managing owner of the company, Mr Hogarth, for the purpose of voyaging within certain limits at a certain rate, viz. 8s. per gross register ton, per calendar month. The same hire was to continue during the whole period of employment, and until her delivery to her owners at a safe port in the United Kingdom, or on the Continent. The defenders were to have the option of continuing this charter for another voyage upon giving fifteen days' notice to the owners, and they exercised that option. The pursuers, the owners of the vessel, were to provide a crew and captain for the vessel, but the captain was to be under the orders of the defenders, the charterers, "as regards employment, agency, or other arrangements."

Now, the captain, although acting under the orders of the defenders, had charge of the management of the vessel, and he sailed in safety and in the ordinary course of the voyage in which he was engaged for Europe from the West Coast of Africa. Upon the 30th September 1887 the ship, which was a compound engined vessel, broke down in consequence of her high-pressure cylinder giving way. She made her way back to Las Palmas, and if the claim had been made for hire during the time she was laid up the question could not, I think, have been difficult, as I have no doubt that at the time she lay at Las Palmas after the breakdown she was inefficient. But the owners and the charterers entered into an arrangement to see if they could not get the ship sent home by means of her low-pressure engine only. Now, the surveyors at Las Palmas declined to allow her to proceed to sea in that state; they came to the conclusion that she was not a seaworthy ship in the condition she was in. I think it is plain they were right, because looking at the evidence of the difficulties she experienced in going into Las Palmas she was not fit to encounter the dangers of the sea. But I do not think it necessary to go into that matter, because it is enough to decide the question that the surveyors at Las Palmas would not allow her to go to sea as a seaworthy ship, and I look upon that matter as settled.

Well, the pursuers did not proceed in the matter further by themselves, but they went to the defenders and negotiated with them, so that all parties agreed that the best thing would be that a tug should be sent out to enable the "Westfalia" to make her voyage safe home, and if possible increase her speed by towing. The expense which it was calculated would be incurred by sending out the tug was £1100 or thereby, and in the negotiations about the matter it was considered what proportion of that expense each of the two parties should bear, so that on the one hand the defenders should have the advantage of getting their goods, the cargo, home in good time for its sale, and on the other hand the pursuers should have the advantage of getting their vessel repaired at home more easily, more rapidly, and more cheaply than where she was. It appears from the evidence that if she had had to be repaired at Las Palmas it would have detained her for a period of two months, and that machinery and engineers would have had to be sent out from this county. The result of the negotiations was that the defenders agreed to pay £800 for the services of the tug, and the pursuers paid £300. The tug was sent out, and the ship arrived at Harburg upon the 31st October, and her cargo was discharged by the 10th November.

Now, the pursuers claim that the defenders should pay them the hire at the stipulated rate for the use of the vessel during the time she was upon the voyage from Las Palmas to Harburg, and the time that was occupied in discharging her cargo. The two periods of time do not stand quite in the same position.

The pursuers says that their ship was made seaworthy by the tug towing it home, and that it was then as seaworthy as if a new boiler had been put on board, that it does not matter how the thing was arranged, but that the ship was made seaworthy, and the Lord Ordinary agrees with them. I cannot concur in that opinion. I think that the position of the pursuers and the defenders during the time of the voyage from Las Palmas to Harburg was that they were dealing with an unseaworthy vessel, and the question with them was how they could best save themselves from loss by getting her home in that unseaworthy condition. They therefore had to try some expedient to do this, and the expedient they adopted cost less than it would have done to get the vessel made seaworthy. I think therefore that a special arrangement was entered into for the special purpose of getting this vessel home, and that the whole duties between the pursuers and the defenders for that time were settled by the payment of the sums which they had agreed to pay for the use of the tug.

But the defenders also refuse to pay the hire for the vessel for the time she was engaged in discharging cargo at Harburg. It seems that the discharge took a longer time than was necessary. Probably the stevedores thought that as the repairs had to be executed before the vessel could leave there was no occasion for them to hurry, and therefore dawdled. As one of the defenders pointed out in a letter, they were responsible for the hire of the vessel during the time of discharging. I think therefore that the defenders must pay the hire for the period usually occupied in discharging the vessel. Even if the "Westfalia" had been unseaworthy on her voyage to Harburg, there was here no question of seaworthiness or unseaworthiness; she was sufficient for all that the defenders needed. I think therefore that they should pay, not for the whole time that the vessel was detained at Harburg, but for the period that was usually occupied by discharging the cargo, and the defenders admit that was three or four days.

Lord Young—Upon the question of hire to be paid upon the vessel during the time of discharging her cargo I would wish to say something. Upon the general question I agree with your Lordship in everything you have stated but this. But the facts are striking. This vessel is at Harburg undergoing repairs; she has broken down so far that until repaired she cannot be sent off as before. It required ten days to make these repairs, and it was the defender himself who took her on hire again when she was fit to be used. Now, if during that period the discharge of the cargo went on in rather a dawdling manner,

without injury being done to anyone, I think it is very doubtful whether there is any hire due under the charter-party at all. I think that it was upon my suggestion that the parties agreed to find out what time was usually occupied in unloading, and I then thought that I might have consented to the hire for three or four days being given, but if the pursuers cannot agree as to what was the time, I do not think there should be any hire.

Upon the general question I have already stated my concurrence in your Lordship's opinion, and if the Lord Ordinary's judgment had been to the same effect I would not have thought it necessary to add anything, but as this is a case in which the parties take an interest, and the Lord Ordinary's opinion is different from that which I entertain, I think it right to state my view in my own words.

The action is one for the payment of the hire of this vessel for the period between 18th October and 10th November 1887 under a charter-party, and if the vessel during that period had been in the hands of the defenders under the charter-party in an efficient and seaworthy condition the action would have been unanswerable. The question is, whether during that period the vessel was in the hands of the defenders under the charter-party in an efficient and seaworthy condition? My opinion is that she was not.

The charter-party in question is not a common one, *i.e.*, it is not in the usual form for these instruments, although I dare say it is often used. It is not a contract for the carriage of goods at all, but it is a contract for the hire of a ship. The shipowners are no more carriers of goods than the owner of a waggon and horses who has lent them to a carrier, or to anyone for conveyance of his goods, is a carrier. She was hired to be employed "in carrying lawful and non-injurious merchandise between such ports within the following limits, viz., Swansea $\frac{\text{and}}{\text{or}}$ Rotterdam, or other ports in the United Kingdom, and Continent, to such safe ports on the West Coast of Africa as charterers direct, and back to Europe. Between these somewhat wide limits the merchant may use the vessel as he pleases. The hire is to be paid monthly and in advance, and is not dependent upon the carriage of goods. Hire is due for her although she should never carry a ton of goods, and even in the event of her being lost the hire must be paid up to the day of her loss. Under the ordinary charter-party the owners of the ship cannot earn freight except for goods delivered safely and in good order as when placed upon the vessel. This contract is distinguishable in a marked manner from the usual contract of carriage of goods by sea, as here if the ship has made however long a voyage, and should be lost at the harbour mouth, freight would be payable up to that moment. Then, necessarily in a contract of this kind there must be some provision for calamity overtaking the vessel. In the ordinary case of carriage by sea if calamity overtakes a vessel and impedes her voyage, that does not matter to the owner. If the ship finally arrives freight has to be paid by the owner of the cargo. Here it is otherwise, and provision is thus made in the charter-party for any breakdown which may overtake the ship, and delay her voyage—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. Quarantine (if any) at charterers' expense. That should the vessel be lost, any freight paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the charterers. The act of God, the Queen's enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the sea, rivers, machinery, boilers, and steam navigation throughout this charter-party always excepted." That is the contract made by the charter-party under which, it is alleged by the pursuer, the vessel was in the defenders' hands during the period mentioned.

Now, what are the facts? The engines broke down when the ship was at sea upon the 30th September. Thereby she admittedly ceased to be in an efficient state, and was got into Las Palmas with difficulty from her broken down condition upon the 2nd October. She was then in an unfit state to perform the service for which she was engaged, the goods were safe on board, but the vessel was broken down—she was inefficient and unseaworthy. Nothing is done to her machinery to make her seaworthy until she arrives at Harburg. Therefore if she was in an inefficient state at Las Palmas, she continued to be in that state until Harburg was reached. Nothing was done to her during that period, and that the pursuer admits she was inefficient when at Las Palmas is clear, because he does not ask hire for the period she was lying there up to 18th October.

During the course of the argument I put this supposition to the defenders' counsel—"Suppose the charterer had found another vessel at Las Palmas which could have brought his goods home, would he not have been entitled to take them out of one vessel and put them on board the other?" The first answer I got was, "Certainly;" but this was afterwards modified with the limitation, "If the pursuers' vessel was unseaworthy," and it was conceded that she was in that condition. But how could he have done that unless the contract was at an end? That course could not be taken, because there was not another ship at Las Palmas, and therefore the supposition was only an illustration, but it illustrates the fact that the contract was at an end. Again, to put another illustration—Suppose instead of reaching Las Palmas this ship had only got on an uninhabited island, and was unable to proceed because she was unseaworthy. What then? The goods were safe on board, but they are of no value in that place, and they must be brought to a place where they are wanted to be of any value, just as the ship must be brought home to be repaired before she can be of use again. Now, Las Palmas is not very different from that; the goods are of no value, and there were no means of repairing the vessel. The owners therefore concurred that the best means of saving the vessel and cargo was to have the vessel towed to Harburg. That was the agree-

ment. The interest of the cargo-owner was to get his goods to where they would be of value, and of the shipowner to get his vessel repaired; therefore they agreed to have her brought home in this way, and that the expense should be divided between them in the proportions that the value of the cargo bore to the value of the ship. That was not upon the charter-party at all, although it was a most proper and reasonable agreement to make. The cargo was more valuable by the freight that had been paid upon it, and the freight had been paid to the shipowners up to the time of the *quasi*-shipwreck. That was therefore a reasonable division of payment, and may be called salvage if you like, but I do not see what the contract of hire has to do with it.

It is put in the Lord Ordinary's note, and was argued to us, that if the owner of the ship had provided a tug at his own expense and brought her home safe, then his claim for hire would have been unanswerable. I am not quite so sure of that. If that had been done under agreement I think it would have been unanswerable; but again, to take the former supposition, suppose there had been another ship at Las Palmas, and the cargo-owner had preferred to tranship his goods to her, would he not have been entitled to do so? It does not appear to me the same thing to have my goods in an inefficient ship which has to be towed home, and to have them in a seaworthy vessel which goes by her own power. I think the owner might have refused to have his goods so brought home, and therefore, unless under a contract, I am not clear that the shipowner would have done his duty to the charterer by giving a tug to his vessel instead of machinery. But another arrangement was come to, and the ship was brought to Harburg under this other arrangement. If that is so, then nothing can be claimed by way of hire for the voyage. I indicated my concurrence in that result with the view that the vessel was unseaworthy. I do not indicate, however, that the breakdown of the machinery, if it could be repaired in a few days, or even in a period exceeding a week, that that would terminate the contract. Indeed that is the view taken in the charter-party, because the hire is not to cease unless the vessel has been detained for more than forty-eight hours, but there must be a limit, and I think that limit has been exceeded when the delay would extend to two months if the ship was to be repaired.

Well, there is another point. The vessel arrives at Harburg, being towed by the tug, and she is useless unless repaired, so they immediately set about repairing her in order to hire her out to the same persons, the defenders in this action. They could not hire her out until she had been repaired, and the question of whether there is any hire due for the time during which she was discharging her cargo is complicated by the consideration that she was not seaworthy and efficient until the repairs were done. I am of opinion that no hire is due for the period of discharging.

Lord Lee—I have come to the same conclusion, although I confess it was with diffidence I reached a conclusion differing from that of the Lord Ordinary, whose particular knowledge and experience in this branch of the law I desire to recognise. But my difference from him is, I think, chiefly on a matter of fact. I quite agree with the observation in his Lordship's note that payment of general average does not exempt from liability for freight. But it seems to me the question is, whether the arrangement come to between the cargo-owner and the shipowner deprives the latter of his right to sue for hire during the period mentioned in the record?

The clause in the charter-party is a very special one, and requires to be attended to. The provision is—"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service, but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense. Quarantine (if any) at charterers' expense. That should the vessel be lost, any freight paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the charterers. The act of God, the Queen's enemies, fire, restraints of princes, rulers, and people, and all other dangers and accidents of the sea, rivers, machinery, boilers, and steam navigation throughout this charter-party always excepted." Now, it is important to notice that this is not an agreement which provides that time lost from a breakdown of the vessel shall be deducted from the time for which hire is due, but the provision is that on the breakdown the payment of hire shall cease until the vessel has again been made efficient. Now, when the breakdown took place the owner had to make arrangements for his vessel being put in an efficient and seaworthy condition again, but while she was in an inefficient condition he could not claim that hire should be paid. The vessel could not be repaired at Las Palmas, and the owner, as he says, tried to coax her home in the state she was in with only one boiler as seaworthy, but he failed to do so. Some other arrangement had to be come to. Well, then, it was for the shipowner, if he intended to claim hire for the time the ship was on her voyage from Las Palmas to Harburg, to make it plain in the agreement that his ship was in an efficient condition, or that she was made so by the engines of the tug being taken instead of her own, so that hire would have run on. He did not make any such arrangement, and in my opinion he cannot get out of the clause in the charter-party by saying he sent out the tug to bring her home.

The principal thing is that the ship was not in a position to earn hire under the conditions of the charter-party during the period from 18th to 31st October. Now, the Lord Ordinary's view is that she was in an efficient condition, and he states so in his note—"The service which the steamer was bound to render the defenders under the charter-party was to carry the cargo to the port of delivery. That the 'Westfalia' was in a condition efficiently to render this service is best proved by the fact that she did it." I am not only not moved by that, but I think that it is disproved by the whole evidence. She did not make that voyage alone; she was not fit to make

any voyage by her own power. On the argument that as she made it along with the tug she was efficient, I do not find any provision as to hire going on for that time in the agreement between the parties. I therefore concur in your Lordship's opinion that hire cannot be claimed for that time.

But that leaves another question for decision as to her position as a wage-earning vessel in the port of Harburg. She was efficient for the only purpose for which the defenders needed her, viz., the discharge of the cargo, and in my opinion something ought to be allowed for that time. I think we have evidence to enable us to fix what should be given. I refer to the letter of the pursuers' of 7th November 1887, in which they complain that the stevedore had taken a "whole week, or at least double the time that should have been spent." I therefore think that four days may be allowed as the time necessary for discharging the cargo, and that hire ought to be allowed for that time.

The Court recalled the Lord Ordinary's interlocutor, found "the defenders liable to the pursuers in the sum of £60 sterling, ordained them to make payment thereof, and *quoad ultra* assoilzied them with expenses."

Counsel for the Pursuer — Dickson — Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Sol.-Gen. Darling, Q.C.—Graham Murray. Agent—David Turnbull, W.S.

Friday, March 15.

FIRST DIVISION.

THE STEEL COMPANY OF SCOTLAND (LIMITED) *v.* TANCRED, ARROL, & COMPANY.

(*Supra*, p. 305.)

Process—Appeal to House of Lords—Execution pending Appeal—Caution.

In a petition for execution pending appeal to the House of Lords, the respondents argued that the appeal would shortly be heard; the amount decerned for was unusually large, and could only be raised and transferred at great expense, which would be lost if the judgment was reversed on appeal. *Held* that as the application was only granted on caution being found for repetition, in the event of the judgment appealed against being reversed, no sufficient reason had been assigned for departing from the ordinary rule.

In the action at the instance of the *Steel Company of Scotland* v. *Tancred, Arrol, & Company*, reported *supra*, p. 305, the Lord Ordinary (TRAYNER), after sundry procedure, pronounced an interlocutor on 13th June 1888 in these terms —"Interpones authority to the joint minute No. 516 of process, and in respect thereof decerns against the defenders for £14,850 sterling; finds the defenders liable to the pursuers in expenses."

Tancred, Arrol, & Company reclaimed against this interlocutor, and their Lordships of the First Division on 1st February 1889, *inter alia*, recalled the interlocutor of 13th June 1888, in so far as it found the defenders liable in expenses, and in place thereof found the defenders liable in expenses with the exception of the expenses of the proof, and remitted the account to the Auditor to tax and report.

The Auditor taxed the account of the said expenses at £241, 10s. 1d. Tancred, Arrol, & Company presented a petition of appeal to the House of Lords against the various judgments in the cause.

On March 13th 1889 the Steel Company of Scotland presented the present petition for interim execution pending appeal in terms of 48 Geo. III. cap. 151, sec. 17, and praying the Court to approve of the Auditor's report on their account of expenses, and to decern therefor; and further, to allow decree for the taxed amount of the said expenses, and also decree in terms of the various interlocutors in their favour, to go out and be extracted, and execution to proceed thereupon, notwithstanding the appeal, to the effect of enabling the petitioners to recover payment of the sums of principal, interest, and expenses due to them, in terms of the said decrees, with the expenses of extract and of this petition, and that upon caution in common form, to repeat the same, in the event of the interlocutors above recited being reversed in the House of Lords.

The Act 48 Geo. III. cap. 151, sec. 17, declares —"That when any appeal is lodged in the House of Lords, a copy of the petition of appeal shall be laid by the respondent or respondents before the Judges of the Division to which the cause belongs; and the said Division, or any four of the Judges thereof, shall have power to regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion; having a just regard to the interests of the parties as they may be affected by the affirmance or reversal of the judgment or decree appealed from."

Argued for Tancred, Arrol, & Company that the appeal to the House of Lords would shortly be heard and disposed of; that the amount carried by the decrees was very large, and that the expenses of raising and transferring the money would be great; and in the event of the judgment of the Court being reversed by the House of Lords this expense would all be thrown away, as there would then require to be a re-transfer; that as the Court had the amplest discretion as to the regulation of all matters relative to interim possession, it was not in the circumstances desirable that execution should pass.

At advising—

LORD PRESIDENT—I do not think that Mr Jamieson has suggested any good reason why we should depart from the rule which we ordinarily follow in cases like the present.

If execution pending appeal is granted, this of course is only done upon caution being found that in the event of our judgment being reversed the money thus handed over will be repaid; whereas if we refuse the present motion, the petitioners have no security that the money to which we have found them entitled will be forthcoming in

the event of our judgment being affirmed.

I am therefore for granting the application.

Lord Rutherfurd Clark and Lord Adam concurred.

Lord Mure and Lord Shand were absent from illness.

The Court granted the application, but refused the petitioners expenses.

Counsel for the Steel Company—Salvesen. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Tancred, Arrol, & Company—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Friday, March 15.

FIRST DIVISION.

[Lord Lee, Ordinary.

LANG *v.* LATTA AND OTHERS (LANG'S TRUSTEES) AND OTHERS.

Husband and Wife—Antenuptial Contract—Reduction—Agent of One Party Signing as Notary for the Other—Marriage—Rei interventus.

In an action by a widow to reduce an antenuptial contract as invalid, inasmuch as the agent for her husband had signed as notary for her, the Court, without deciding the question whether the contract had or had not been validly executed, *held* that if any informality in execution had existed, it had been cured *rei interventu* by the marriage having followed upon it.

This action was raised by Mrs Lang, widow of Walter Lang of Chapelton, near Dumbarton, against Robert Latta and others, the trustees and executors of the deceased Walter Lang, for the purpose of reducing an antenuptial contract of marriage dated 30th September 1878 entered into between the pursuer and her deceased husband.

The pursuer had been taken into the service of Walter Lang as housekeeper and general servant in 1868. She thereafter became his mistress, and she lived with him in that relation down to the year 1878, during which period she bore him three children in 1869, 1871, and 1874 respectively. In 1878 Walter Lang became seriously ill, and was urged by his friends to marry the pursuer, which he consented to do. The banns were published in the Parish Church of Dumbarton on 29th September 1878. On the 30th September the marriage-contract sought to be reduced was executed. It was signed by Walter Lang, and bore to be executed notarially for the pursuer by Robert M'Farlan, writer and notary public, Dumbarton. Later on the same day the parties were married, and they subsequently lived together as husband and wife down to Lang's death in 1887. By the above contract Walter Lang bound himself to secure to the pursuer the liferent of a cottage and garden at Townend, Dumbarton, belonging to him, and the liferent of the field opposite acquired by him from Mrs Findlay. He also gave the pursuer, if she should survive him, the whole household furniture and plenishings and general household goods that should belong to him at his death, and bound himself to make payment within three months after his death of the sum of £20 sterling as an allowance for mournings, and a sum of £100 within six months after his death, and the deed provided that the pursuer thereby accepted the said provisions in her favour as in full satisfaction of terce of lands, legal share of moveables, and every other thing that she, *jure relicta* or otherwise, could claim from him or his heirs by and through his death.

The pursuer averred the following grounds of reduction. The contract was not read over by or to the pursuer, nor were its contents explained to her before it was executed. The pursuer gave no instructions for the execution of the deed on her behalf, and had no knowledge of its execution, but it bore to have been executed notarially for her by Robert M'Farlan as notary. She had no knowledge of its contents or effect. The notary who was said to have executed it on the pursuer's behalf was the private agent of Walter Lang, and as such prepared the marriage-contract upon his instructions, and was in attendance at the execution thereof as his agent. It was unlawful for him to occupy the position of agent for the husband and to act as notary for the wife in the execution of the said contract, under which they had conflicting interests. The interests of the pursuer were not protected by the said notary, but, on the other hand, he acted in the interests of the said Walter Lang, and both he and the said Walter Lang fraudulently concealed from the pursuer the provisions and effect of the contract, and also the amount and value of Walter Lang's means and estate, and the legal rights which would accrue to her as his wife. The provisions made in favour of the pursuer by the deed were totally disproportionate to the means and estate which then belonged to Walter Lang, and which were left by him at the time of his death.

The defenders pleaded—"(1) The pursuer's averments being irrelevant, the action ought to be dismissed. (3) The pursuer having suffered no lesion, is not entitled to have the contract reduced."

On 23d December 1887 the Lord Ordinary (Lee) approved of certain issues for the trial of the cause. On the 24th January 1888 the Inner House of consent dispensed with the adjustment of issues, and remitted to the Lord Ordinary to allow a proof before answer.

The result of the proof which was taken before the Lord Ordinary on 29th May 1888 was as follows:—At the date of the marriage Mr Lang derived £110 a-year from rents, £49 a-year from feu-duties, and about £127 a-year from the interest on a bond of £2600. He had also about two or three hundred pounds in bank, and was the owner of the estate of Chapelton, the letting value of which after his death, when it had increased in value, was £130 a-year. At the date of his death his estate had much increased in value, his personalty having increased to £6452, and the amount he received from feu-duties to £102 a-year. He appeared to have been unwilling to marry the pursuer, but was urged to do so by his friends. Mr M'Farlan deponed that when he was called in about the marriage-

contract "Mr Lang said 'They have been at me to marry her, but I will not do it until I have a settlement,' or words to that effect." The marriage-contract was prepared by Mr M'Farlan on the instructions of Mr Lang. He deponed that he had received his instructions in the presence of the pursuer, and that he subsequently read over the deed and explained its effect to her, and that she authorised him to sign for her, and these statements were corroborated by other witnesses. It was also clear from the pursuer's evidence that the deed had been read over to her, for she said in cross-examination—"I did not know what Mr M'Farlan was reading when Mr Jardine and the others were present before the marriage." Mr M'Farlan also deponed that he had told the pursuer what her legal rights would be if she married without a contract, and that she was quite aware of what they would be. The pursuer, on the other hand, said that she did not know that she was entering into any contract, and that she knew nothing of what was being done, but the Court preferred the testimony of Mr M'Farlan, corroborated as it was in part by the evidence of other witnesses.

The Lord Ordinary on 29th June 1888 pronounced this interlocutor:—"Finds that the notary by whom the deed under reduction was executed for the pursuer was acting at the time as the law-agent of the deceased Walter Lang, the other party to the contract, and on his instructions and employment: Finds that as such agent the said notary was personally interested in the deed, and was incapacitated by the law from acting as a notary in the execution of the deed for the pursuer: To this extent sustains the reasons of reduction: Therefore repels the defences: Reduces, decerns, and declares in terms of the reductive conclusions of the summons." . . .

"*Opinion.*—The pursuer of this action is the widow of Walter Lang of Chapelton. She here seeks to reduce an antenuptial marriage-contract between her and her husband, which is alleged to have been executed by her notarially on the day of her marriage, viz., 30th September 1878. The deed confessedly made a very poor and inadequate provision for her, which was 'accepted by her in full satisfaction of all terce of land, legal share of moveables, and every other thing that she, *jure relictæ* or otherwise, could ask, claim, or demand . . . through his death, his own free will only excepted.'

"But the grounds of reduction which were chiefly relied on go only to this, that the deed was not well executed.

"The pursuer and her husband (whose housekeeper she was) had lived together for about ten years before the marriage, and she had borne him three children. It is not disputed that she desired to marry him for the sake of the children. But the proof shows that in point of fact the marriage was brought about, not by her, but by the parish minister and one or two elders, who were visiting him at a time of severe illness. During the week previous to the marriage he was thought to be dying, and the witness Jardine was sent to Glasgow to find out how a marriage could be accomplished without awaiting the proclamation of banns. During the same week it appears that the witness Mr M'Farlan was busy, as Mr Lang's law-agent, with the preparation of his testamentary settlements. The banns were proclaimed by Mr Lang's instructions on the 29th, and the marriage took place on the afternoon of the 30th. It was not until the morning of the 30th, according to the witness M'Farlan, that he was told anything of the intended marriage. He was then sent for, and received instructions from Mr Lang as to the marriage-contract. He prepared the deed presumably in accordance with his instructions. It gives to the pursuer, as Mr Lang's wife, the same provisions substantially as she was to have received under the unexecuted settlements as Mr Lang's housekeeper and the mother of his illegitimate children. But if the deed under reduction is valid, she agreed to accept this in full of her legal rights. The question is, whether that deed is ineffectual upon any of the grounds stated?

"The principal objection urged at the debate was, that the deed was not well executed, in respect that the notary who signed it on the pursuer's behalf was the agent of Mr Lang, the other contracting party, and was acting at the time under his instructions. In disposing of this objection it must of course be assumed that the formalities required by the 41st clause of the Conveyancing Act were observed, that the deed was read over to the pursuer, and that she gave authority to Mr M'Farlan to subscribe it for her. But if it be the fact that Mr M'Farlan, the notary, acted in all he did as agent for Mr Lang, and was present solely in his interest and for his purposes, I cannot doubt that a serious question arises regarding his qualifications to act as notary in the execution of the deed for the other party.

"It is settled by the case of *Ferrie* v. *Ferrie's Trustees*, 1 Macph. 291, and by the authorities there cited, that a notary cannot, as such, execute a deed in which he is himself concerned. In that case the deed (a testamentary trust-settlement) was executed notarially and in good form by two notaries and four witnesses, but one of the notaries (Mr Adam Paterson, a well-known solicitor in Glasgow) was also one of the five gratuitous trustees to whom the execution of the testator's will was committed, and the deed authorised the employment by the trustees of one of their own number as agent, with remuneration. It was held that the deed was null, because one of the notaries was disqualified. In the words of the Lord President, 'The law excluded Mr Paterson from acting as a notary in the execution of this deed.' Lord Curriehill's opinion puts his judgment on the ground that it was settled 'that the acts of a notary in the exercise of his office will not be effectual where he is personally interested.'

"In the present case the notary was not interested as a beneficiary under the deed, but the evidence shows that he was intimately concerned in it as the agent of Mr Lang, and was interested to the extent of charging Mr Lang as his employer with his fees, both as agent and as notary. He says that he acted also as agent for Mrs Lang, but he admits that he was not employed by her, and that he took his instructions from Mr Lang. It was on his behalf that he had prepared the deed, and was present to get it executed. He thought the provisions of the deed in favour of Mrs Lang mean and inadequate, but he took, in my view of his evidence, no steps to inform him-

self as to Mr Lang's means, such as a separate agent would have taken, with a view to advising Mrs Lang concerning the full effect of the renunciation of her legal rights. He trusted to her knowledge on that subject, and states that she asked a question indicating her acquaintance with the legal rights of a widow. Upon this point, however, he is contradicted by Mrs Lang, and is not corroborated. I am not satisfied upon the evidence that she put any such question as he mentions. But the conflict of evidence as to the extent of Mr M'Farlan's explanations to her illustrates the difficulty and danger which must be experienced, even by the most conscientious agent, in attempting to combine agency for one of the contracting parties with the position of notary executing the deed for the other. Mr M'Farlan, I am sure, did not consciously fail to act faithfully towards her, but upon the evidence I was satisfied that he acted solely as agent for Mr Lang.

"This being so, did the law allow him, upon the employment of Mr Lang, to act as notary public in the execution of the deed by the other party? It seems clear that if Mr Lang had happened to be a notary-public himself he could not have executed it notarially for the other party. Could he, then, do by an agent that which he could not have done himself, supposing that no agent had been employed or required? I think not; and my opinion is that Mr M'Farlan, as Mr Lang's agent, was so much identified with his interests, and so far personally interested in the execution of the deed, that he was disqualified for acting as notary for Mrs Lang.

"I think it unnecessary to go back upon the old authorities, but the case of *Graeme's Trustees*, 7 Macph. 14, like the case of *Stoddart*, 1799, M. 16,857, appears to me to be distinguished by this, that the judgment was there put upon the ground that the deed was not a contract but a testamentary and revocable deed.

"The case of *Nisbet* v. *Newlands*, 1630, M. 17,016 and 5682, was referred to. But I think that the separate report, under the head 'homologation,' shows a distinction. For there was there a conveyance which had taken effect during the husband's life, and the judgment was put upon the ground of homologation.

"I therefore sustain this reason of reduction.

"*Secondly.* With regard to the question whether the deed was executed by the authority of the pursuer, there is one aspect of it in which I should give my verdict for the pursuer. If Mr M'Farlan was disqualified from acting as notary in the execution of that deed for the pursuer he was incapable of receiving authority to that effect, and did not receive it. But if I am wrong upon the first ground of reduction I should hold the evidence insufficient to contradict the notary's docquet, attested as it is and supported by the evidence of the witnesses Jardine and Bayne.

"*Thirdly.* Upon the question whether the deed was read over to the pursuer, my verdict again is for the defenders. I think that it was proved that it was read over. Mr Jardine's failure of memory is not sufficient to falsify the docquet attested by himself as well as by Bayne—*Frank* v. *Frank*, 1795, M. 16,825.

"*Fourthly.* As to the alleged fraudulent concealment, I am of opinion that it is not proved. There was no duty of disclosure imposed upon Mr Lang, excepting in so far as the employment of his own agent to act as a notary for the pursuer may have given rise to an obligation to see that she was fully advised. I am assuming at present, however, that the deed was well executed. In this view it was a deed between parties of full age, and not to be set aside without proof of fraud. Fraud not being proved, the pursuer cannot set aside the deed on the ground merely that she agreed to a bad bargain."

The defenders reclaimed, and argued—It was not a fatal objection to a deed that the notary who signed it for one of the parties was agent for the other party. There was no authority for the judgment of the Lord Ordinary to that effect. It had been found that the intimation of an assignation was null where the same party acted as procurator and notary, and also that the holder of a bill could not act as a notary in protesting it—*Scott* v. *Drumlanrig*, July 3, 1628, M. 864; *Russell* v. *Kirk*, November 27, 1827, 6 Sh. 133; *Leith Bank* v. *Walker's Trustees*, January 22, 1836, 14 Sh. 332. But, on the other hand, it had been found that it was no objection to the protest of a bill of exchange, made payable at the office of the son of the creditor, that it was taken by the son as notary—*Rankeillor* v. *Grindlay*, November 19, 1830, F.C. The decision that the same notary cannot act for both parties in a contract in *Craig* v. *Richardson*, June 27, 1610, M. 16,829, was gravely doubted by Lord Deas in the case of *Graeme* v. *Graeme's Trustees*, October 21, 1868, 7 Macph. 14. The decision in the case of *Ferrie* v. *Ferrie's Trustees*, January 23, 1863, 1 Macph. 291, could be explained by the fact that the trustee might have taken a beneficial interest under the deed, and was thus disqualified from acting as notary. Many things could be done through a man's agent which could not be done by himself. At all events, a long series of decisions established the fact that a technical objection such as this might be homologated by subsequent marriage—*Cheape* v. *Mowat*, July 6, 1626, M. 17,014; *Muir* v. *Crawford*, March 11, 1628, M. 17,014; *Brady* v. *Brady*, July 1, 1662, M. 17,018; *Nisbet* v. *Newlands*, December 10, 1630, M. 17,016, also M. 5682.

The pursuer argued — An agent for one party could not sign as notary for the other. The notary must be free from interest either *per alium* or *per se*. It was a *quasi*-judicial office, and notaries have been prevented from acting in any capacity which might bias their judicial mind—The Office of a Notary, pp. 15–248; *Jormock*, April 1583, M. 16,874. The provisions for the wife in this case were grossly inadequate, and the primary duty of the notary was to the husband to carry through this niggardly contract. He was therefore plainly put in a position which was in conflict with his *quasi*-judicial duties of reading over and explaining to the pursuer the provisions of the deed. The argument that the contract had been validated by homologation depended entirely on the fact that marriage followed. But if the first branch of the pursuer's argument was sound the deed had never been signed, and there was no deed capable of being homologated. The cases founded on by the defenders were all cases of technical objections founded upon statutory informalities and the

like—*Cooper* v. *Cooper and Others*, January 9, 1885, 12 R. 473, Feb. 24, 1888, 13 L.R. App. 88, 15 R. (H. of L.) 21.

At advising—

LORD RUTHERFURD CLARK—This is an action to set aside an antenuptial marriage-contract into which the pursuer is said to have entered on 30th September 1878. It is directed against the trustees and executors of the pursuer's late husband, and also against her children. She has a very material interest to reduce the contract, because it contains a discharge of her legal rights, which are of greater value than the conventional provisions.

The pursuer had for a considerable time been the mistress of the late Mr Lang, and had borne three children to him. In 1878 Mr Lang became seriously ill, and he was urged by his friends to marry the pursuer. He does not appear to have been very willing to do so, but he ultimately consented, and the marriage was celebrated on 30th September 1878, the marriage-contract having been previously executed on the same day.

The marriage-contract was prepared by Mr M'Farlan, a writer in Dumbarton, on the instructions of Mr Lang, and he says that he received his instructions in the presence of the pursuer. He further states—"Mr Lang said 'They have been at me to marry her, but I am not going to do it until I have a settlement with her.'" As the pursuer could not write, the contract was executed by her notarially, and Mr M'Farlan acted as the notary.

The sole ground of reduction relied on in argument was that Mr M'Farlan was disqualified from acting as notary, inasmuch as he was the agent of the other party. The pursuer did not attempt to set aside the contract on the plea that it was obtained from her by misrepresentation or undue influence. It is true that she says that she was ignorant of its terms, and that she did not understand that she was entering into a marriage-contract. These matters are, however, introduced into the case, not as substantial grounds of reduction, but as indicating the reason of the rule for which the pursuer contends.

I have further to observe that the objection on which the pursuer relies is not an objection which appears *ex facie* of the contract. On the contrary, so far as the deed shows, the prescribed legal formalities were duly observed.

The question which is thus raised is important. I do not think that it is ruled by any of the cases that are cited to us. It was decided in *Ferrie* v. *Ferrie's Trustees*, 1 Macph. 291, that a trust disponee cannot act as the notary of the truster, though there, something may have turned on the fact that the notary might and probably would have a personal benefit from the settlement inasmuch as he was the agent of the truster, and as the deed contained an express dispensation of the ordinary law applicable to a trustee who acts as agent for the trust. In the old case of *Craig*, M. 16,829, it was held that the same notary cannot subscribe for both the parties to a contract. But the soundness of this decision was more than doubted by Lord Deas in the case of *Graeme*, 7 Macph. 14, though it was regarded with more favour by Lord Ardmillan. The latter case was decided on the single ground that no statutory nullity was incurred because the same notaries had subscribed for each of the two parties to a mutual disposition and settlement which bore to be revocable by either. These are the only cases which have any direct application to the present, and they do not give us much assistance in the determination of it.

I confess that I think it very undesirable that the agent of the one party to a contract should act as the notary of the other. It is of great importance to preserve the purity of the office of notary, and to require that he shall not be under any influence which might induce him to be either corrupt or careless in the discharge of his duty. And these considerations present themselves with great force when we keep in view the duties that devolve on the notary who acts for an illiterate person. But there is a very analogous case where such considerations would not, I think, prevail against the validity of the deed. If the pursuer had been able to write, and if the same agent acted for both parties, the contract would not be void, but only voidable, though the Court before sustaining it would require to be satisfied that it was obtained with perfect fairness, and with full intelligence on the part of the wife.

I am glad to think that we need not decide this difficult and delicate question, because we can determine this case on another ground.

It is to my mind quite certain that before the marriage was celebrated the parties intended to enter into a marriage-contract, and we have in writing the contract which they intended to execute. The pursuer no doubt says that she did not know that she was entering into any contract, and affects to say that she knew nothing of what was done. I cannot take this off her hands. I prefer the testimony of Mr M'Farlan, whose veracity and honour were not impeached, and who is supported in the main by the other parties who were present. He gives distinct evidence to the effect that he read over the deed to the pursuer, and explained the meaning and effect of it. That the deed was read over is clear from the evidence of the pursuer herself. For she says that she "did not know what Mr M'Farlan was reading when Mr Jardine and the others were present before the marriage." Unless Mr M'Farlan was guilty of a fraud which he had no interest to commit, and which it is not alleged that he did commit, the whole proceedings were conducted with perfect fairness, and the intended contract was fully understood by the pursuer.

The marriage followed upon it, and in my opinion, any imperfection in the mode of execution has been removed *rei interventu*. The case of *Nisbet*, M. 17,016, is a direct authority to that effect, and it is in accordance with the recognised law that informal contracts may be so validated. There the Court had to consider a marriage-contract where only one notary subscribed for each party. It is clear that this was no subscription at all, and that so far as mere execution went the contract was absolutely void. But it was held that the contract was not challengeable provided marriage had followed upon it, because marriage is an act of homologation which bars objection. The worst that can be said of the contract in question is that it was not signed for

the pursuer by reason of the disqualification of the notary. But the marriage followed upon it, and I think that we accept the statement of Mr M'Farlan, which is in accordance with the reasonable and legal inference that the marriage would not have taken place if the contract had not been executed. In sustaining the marriage-contract in question we are within the rule of the case to which I have referred, and we are merely acting on the well-established principle which applies to marriage-contracts, as it applies to all other contracts, that informality in legal execution is cured *rei interventu*.

The LORD PRESIDENT and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

The Court recalled the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—Balfour, Q.C.—C. S. Dickson. Agents—Gill & Pringle, W.S.

Counsel for the Defenders—Gloag—C. Johnstone. Agents—T. & W. A. M'Laren, W.S.

Saturday, March 16.

SECOND DIVISION.

WEIR *v.* COLTNESS IRON COMPANY (LIMITED).

Reparation—Parent and Child—Title to Sue—Action of Damages for Loss of an Illegitimate Child.

Held that a woman has no title to sue an action of damages for the loss of her illegitimate child.

Margaret Grant or Weir, residing in Harthill, Lanarkshire, wife of Robert Weir, miner, brought an action in the Sheriff Court of Lanarkshire at Airdrie against the Coltness Iron Company (Limited), concluding for the sum of £500 as damages for the loss of her illegitimate son James Grant, aged fifteen, who had died from an accident sustained in the defenders' pit.

The pursuer had been twice married. She had children by her first husband, who were still alive and grown up. Her two sons by this marriage lived with the pursuer, and earned between them 8s. per day. Her illegitimate son was born while she was a widow, and her present husband, who was not the father of that son, had been living separate from her for ten years. He did not contribute to her support, and was not a party to this action.

The defenders pleaded, *inter alia*—"(1) No title to sue; and (2) *separatim*, the pursuer's husband should be a party, or at all events a consentor to the action, and it therefore falls to be dismissed."

The Sheriff-Substitute (MAIR) on 13th February 1889 repelled *hoc statu* the first and second pleas stated for the defenders, and before answer allowed to the parties a proof of their averments.

"*Note.*—. . . The first of these pleas raises the question whether the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of the child. So far as I am aware this question has never been authoritatively decided by the Supreme Court. Cases of reparation have hitherto been confined to fathers and mothers and their lawful children, and in the two cases of *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860, and *Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, the Court has refused to sustain the title of brothers or sisters to sue such actions. In the latter case, however, the Lord President (Inglis) observed—'It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations to the deceased may sue an action like this for *solatium* where he can qualify no real damage, and for pecuniary loss in addition where such loss can be proved.'

"In the present case the deceased was the pursuer's illegitimate son, and there can be no doubt as between the two there existed during life a mutual obligation of support in case of necessity. In the recent case of *Samson* v. *Davie*, November 26, 1886, 14 R. 113, it was held that a bastard son was liable to maintain his mother. This, in my opinion, is sufficient for the disposal of the defenders' plea. But the question was raised in the case of *Renton* v. *North British Railway Company*, 1869, to be found only in the 6th volume of the Scottish Law Reporter, 255, in which it was held by Lord Jerviswoode (Ordinary) that the mother of an 'illegitimate child has a title to sue an action of damages and *solatium* for the death of her child.' So far as appears, the judgment of the Lord Ordinary was acquiesced in, but I cannot help thinking, when I find that the counsel for the defender in that case was the present Lord Shand, if his Lordship had thought there was anything in the plea raised by the defenders they would have taken the judgment of the Court upon it. As it is, I must hold the Lord Ordinary's decision as binding on me." . . .

The pursuer appealed to the Second Division of the Court of Session for jury trial, and lodged an issue.

At the suggestion of the Court the husband by minute sisted himself as a party to the action.

The defenders again maintained their plea of no title to sue, and argued—The law recognised no claim for the loss of a relation, not being an action of assythment, except by husband and wife and by parents for the loss of their legitimate children, and *vice versa*. No action could be brought by collaterals for *solatium*—*Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860—nor even for pecuniary loss—*Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980. Such actions as the present were unknown in practice, and the only authority for them was sought to be found in the case of *Renton*, where Lord Jerviswoode had repelled a plea of no title to sue. That was only an Outer House case, and could not be held decisive on the subject. The case of *Samson* was an action of a totally different character. Even if a woman had a claim

against her illegitimate children it was only a secondary claim, but here the pursuer was not dependent upon her illegitimate son's wages, but had both a husband and legitimate children able and bound to support her.

The pursuer argued—There was no need to examine the question of collaterals. The question here was settled. The objection taken had been disposed of by Lord Jerviswoode in the case of *Renton* v. *North British Railway Company*, January 1869, 6 S.L.R. 255, and by this Division in the recent case of *Samson* v. *Davie*, November 26, 1886, 14 R. 113, which was directly in point, for if an illegitimate child was bound to support his mother, his mother surely had a title to sue an action for the loss sustained by his death.

At advising—

Lord Young—This is an action by the mother of an illegitimate child for injuries that child received in the defenders' pit. Two preliminary defences are stated, the first being that she has no title to sue, and the second that her husband, who is still alive, is not a party to the action. The husband has become a party to the action, so that the Court has no further occasion to consider that plea. The other plea ("no title to sue") remains for our consideration. It has been decided by the Sheriff-Substitute that the pursuer has a title to sue—that is, that the mother of an illegitimate son is entitled to recover damages for any fault whereby he is injured. The Sheriff-Substitute in his note says—"The first of these pleas raises the question whether the mother of an illegitimate child has a title to sue an action of damages and *solatium* for the death of the child. So far as I am aware this question has never been authoritatively decided by the Supreme Court. Cases of reparation have hitherto been confined to fathers and mothers and their lawful children, and in the two cases of *Greenhorn* v. *Addie*, June 13, 1855, 17 D. 860, and *Eisten* v. *North British Railway Company*, July 13, 1870, 8 Macph. 980, the Court refused to sustain the title of brothers or sisters to sue such actions. In the latter case, however (*Eisten* v. *North British Railway Company*, 1870), the Lord President (Inglis) observed—'It appears to me that the true foundation of this claim is partly nearness of relationship between the deceased and the person claiming on account of the death, and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity. On these two considerations in combination our law has held that a person standing in one of these relations to the deceased may sue an action like this for *solatium* where he can qualify no real damage, and for pecuniary loss in addition where such loss can be proved.'" I have read that passage because it accurately states that there has hitherto been no such actions sustained. There is an exception which the Sheriff-Substitute notices, and to which I shall refer immediately, but there is no instance of any such action having been prosecuted. The question has never been authoritatively decided by the Supreme Court, and I think it is true that cases of reparation of that kind have hitherto been confined to fathers and mothers and their lawful children. That is the customary law of the land. There is no custom that is common law extending beyond fathers and mothers of legitimate children. I am not aware that there is any statute upon the subject. In fact there is none. This matter stands in England upon statute—Lord Campbell's Act—and it is the most recent legislation on the subject, not for Scotland but for England. The law there stands upon statute, and thereby no action is given to a parent for injury to an illegitimate child. This we may take to be the view of the Legislature in the most recent instance of any legislation upon the subject. There is no statute therefore in Scotland to support such an action as this, and it is not according to any practice, for there has not been such an action hitherto, and there is no custom to support it. There was an action of that sort by the mother of an illegitimate child for the death of the child under similar circumstances brought before Lord Jerviswoode, and he repelled the plea of no title to sue. The case does not appear to have gone any further. The Sheriff-Substitute notes that Lord Shand was counsel in the case, and did not carry that judgment to the review of the Court, and that he must have been of opinion that it was sound. I do not say anything in disparagement of this view at all. Lord Shand's opinion even then would be entitled to respect, but I do not deduce from the circumstance that the case went no further what Lord Shand's opinion was. It may very well have been prudent—the almost certainty is that it was prudent—not to have any further litigation about a claim which may have been settled for less than the expense of taking the case to the Inner House or to the House of Lords. But the opinion of Lord Jerviswoode in that case has been referred to. There is no other authority. I think that leaves the question entirely open for our consideration. I think that single expression of opinion by a Lord Ordinary is not evidence upon the customary law upon this subject. I think there is no customary law upon this subject. The custom has been against it, and it cannot be otherwise without express decision, and there has been no such action sustained subject to the instance to which I have just referred.

Another case brought forward in argument, and referred to by the Sheriff-Substitute, is a case in this Division of the Court—the case of *Samson* v. *Davie*—in which it was held that a legitimate son was liable in relief to the poor law authorities who had made advances for the relief of his mother. If that case were decisive of this I think we should require further argument, and probably further consideration, if not a reference to more Judges. But I think very clearly it is not. I may say in passing with reference to that case—although we decide nothing against it here, for we do not require to say anything upon that subject—that in my humble opinion it merits consideration. The action was brought by the inspector of poor for £3 odds advanced to the mother. He was allowed to prove that the defender was the illegitimate son of the pauper, and therefore liable to him in that relief. It was decided that although during a pretty long life he had only seen the woman twice, and did not know she was his mother, yet she was, and he must pay. I dissented from that judgment at the time. I thought then, and think still, that

it altogether merits further consideration. I believe it is the fact, and it strengthens my view for further consideration, that upon an appeal being taken to the House of Lords the case was settled upon the footing that the judgment should be held as reversed, and with costs. But the question here regards the title to sue an action of damages upon such facts as are set forth here, and my opinion is that there is no title to sue in this action. We have limited the title to sue in our practice hitherto to legitimate parents and legitimate children, and I think we have no authority to extend it. If it is thought desirable to extend it there must be an appeal to the Legislature. Whether they would think it fitting to deal with Scotland differently from England in the matter it is not for us to determine. In England they thought fit very recently to determine that there should be no such action, and the probability is that that would be their view for Scotland also. These actions are of an anomalous character altogether. I suppose that where children sue for the death of their father they must sue as a body—as a family. It was argued that wherever feelings are wounded there ought to be *solatium* by those who cause that pain or suffering. The law has not recognised that, for it has refused actions at the instance of a brother for the death of a sister, or of a sister for the death of a brother. The brother and sister may have lived together all their days, and there may been as much attachment, love, and interest between as is possible in this world. Still there is no action. It is not according to custom. It has not been allowed. It has never been allowed here, and it was not allowed by the Legislature in England when dealing with the subject. If it were allowed the case of bastards would be very perplexing indeed. I do not know what limit there is to the number of bastards a woman may have. I remember Lord Mackenzie saying upon this bench that there is no limit at all after she has had one. There may be any number of them, and any number of fathers. Well, if she could sue for the death of one of them, any one of them could sue for her death, and if any one of them, then every one of them. There must be a limit, and I think the limit we must take is that which is according to the custom heretofore—that is, the common law and practice in the matter. That has not extended it beyond legitimate parents and their children, and I am therefore of opinion that we ought to sustain the first plea for the defenders, that the pursuer has no title to sue, and to dismiss the action.

The Lord Justice-Clerk and Lord Lee concurred.

Lord Rutherfurd Clark was absent when the case was heard.

Counsel for the Pursuer—Young—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Defenders—Comrie Thomson—Dickson. Agent—W. G. L. Winchester, W.S.

Saturday, March 16.

FIRST DIVISION.

[Sheriff-Substitute of Forfarshire.

M'NAB AND OTHERS *v.* CLARKE.

Bankruptcy—Cessio—*Notour Bankruptcy—Insolvency—Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. cap.* 34), *secs.* 6 *and* 8.

By the 8th section of this Act it is provided that "any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 . . . or of this Act," may present a petition to the Sheriff of the county in which is his debtor's domicile, praying for decree of *cessio* against the debtor; and "with the petition shall be produced evidence that the debtor is notour bankrupt." By the 6th section it is provided that where imprisonment is rendered incompetent by the Act, "notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by expiry of the days of charge without payment."

In a petition for his debtor's *cessio* a creditor produced a charge expired without payment as evidence of the debtor's notour bankruptcy. A suspension of the charge had been raised, and the note had been refused. It appeared from the circumstances that the creditor might reasonably hope for the ultimate payment of his debt, although the debtor was unable to make present payment thereof. *Held* that there was *prima facie* evidence of the debtor's notour bankruptcy.

By bond and disposition in security, dated 13th and recorded 14th October 1876, David Wilkie Clarke and David Crabb, both residing in Dundee, bound themselves as trustees and individuals, and also conjunctly and severally, and their heirs, executors, and representatives whomsoever, also conjunctly and severally, and without the necessity of discussing them in their order, to repay the sum of £2000 to Jane M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, and to pay interest thereon at the rate of 4½ per cent. till payment, and in security of repayment they further disponed certain lands.

The bond was registered in the Books of Council and Session on 12th January 1888, and on 24th January Clarke was charged to make payment of the sum due thereunder within six days, with interest from the term of Martinmas till payment was made. On 31st January Clarke raised a suspension of the charge, and on 14th March the Lord Ordinary on the Bills refused the note of suspension, and on 26th May the First Division adhered.

The present petition was thereafter presented in the Sheriff Court of Forfarshire at Dundee by the creditors in the above mentioned bond, viz., Jane M'Nab, Martha M'Nab, John M'Nab, and James Cuthbert, for the *cessio* of the said David Wilkie Clarke.

The pursuers, after setting forth the fact of the charge having been made, and the proceedings in the suspension, averred, *inter alia*, as follows—"Since the term of Whitsunday (15th

May) 1888 the half-year's interest due on the said sum of £2000 at that term has been paid or accounted for to the pursuers, and sundry sums have also been received by them of sundry dates, all subsequent to the last-mentioned term, to account of said sum of £2000, amounting *in cumulo* to £92, 5s. 8d., being £13, 2s. 4d. of net proceeds of goods which belonged to said defender sold under poinding, and £79, 3s. 4d. of balance of rents, after deducting fire insurance premium, interest, and other outgoings. The said principal sum of £2000, with interest thereon at the rate of £4, 10s. per centum per annum from the said term of Whitsunday, is still due, under deduction of the said sum of £92, 5s. 8d. and interest corresponding thereto, as from the said term, all as more fully set forth in copy state of debt herewith produced and referred to, showing the debt at the date of the presentation hereof to be £1944, 8s. 10d., including therein interest to said date, and £1, 13s. 1d. of expenses. The days of charge have expired, and the debt has not been paid or satisfied to a greater extent than that above mentioned. Said extract bond and disposition in security, and the execution of said charge thereon, are herewith produced and referred to. Upon the 4th day of October 1888 notice of the pursuer's intention to present this petition was duly given to the defender in terms of the Act of Sederunt of the Lords of Council and Session, of date the 22nd day of December 1882, and section first thereof, entituled Act of Sederunt anent Processes of Cessio. A certificate of the posting of the said notice to the defender, and the Post Office official receipt therefor, are herewith produced. The defender is insolvent, and unable to pay his debts."

The pursuers pleaded—"(1) The defender is, in the circumstances stated, notour bankrupt within the meaning of the Debtors (Scotland) Act 1880, and the Bankruptcy and Cessio (Scotland) Act 1881 amending the same. (2) The pursuers, being creditors of the defender, are, in respect of his notour bankruptcy, entitled to obtain decree as craved."

Section 6 of the Debtors (Scotland) Act 1880 provides that "in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly-executed charge for payment, followed by expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment, followed by the lapse of the days intervening prior to execution without payment having been made. Nothing in this section contained shall affect the provisions of section 7 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79)." Section 8 of the same Act provides as follows—"Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), or of this Act, may present a petition to the sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed who shall take the management and disposal of his estate for such behoof, and such process shall be taken and deemed to be a process of *cessio*. In the petition there shall be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence, so far as known to the petitioner, and with the petition shall be produced evidence that the debtor is notour bankrupt."

In anticipation of the presentation of the petition a *caveat* had been lodged and the parties were heard before the Sheriff-Substitute (SMITH).

On 21st November the Sheriff-Substitute having made avizandum found "that the pursuers' averments and relative documentary evidence do not sufficiently warrant the granting of the petition; in respect, and *separatim* . . . that the inference deducible from the documents does not amount to *prima facie* evidence of insolvency, therefore dismisses the petition."

"*Note.*—The respondent and David Crabb are debtors under bond to the pursuers, and are bound conjunctly and severally, and as individuals, to pay to the pursuers the sums of £1600 and £400, and for these two sums, amounting to £2000, they have granted heritable security with the usual power of sale over three separate properties in Dundee. The pursuers have taken no steps to exercise their power of sale. They have charged the respondent and his co-obligant, be he co-partner or joint-adventurer, or whatever kind of colleague he may be, and without waiting to see whether the charge would be obeyed by this respondent or not, two days after its date they made intimation that they were to institute processes of cessio. The days of charge have, however, eventually expired, and payment has not been made. The petitioners aver that the respondent and his co-obligant are insolvent, but they tender no evidence of insolvency except the expired charge, and they plead that the expired charge by itself constitutes both *prima facie* evidence of insolvency and notour bankruptcy according to the 6th section of the Debtors (Scotland) Act 1880. They maintain that under said section and the 8th they are entitled to have the first order in a process of *cessio* pronounced against the respondent in each of the two processes. . . .

"There is no evidence of insolvency except the expired charge, and I am not disposed to hold that every expired charge for every debt, however small, is proof of notour bankruptcy against any debtor, however rich, more especially when the creditor has a power of sale, be it under a bond or a poinding, and shrinks at the same time from taking payment of his own debt in the readiest way, and also in proving his averment of insolvency if that averment be really true. But I am satisfied in this case the petitioners' own state of debt contains *prima facie* evidence of solvency. This state shews that within the last six months, or rather five months, the rents of the property exceeded the interest and outlays by £80, and that in that time the petitioners' debt had been reduced from £2000 to £1907. Therefore it seems to me that the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt, and about the regular and termly payment of interest, that there is no *prima facie* evidence of insolvency, and that there is *prima facie* evidence that the process is attempted for some other and less justifiable object than the mere payment of debt."

The petitioners appealed, and argued—The process of *cessio* at the instance of a creditor was introduced by the Debtors Act 1880. By that Act imprisonment for debt was abolished save in certain specified instances and it was necessary to have "notour bankruptcy" constituted in some other way. Section 6 of the Act showed how that was to be done. Insolvency was presumed when the other requisites concurred—Bell's Comm. 5th ed. 317, 7th ed. 334; *Knowles* v. *Balgarnie*, February 1, 1865, 3 Macph. 457. In the present case there had been an inhibition and a poinding of the ground, both of which processes had been resisted by the defender—*Clarke* v. *M'Nab*, March 10, 1888, 15 R. 569; *Clarke* v. *M'Nab*, May 26, 1888, 15 R. 670. These proceedings gave some evidence of continued insolvency. Having got an expired charge, an inhibition and poinding of the ground, it was difficult to see what more could be got to constitute "notour bankruptcy"—*Black* v. *Watson*, November 29, 1881, 9 R. 167; *Teenen's Trustee* v. *Teenen*, March 19, 1886, 13 R. 833.

The respondent argued—The inference deducible from the documents did not amount to *prima facie* evidence of insolvency, and insolvency had to be established as a requisite of notour bankruptcy. A mere expired charge was not sufficient. Insolvency had to be established. The practice under the old law afforded no ground for the proposition now maintained which was that the absence of an offer to pay the debt coupled with an expired charge constituted notour bankruptcy. Here there was no *prima facie* evidence of insolvency as the rents more than met the interest on the bond. The question to be decided involved the further question whether it was possible to get *cessio* and then sequestration as following thereon, when on the evidence of insolvency presented sequestration could not have been obtained—44 and 45 Vict. cap. 22, sec. 11.

At advising—

Lord Adam—The appellants in this case are creditors of the respondent and David Crabb, under a bond and disposition in security dated 13th October 1876, for £2000. The respondent and Crabb bound themselves to pay jointly and severally, and in security of repayment they conveyed certain subjects in security. On the 24th January 1888 they were charged by the appellants under the bond to make payment, and the charge, which expired six days later on 31st January, was then brought under suspension, and the note was refused on 26th May 1888. On 4th October the appellants intimated, in terms of the Act of Sederunt of September 1882, their intention to apply for *cessio* against the respondent. They applied and the respondent lodged a *caveat*, with the result that both parties appeared before the Sheriff, and he pronounced the interlocutor of 21st November 1888. By that interlocutor he "finds that the pursuers' averments and relative documentary evidence do not sufficiently warrant the granting of the petition," and he states as a reason for arriving at that conclusion "that the inference deducible from the documents does not amount to *prima facie* evidence of insolvency," and this we took time to consider. I am, however, of opinion that it is illfounded. It depends on the construction of the Act 43 and 44 Vict. cap. 34, sec. 8, which says—"Any creditor of a debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act 1856, . . . or of this Act, may present a petition to the Sheriff of the county in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum*," and so on. What the meaning of "notour bankruptcy" is, is discovered by going to section 6, which says—"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or, when a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made." "Notour bankruptcy" is therefore constituted by "insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment." We have next to look at the 9th section of the Act, which points out what the Sheriff has to do when the petition for *cessio* is presented to him. His duty is this—"The Sheriff, if he is satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette*, intimating that such petition has been presented, and requiring all the creditors to appear in Court on a certain day, being not less than 30 days," and so forth.

We have here undoubtedly one element going to constitute notour bankruptcy, namely, a duly executed charge followed by expiry of the days of charge without payment. The only question is, whether or not there is *prima facie* evidence of insolvency, and that is the question with which the Sheriff-Substitute has dealt.

We must, I think, first ascertain what is the meaning of insolvency in the sense of the Act. It means, I think, present inability to pay a debt. If a man, when a demand has been made upon him, cannot pay, he is *prima facie* insolvent. It is no answer to say that if he were given time to realise he might meet the obligation. Now, if that is the meaning of insolvency, it appears to me that the fact that there has been a charge for payment, and that the time allowed for payment has expired is equal to *prima facie* evidence of insolvency, and I confess I do not see how you could have better evidence. No doubt it might be said in some cases that the debt has not been paid because not due. But the charge has been here brought under suspension, and the note was refused, and we have thus an assurance that the respondent has no good ground for objecting to pay the debt. I cannot accept therefore the grounds which the Sheriff-Substitute gives in his note, on which he thinks there is no *prima facie* evidence of insolvency. These are stated thus at the end of his note—"But I am satisfied in this case the petitioners' own state of debt contains *prima facie* evidence of solvency. This state shows that within the last six months, or rather five months, the rents of the property exceeded the interest and outlays by £80, and that in that time the petitioners' debt had been reduced from

£2000 to £1907. Therefore it seems to me that the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt, and about the regular and termly payment of interest, that there is no *prima facie* evidence of insolvency, and that there is *prima facie* evidence that the process is attempted for some other and less justifiable object than the mere payment of debt." It is quite clear what the error of the Sheriff-Substitute has been. He thinks there is no *prima facie* evidence of insolvency, "because the petitioners can be under no reasonable and honest apprehension about the ultimate payment of their debt." It is not a question of "ultimate" payment. The question is whether the respondent is able to make present payment of the debt. In all the circumstances I think there is ample evidence of insolvency; and if there is *prima facie* evidence of insolvency concurring with the production of an expired charge, there is *prima facie* evidence of notour bankruptcy, and the Sheriff-Substitute should have proceeded to grant decree of *cessio*.

Lord Lee—My opinion is that the Sheriff-Substitute has gone too fast in throwing out this petition. The case, as was explained to us, was before us on a *caveat*, and the only question, therefore, was whether the petition should be entertained and proceeded with in terms of the statute.

The only point for consideration is, whether there was *prima facie* evidence of notour bankruptcy sufficient to entitle the petitioner to a warrant in terms of the 8th section of the Act. I think that the statute requires the Sheriff to consider this point, and that he is not bound to accept as in all cases sufficient and conclusive the fact that a charge for payment has expired. To constitute notour bankruptcy the statute requires that insolvency shall concur with the expired charge. But in the case of an undisputed debt, neither paid nor offered to be paid, I think that an expired charge is sufficient to raise a presumption of insolvency, and therefore affords *prima facie* evidence of notour bankruptcy.

The provisions of the second and third subsection of clause 9, as to the procedure which is to follow, appears to me sufficient to enable the Sheriff to afford the bankrupt an opportunity at a later stage of showing that the petition ought to be refused.

The Lord President concurred.

Lord Mure and Lord Shand absent.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor appealed from, and before remitting to the Sheriff find the appellants entitled to expenses in this Court, allow an account thereof to be given in, and remit the same to the Auditor to tax and report to the Sheriff: Further, remit the cause to the Sheriff to proceed therewith in terms of law, with power to decern for the taxed amount of the expenses hereby found due."

Counsel for the Appellants—Gloag—Graham Murray. Agents—Watt & Anderson, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Salvesen. Agent—J. Smith Clark, S.S.C.

Friday, March 19.

SECOND DIVISION.

SCOTT *v.* SCOTTISH ACCIDENT INSURANCE COMPANY (LIMITED).

Policy of Insurance—Construction—Liability Defined by Notice on Policy—Ambiguity to be Interpreted "contra proferentem."

A man effected a policy of insurance with an accident company, which provided that "if the insured shall sustain any bodily injury . . . which shall occasion permanent partial disablement (as defined on the back hereof) then the company shall be liable to pay to him the sum of £200." On the back of the policy there was the following:—"Notice.— . . . Permanent partial disablement implied the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight."

Held that the notice was ambiguous in its terms, and must be read in the most favourable way for the insured, and that consequently he was entitled to recover the sum of £200 for permanent partial disablement from hernia if he had otherwise complied with the conditions of the policy.

On 3rd February 1885 John Scott, timber merchant, Finnieston Sawmills, Glasgow, effected a policy of insurance with the Scottish Accident Insurance Company (Limited), having its registered office at No. 115 George Street, Edinburgh.

The policy contained the following clause—"If the insured shall sustain any bodily injury caused as aforesaid (viz., by violent accidental means) which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay to him the sum of £200 within one calendar month, after satisfactory proof of such disablement shall have been furnished to the directors, and if such injury does not entitle the insured to the compensation for permanent total or permanent partial disablement, as above provided, but shall independently of all other causes immediately and totally disable and prevent him from attending to business of any kind, then compensation shall be paid to him at the rate of £3 per week for the period of such continuous total disablement as shall immediately follow the said accident and injury, or at the rate of 15s. so long as he shall be thereby rendered partially unable to attend to business. But the period during which compensation for total or partial temporary disablement, or both, is to be paid, shall not for any single accident exceed twenty-six consecutive weeks from the date thereof." And on the back of the policy the following definition was given:—"Notice.—Permanent total disablement implies the loss of both hands or of both feet, or the loss of a hand and a foot. Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight." The said policy also contains a provision in the following terms:—"Provided always that this policy shall not extend to, nor cover the death or injury of the insured . . . arising from natural disease, or weakness, or exhaustion consequent upon disease or any surgical operation

rendered necessary thereby, or arising from such disease, weakness, exhaustion, or surgical operation, although accelerated by accident."

On 27th October 1887 an accident befel the insured, in consequence of which he raised an action in June 1888 against the said insurance company, concluding for the sum of £200, with interest at 5 per cent from 30th November 1887.

The parties, *inter alia*, averred as follows:—"(Cond. 2) On the 27th of October 1887 an accident befel the pursuer, which resulted in his permanent partial disablement. While superintending his men and assisting them in the removal of some 'log ends' of wood from one woodyard to another, both of which are situated in Galbraith Street, Finnieston, and belong to him, a 'log end' fell upon him by accident in Galbraith Street aforesaid, striking him on the back or shoulders and rolling over his head. By the force of the blow the pursuer was knocked down, had his back and one of his knees seriously injured, and sustained a severe rupture on the left side. A notice of the accident, accompanied by a medical certificate, was sent to the defenders on 31st October 1887. The counter statements are denied, under reference to the proposal for insurance referred to. (Ans. 2) Admitted that an accident happened to the pursuer on 27th October 1887 by a log end falling upon him. Believed to be true that the pursuer was thereby temporarily injured in his back and knees, and explained that a rupture which had formerly existed on the pursuer's left side was thereby considerably increased in size, but he did not suffer the loss of a hand, or of a foot, or of his sight. Further explained and averred, that the said rupture existed for some years prior to the said accident, and that the defenders in issuing the policy to the pursuer were misled by the statement in pursuer's proposal for insurance dated 3d February 1885, to the effect that he had not been ruptured. The proposal form is produced and referred to. The defenders believe that the said statement was made in error, but not with intent to deceive. The notice and certificate are referred to. *Quoad ultra* denied. (Cond. 3) In consequence of the accident above mentioned the pursuer suffered great pain, and was for several weeks confined to the house, and under constant medical attendance. He still suffers from severe hernia, which is incurable. The pursuer is able to attend partially to the duties of his business, but he is in consequence of the injury to his side permanently incapacitated from performing his ordinary duties connected with his calling, which he was capable of performing prior to the date of the said accident. The pursuer intimated to the defenders that the result of the said accident had been to inflict on him permanent partial disablement, and in respect thereof he claimed compensation in terms of the said contract of insurance. The defenders refused, however, to admit the pursuer's claim, and the present action has thus been rendered necessary. The counter statements are denied. (Ans. 3) Admitted that the pursuer was for several weeks confined to the house in consequence of said accident. Admitted that the pursuer has intimated to the defenders that the result of the said accident had been to inflict on him permanent partial disablement. *Quoad ultra* denied. Explained that the pursuer is now able to attend to his ordinary business, that he has not suffered permanent partial disablement as defined by the policy, and that the defenders have offered to compensate him under the policy for five weeks total temporary disablement, and for partial temporary disablement for such longer period as the pursuer may have been partially disabled from attending to business, and are still willing to do so, but he refuses all such payment, and demands to be paid as for permanent partial disablement. The hernia or rupture complained of by the pursuer arose from natural disease, and existed previous to the accident in question, although the defenders believe it has been aggravated and its development accelerated by the accident."

The pursuer pleaded—"(1) The pursuer having, in consequence of the accident in question, suffered permanent partial bodily disablement, is entitled to decree as concluded for, with expenses."

The defenders pleaded—"(1) The pursuer's averments are not relevant. (2) The pursuer not having suffered permanent partial bodily disablement as defined by the policy, the defenders ought to be assoilzied, with expenses. (3) The pursuer having in his proposal for the policy in question made the statement that he had no rupture, which statement was untrue in fact, and misled the defenders in entering into the said policy, the pursuer is barred from insisting in the present claim, so far as made in respect of an injury arising from said rupture. (4) The injury complained of by the pursuer having arisen from natural disease or weakness, though possibly accelerated by the accident, the defenders are entitled to absolvitor, with expenses."

Upon 14th November 1888 the Lord Ordinary (Trayner) sustained the first plea-in-law for the defenders, dismissed the action, and decerned.

"*Opinion.*—The pursuer in this action claims payment from the defenders of a sum of £200, which he says is due to him in respect of an insurance effected by him with the defenders. The defenders deny liability on the ground that the injuries suffered by the pursuer, as alleged, are not covered by the policy.

"By the policy issued by the defenders they undertake to pay the pursuer the sum of £200 in the event of his sustaining any bodily injury caused by violent, accidental, external, and visible means, 'which shall occasion permanent partial disablement (as defined on the back hereof).' On the back of the policy is printed this notice, 'Permanent partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight.' If this is regarded as an exhaustive definition of the 'permanent partial disablement' of the policy, then this action cannot be maintained, for the injuries sustained by the pursuer do not fall within the definition. But the pursuer contends that what is called a definition is only illustrative; and that while permanent partial disablement implies the specific injuries enumerated, it does not exclude other injuries having the effect of permanent partial disablement. If the word 'implies' on the back of the policy is to be regarded etymologically, and apart from the language of the policy itself, I agree with the pursuer. But I cannot so regard it here. The parties, by issuing and accepting the policy

respectively, have agreed to regard the 'notice' on the back of it as a definition; and as a definition covers the whole limits or signification of the thing defined, I must hold that permanent partial disablement in the sense of the policy means, and means only, the special forms of injury enumerated in the so-called definition. I am therefore of opinion that the pursuer has not set forth relevant grounds to sustain an action on the policy in question."

The pursuer reclaimed, and argued—There was here no exhaustive definition given, but only illustrations to meet cases which might be arguable, *e.g.*, it might be argued that a musician who only used his hands and met with an accident causing the loss of one foot was not permanently partially disabled. This notice said he was to be so regarded. But to say that persons insuring with this company against accidents who might meet with accidents to their hands, their spines, their knee-caps, and so on, could not recover under their policies unless they had lost one hand, or one foot, or where rendered totally blind, was extravagant. No one would insure on such conditions. If that was really intended it should have been made plain beyond possibility of a doubt. Any dubiety or ambiguity must be interpreted in favour of the insured, and against the person issuing the policy according to the maxim, *verba sunt interpretanda contra proferentem*.

The respondents argued—This notice was a proper definition. It was so referred to *in gremio* of the policy, for it was the only writing on the back. "Implies" has, according to the best dictionaries, not only the sense of "involving," but also of "signifying," "importing," "denoting," "meaning." The pursuer had no cause of complaint. He could not have expected to be insured against all accidents for the small premium he paid. The limitations in the notice were perfectly fair and open. The pursuer was not deprived of all redress, for there were really two contracts in this policy—one for certain payments down, and the other for weekly payments in cases not embraced under the definition. The pursuer here was entitled to so much a week, and had been offered compensation on that footing, but had declined it.

At advising—

Lord Justice-Clerk—The policy here provides that "if the insured shall sustain any bodily injury caused as aforesaid, which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay to him the sum of £200." Now, the pursuer's accident as described in the condescendence is this—"While superintending his men and assisting them in the removal of some 'log ends' of wood from one woodyard to another, both of which are situated in Galbraith Street, Finnieston, and belong to him, a 'log end' fell upon him by accident in Galbraith Street aforesaid, striking him on the back or shoulders and rolling over his head. By the force of the blow the pursuer was knocked down, had his back and one of his knees seriously injured, and sustained a severe rupture on the left side." He accordingly claims £200 for permanent partial disablement. The defenders maintain that under the terms of the notice on the back of the policy they are not liable as for permanent partial disablement. The policy refers to what is in the notice by the words "as defined on the back hereof." The notice does not bear on the face of it to be a definition, and can only be taken as such because so referred to in the policy. Whatever it is to be called the terms of the notice are most ambiguous, and no better test of their ambiguity can be given than the fact that the counsel for the defenders read to us fifteen different synonyms for the only verb used. All depends on the meaning to be attached to the word "implies." If the notice is to be regarded as a notice to the insured it must be held to mean whatever the insured could reasonably regard it as meaning. The ambiguity is not to be interpreted in favour of the party who draws up the policy, but is to be interpreted in the most favourable sense for the insured.

I cannot read it as the Lord Ordinary has done. He thinks that in no case of injury can a person recover as for permanent partial disablement unless he has lost one hand, or one foot, or both his eyes. That would be to give the policy an extraordinary meaning. It would never lead anyone to read it in that way, and such an interpretation would be contrary to the common sense of mankind. A policy may limit the payment of £200 in case of an accident to the case of the loss of a hand or of a foot, but it must make the intention to do so quite plain. I suspect that very little business would be done by the defenders if people thought those policies were only to be read as the company suggests.

It was said that there are here two contracts, and that the pursuer has a claim under the second one, although not under the first. But under the former the most he can receive is £78, or £3 for 26 weeks, which is very different from £200 down, and the defenders' contention is to make a man who has met with an injury to his spine or to his head entitled only to so much a week. If that was the intention of the defenders they should have made it impossible to read their policy in any other way. Here I think it is to be read in the way most favourable to the pursuer. I am therefore for sustaining the appeal, and repelling the first plea-in-law for the defenders.

Lord Young and Lord Lee concurred.

Lord Rutherfurd Clark was absent.

The Court sustained the appeal.

Counsel for the Pursuer—Ure. Agents—Reid & Guild, W.S.

Counsel for the Defenders—Jameson—Crole. Agents—J. & R. A. Robertson, S.S.C.

Tuesday, March 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

AITON *v.* MILNE AND OTHERS (RUSSELL'S EXECUTORS).

Superior and Vassal—Personal Obligation in Feu-Contract—Obligation on Vassal, his Heirs, Executors, and Successors whomsoever.

A feu-contract provided that the subjects disponed should in all time coming descend to and be acquired by the heirs and successors of the vassal, who bound "himself, his heirs, executors, and successors whomsoever" to pay the feu-duties and implement the other prestations incumbent on them. On the death of the vassal his heir-at-law refused to take up the succession. In an action at the instance of the superior—*held* (1) (following the case of *The Police Commissioners of Dundee* v. *Straton*, February 22, 1884, 11 R. 586) that the deceased's executors were liable only for feu-duties falling due in the vassal's lifetime; and (2) that they were not liable for damages in respect of the heir's failure to enter.

By feu-contract dated 17th and 26th September 1879 William Aiton of Boddam, Aberdeenshire, disponed to James George Ferguson Russell of Aden and Buchanness Lodge, Aberdeenshire, and his heirs and assignees, an area of ground measuring about 9 acres adjoining Buchanness. The feu-contract, after specifying certain conditions, provided, *inter alia*:—"And further, as the pieces of ground and others hereby disponed are so disponed for the purpose of adding to or extending the grounds already attached to, and for increasing the amenities of Buchanness Lodge, it is hereby expressly provided and declared, that the said pieces of ground and others hereby disponed shall continue and in all time coming remain attached to, and shall not be separated from Buchanness Lodge and grounds, and the said James George Ferguson Russell and his foresaids shall not be entitled to dispone, assign, or gratuitously convey the said pieces or portions of ground hereby disponed or any part thereof, except as a part of and along with the said lodge and grounds, and the same shall in all time coming descend to and be acquired by the heirs and successors of the said James George Ferguson Russell in the said lodge and grounds: . . . All which conditions, &c., are hereby declared to be real burdens affecting the said pieces of ground and others hereby disponed, &c., . . . And it is hereby expressly provided and declared that if the said James George Ferguson Russell or his foresaids shall contravene or fail to implement any of the conditions, provisions, and obligations herein written, this present right and all that may have followed thereon shall, in the option of the said William Aiton and his foresaids, become null and void, without declarator or other process of law to that effect, any law or practice to the contrary notwithstanding; and the said James George Ferguson Russell and his foresaids shall admit, lose, and forfeit all right and interest in the ground hereby feued, and buildings thereon, which shall thereupon revert to the said William Aiton and his foresaids free and disencumbered of all burdens whatsoever, in like manner as if this feu-right had never been granted." . . . "For which causes, and on the other part, the said James George Ferguson Russell binds and obliges himself, and his heirs, executors, and successors whomsoever, to make payment to the said William Aiton, and his heirs and assignees, of the sum of £117, 15s. sterling yearly, being at the rate of £12 per imperial acre, in name of feu-duty, for the said pieces of ground and others hereby disponed, and that at the term of Martinmas yearly, beginning the first term's payment thereof at the term of Martinmas next, 1879 for the year ending at that date, and so forth yearly in all time thereafter; . . . and further, the said James George Ferguson Russell binds and obliges himself and his foresaids to implement and perform the whole other prestations, conditions, and provisions herein contained, incumbent on them." The feu-duty was duly paid to Martinmas 1886.

Mr Russell died on 15th April 1887, and there being no heirs of his body his younger and only surviving brother Colonel Frank Shirley Russell, his heir-at-law, succeeded to the entailed estates of Aden and others, including Buchanness Lodge. Mr Russell left no other heritage except the said feu.

Colonel Russell refused to take up the said contract of feu, or to implement the obligation therein.

Mr Aiton raised the present action against John Duguid Milne and others, James Russell's executors, concluding for payment of (1) the sum of £117, 15s. in name of feu-duty due at Martinmas 1887 and interest, or of £50 (the proportion thereof accruing between Martinmas 1886 and 15th April 1887) and interest; (2) of £2000 of damages for breach of contract.

The pursuer averred that by the feu-contract it was provided that the lands disponed should in all time coming descend to and be acquired by the heirs and successors of James Russell in the lodge of Buchanness which was held by him at the date of the feu-contract under a strict entail. In consequence of the declinature of Colonel Russell to take up the feu, the pursuer had called upon the executors of the deceased to make payment of the feu-duties due under the said contract, and also either to take up the said contract of feu or to pay damages. By the breach of the said feu-contract the pursuer has sustained loss and damage to the extent of £2000.

The defenders averred that the clause of payment of feu-duty was in the usual words of style, as given in the last two editions of the Juridical Styles, and that, according to inveterate practice, it imported after the death of the vassal no obligation on his executors for payment of the feu-duty in the future. They denied the liability which the pursuer sought to impose upon them, and they tendered payment of £50 in full of the conclusions of the summons.

The pursuer pleaded, *inter alia*—"(1) The defenders as executors foresaid are due and resting-owing to the pursuer the feu-duty payable for year ending at Martinmas last to the superior under the said feu-contract, or at least the proportion thereof to the date of Mr Russell's death. (2) The defenders as executors foresaid are liable

to the pursuer in implement of the obligations in his favour contained in the foresaid contract of feu. (3) In consequence of the breach of said contract as condescended upon, the said defenders are liable to the pursuer in damages as concluded for."

The defenders pleaded, *inter alia*—"(1) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (2) On a sound construction of the feu-contract libelled, the present defenders are not liable for any feu-duties after the death of the vassal, the late Mr Russell. (4) No damages are due, in respect that there has been no breach of contract or fault on the part of the late vassal or the present defenders, and *separatim*, that the pursuer has suffered no damage."

On 12th June 1888 the Lord Ordinary (KINNEAR) decerned against the executors for payment of £50, the amount of feu-duty which became due during the lifetime of the deceased vassal; *quoad ultra* he sustained the first and second pleas-in-law for the defenders, and assoilzied them from the conclusions of the action, and found them entitled to expenses.

"*Opinion.*—This action is founded upon a feu-contract between the pursuer and the late Mr James Russell of Aden, in Aberdeenshire, by virtue of which Mr Russell held certain lands under the pursuer from 1879 till his death on 15th April 1887. The pursuer avers that the heir of line of the deceased vassal has refused to take up the feu, or to perform the obligations incumbent on the vassal, and in consequence of this declinature he claims a right to recover from the defenders, as the late Mr Russell's executors, the feu-duty which fell due at Martinmas 1887, the term following their author's death, and £2000 as damages for breach of contract.

"I do not think it doubtful that the vassal's executors are liable for the feu-duties accruing due during his lifetime, and I shall accordingly give decree for £50, which is admitted to be the proportion of the feu-duty payable at Martinmas 1879, corresponding to the period of Mr Russell's survivance of the last term. But I think it equally clear in law that no action lies against the executors, either for feu-duties accruing due since the last vassal's death, or for damages in respect of the heir's failure to enter.

"The obligation for payment of the feu-duty is in the usual terms. The feuar binds himself and his heirs, executors, and successors whomsoever, and there can be no question as to the construction of such an obligation in a feu-contract. It must be read, as the Lord President explains in *The Police Commissioners of Dundee* v. *Straton*, 11 R. 590, as an obligation on the original feuar himself, 'so long as he remains vassal and lives, and after his death on his heirs and executors, for payment of arrears, and on his successors in the feu for payment of the feu-duty in the future.' It is possible for the feuar to bind his heirs, executors, and successors so as to make them all liable, jointly and severally, to fulfil the whole obligations of the feu, and the case just cited is a good instance of such a contract. But in the present case there is no room for a construction which would make the several successors of the original feuar liable *singuli in solidum*. The feuar binds himself, so long as he lives and continues to be the vassal in the feu, in the whole prestations of the contract; he binds his successor in the feu in like manner in the whole obligations of the contract after his death; and he binds his heirs and executors for the arrears which may be due at his death, and for nothing more. The pursuer's counsel accordingly did not maintain in argument that the executors would continue liable along with the successor in the feu right if the latter had completed a title and entered with the superior. But if they are not liable jointly with the heir of the investiture, there appears to me to be no ground in law upon which they can be made liable for future prestations at all. The several liabilities of the successor in the feu on the one hand, and the personal representatives of the deceased vassal on the other, are perfectly clear and distinct; and if there be no joint liability, I am unable to see any reasonable ground for subjecting representatives who cannot succeed to the feu to the liabilities attaching only to the vassal.

"But it is said that there is no successor in the feu, because the heir of the investiture declines to take up the estate, and therefore that the representatives of the first vassal must be liable for the feu-duties, because his liability can only be extinguished *delegatione* by the substitution of a new vassal in his room. I know of no authority for this proposition. It is not in my opinion supported by the case of *Hyslop* v. *Shaw*, on which the pursuer's counsel relied. It was held in that case that an entered vassal continues liable for feu-duties, even after he has sold the lands, until a new vassal shall have entered with the superior. But the ground of judgment was that the disponer continues vassal until the entry of the disponee, and therefore cannot escape from the liabilities attaching to that character. This is perfectly consistent with the doctrine laid down by the Lord President in the case of *Straton*, that the original feuar remains liable 'so long as he lives and continues vassal,' but he ceases to be vassal when he dies. His death vacates the feu, and the whole right and liabilities of the feu-contract or feu-charter, if he has not disponed the estate during his life, thereupon pass to the heir of the investiture. No one else can take the place of the deceased vassal, or be affected by liabilities which are inseparable from the tenure. If the heir does not choose to enter, the superior had his remedy by declarator of non-entry under the old law, and he has an analogous remedy under the Statute of 1874. But there is no authority in principle or precedent for sustaining a personal action againt representatives who have no right to the character of vassal, and no title to take up the feu. The only ground on which such an action could be maintained is that of personal obligation imposed upon the deceased vassal's representatives by a special stipulation for that purpose. Whether there is such an obligation in any particular feu-contract is a question of construction, and in the present case the construction of the contract does not appear to me to be doubtful.

"I am unable to follow the reasoning upon which it is proposed to subject the defenders in damages. If they are liable for feu-duties, their liability must be limited to the amount actually

due. If they are not liable, they have committed no breach of contract."

The pursuer reclaimed, and argued—The claim which the pursuer here made was reasonable, and was in its form of damages the only remedy which he had against the vassal's executry estate. An analogy could be drawn for a claim of this kind from leases, the result of the law as to which was that a tenant in binding himself bound his estate after his death—*Bethune* v. *Morgan*, December 16, 1874, 2 R. 186. Leases and feu-contracts were both personal contracts, and it had been held in such cases that the liability of the tenant only ceased *delegatione*—*Skene* v. *Greenhill*, May 20, 1825, 4 Sh. 25. But when there was no delegation an opposite rule prevailed—*Hyslop* v. *Shaw*, March 13, 1863, 2 Macph. 535. The bargain undertaken by the deceased could be implemented by his rich estate, or it could pay damages for breach of contract—*Abercorn* v. *Marnoch's Trustees*, June 26, 1817, 19 F.C. 364. There was in the present case a double liability and a double contract—*Hunter* v. *Boog*, December 16, 1834, 13 Sh. 205. There was in the present case no one the superior could go against by virtue of his tenure, but he could go against the executors of the deceased in virtue of the contract—*Burns* v *Martin*, February 14, 1887, 14 R. (H. of L.) 20; *Stewart* v. *M'Callum*, February 14, 1868, 6 Macph. 382; *King's College of Aberdeen* v. *Hay*, March 11, 1852, 14 D. 675; Stair, ii. 3, 34; 2 Bankton, 144. It was urged by the other side that no case could be shown in which a demand similar to the present had been made, but that was no satisfactory answer, for in the case of *Hyslop, supra*, no parallel case was cited, and yet the decision was in favour of the superior. In cases like the present a distinction was to be drawn between the feudal relation and the personal contract — *Prudential Assurance Company* v. *Cheyne*, June 4, 1884, 11 R. 871.

Argued for the defenders—The defenders' liability here was quite limited in its character, and was settled by the case of *The Police Commissioners of Dundee* v. *Straton*, February 22, 1884, 11 R. 590; they were bound for the feu-duty due at the death of the vassal, but for no more. The defenders had no right to make up a title to these subjects, and if Russell had disponed them to them, he would by so doing have broken the feu-contract. The pursuer was therefore seeking to make the defenders liable in feu-duty for a subject from which they never could derive any benefit. The words in the feu-contract imported no higher liability than would have been incurred under an ordinary feu-charter—Jur. Styles, vol. i. (3rd ed.) p. 32. Divestiture terminated liability. There were two kinds of divestiture—(1) by devolution, (2) by death—Duff's Feudal Conveyancing, p. 133. As the defenders were not the successors of the vassal in the feu, they were not liable in feu-duties after the deceased's death, and it was absurd to suggest that any obligation lay upon them to provide a vassal in all perpetuity—*Peddie* v. *Gibson*, February 27, 1846, 8 D. 560. No analogy could be drawn for the case of leases—*Scott's Executors* v. *Hepburn*, June 14, 1876, 3 R. 816; *M'Callum* v. *Stewart*, February 17, 1870, 8 Macph. (H. of L.) 1. It had never been decided that when a vassal died the superior had two remedies, one against the land and another against the executors. The tenure ended with the vassal's death as effectually as it did *inter vivos* by the entry of a new vassal, and all obligations depending on the tenure ended with it—*Brown's Trustees* v. *Webster*, March 11, 1852, 14 D. 675. The case of *Hyslop, supra*, on which the pursuer so much relied, could not be taken as settling that a landlord had the right to go against his tenant's executors in implement of the prestations of the lease; the question was left open, but the law of leases did not affect the present question as there was no *reddendo* in a lease, only a personal obligation.

At advising—

Lord President—The late Mr Russell of Aden and Buchanness Lodge, Aberdeenshire, died on the 15th April 1887. He had been for some time before his death a vassal of the pursuer's under a feu-contract dated 17th and 26th September 1879. Mr Russell's heir-at-law is not inclined to take up this succession, and he refuses to enter with the pursuer as superior; and accordingly the present action has been brought by the superior against Mr Russell's executors in which he seeks to have them ordained to pay the feu-duty due at Martinmas 1887, the term following their author's death, and to pay a sum of £2000 as damages for breach of contract.

I think this is a very clear case, and I entirely agree in the view adopted by the Lord Ordinary.

The relation of superior and vassal is constituted either by feu-charter or by feu-contract. Under an ordinary charter the vassal, by accepting the feu, comes under an obligation to pay the feu-duty, and he subjects his personal representatives to all feu-duties accruing due during his lifetime. If the vassal's heir takes up the succession, he in like manner becomes liable to the superior in payment of the feu-duty, while if the feu be sold, the successor in the feu becomes liable to the superior for the feu-duty, and the original feuar is discharged.

In the present case, the deed being a feu-contract, the vassal binds himself, his heirs, executors, and successors whomsoever—that is to say, there is an expressed obligation upon the successors in feu, instead of an implied obligation, as there would have been in a feu-charter. All that the vassal here does by his acceptance of the feu is to bind himself and his executors in payment of the stipulated feu-duty accruing during his life, and his successors in the feu for payment of feu-duty in the future.

It is not necessary to consider the various obligations which may be entered into, and which may be made to form part of a feu-contract, because we have none of these to deal with in the present case.

Anything may be the subject of contract between the various parties, but in the ordinary case the personal representatives of the original vassal can only be made liable for the feu-duties accruing due during the vassal's lifetime.

The obligations of the vassal might very easily have been made much wider, as in the case cited by the Lord Ordinary. The words used there were, as in the present case, "heirs, executors, and successors whomsoever," but there was

added, "conjunctly and severally." Now, these were fatal words for the feuar, because each was bound along with all the others. This was not a separate but a conjunct obligation. The Court were all of opinion that but for these words the result at which it arrived would have been the opposite. I see that in that case I said—"If the clause had stood precisely as it does, but without the words 'conjunctly and severally,' it could not have been contended that any party was bound but those who would generally be bound under such clauses in an ordinary feu-contract. The imposition of the obligations on the vassal, his heirs, executors, and successors, would have been read, according to inveterate practice, as an obligation on himself so long as he remained vassal and lived, and after his death on his heirs and executors, for payment of arrears, and on his successors in the feu for payment of feu-duty in the future." Now, that is just the clause which we have to construe here, and accordingly the case of *Straton* becomes an express authority on the present question.

Lord Adam—I think this a very clear case, and I concur in the opinion expressed by your Lordship. The question turns upon the construction which is to be put upon what would be termed the *reddendo* clause in a feu-charter. By it the vassal Russell bound himself during his lifetime, and his heirs and executors, and his successors after his death, in payment of these feu-duties, and accordingly the question comes to be, are the defenders Russell's successors in the feu? If they are, then they are liable in the payments claimed; if they are not, then the sums demanded are not exigible from them. As they are not the vassal's successors in the feu, they are in my opinion entitled to absolvitor. But it was urged in addition that the true reading of the obligation undertaken by Russell was that he bound himself to provide a successor in the feu for all time coming, and that as he had failed in his undertaking, the sum now claimed in name of damages was due. I cannot see anything to warrant such a reading of this contract, and accordingly I think the only course open to the pursuer is just to adopt his ordinary remedy and resume possession of the feu.

The Lord President intimated that Lord Mure (who was absent from illness) concurred in the judgment.

The Court adhered.

Counsel for the Pursuer—Sir C. Pearson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender - D.-F. Mackintosh, Q.C.—Begg. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Commissariot of Edinburgh.

VINCENT AND GUARDIAN *v.* THE EARL OF BUCHAN.

Foreign—Domicile—Proof—Onus.

A lady whose domicile of origin was Scottish married in 1855 a domiciled Scotsman, with whom she resided, partly in Scotland and partly in England, down to the date of his death in 1883.

Her husband left her considerable property, consisting of a house in London, which after occupying for a few months, she sold along with most of the furniture which it contained, two farms in Scotland, which were in her possession at the time of her death, and about £15,000, which was invested by her Scottish agents on heritable security in Scotland. During the five years which she survived her husband she only revisited Scotland twice, residing for the most part in London in furnished houses, or in lodgings. She frequently went abroad, and she also visited occasionally various watering places in England. She died in London in 1888.

After her death a question arose as to whether her domicile was Scottish or English. *Held* that the *onus* of proving that the deceased had abandoned her domicile of origin fell upon the party alleging that she had *animo et facto* acquired an English domicile; and, on the proof, that this *onus* had *not* been discharged.

This was an application in the Commissary Court of Edinburgh for the appointment of an executor to the deceased Lady Elizabeth Lee Harvey, widow of Henry Lee Harvey of Castle Semple, Renfrewshire. She died in London on 13th January 1888.

Francis Erskine Vincent presented a petition to be decerned executor. He was the nephew of the deceased, and her sole next-of-kin by the law of Scotland. He alleged that Lady Elizabeth died domiciled in Scotland.

The application was opposed by the Right Honourable David Stuart, Earl of Buchan, the eldest brother consanguinean of the said Lady Harvey, who alleged that at the date of her death she was a domiciled Englishwoman, that her succession fell to be regulated by the law of England, and that by it, in cases of intestacy, brothers and sisters consanguinean were entitled to participate in the division of the deceased's estate, and to the office of executor, equally with the brothers and sisters german. The respondent maintained that he was entitled to be substituted for the petitioner, who was a minor, or to be conjoined with him in the office of executor.

The Sheriff Commissary allowed a proof, the petitioner being appointed to lead. The following facts were established—Lady Elizabeth Lee Harvey was a daughter of the late Henry David Erskine, 12th Earl of Buchan, who was a domiciled Scotsman. She was born in Scotland. In 1855 she married Henry Lee Harvey of Castle

Semple, Renfrewshire, who was a Scotsman. They resided at Castle Semple after her marriage (down to the date of Mr Harvey's death in May 1883), a small part of each year being spent at Mr Harvey's London house, 113 St George's Square. At his death Mr Harvey left her two farms in the county of Renfrew (which she still held at the time of her death), and from £14,000 to £15,000 of moveable property, which was lent out upon various securities by her Scottish agents (chiefly heritable securities over Scottish property). Mr Harvey also left her his London house in St George's Square, which she occupied for a few months after his death, and then sold it. After Mr Harvey's death Lady Elizabeth only visited Scotland twice. She lived partly in London in various furnished houses in Cadogan Place, and also in lodgings there, and partly on the Continent, and at different watering places in England, and she died in lodgings at 85 Cadogan Place in January 1888 intestate, and without issue. The more important passages in the evidence bearing upon the question whether at the time of her death Lady Elizabeth had or had not abandoned her Scottish domicile of origin are quoted in the opinion of Lord Adam.

On 29th June 1888 the Sheriff-Substitute (Hamilton) pronounced an interlocutor finding that the deceased died domiciled in England, and sustaining the first plea-in-law for the respondent.

"*Note.*—It is not disputed that the late Lady Elizabeth Lee Harvey, who was the daughter of a Scottish Earl, and the wife of a Scottish landed proprietor, had her domicile in Scotland down to her husband's death in 1883. The question is whether she afterwards acquired a domicile in England, which she retained until her death in January last. After careful consideration the Sheriff-Substitute has come to be of opinion that the question must be answered in the affirmative. Shortly stated, the import of the evidence seems to him to be—That when Lady Elizabeth left Scotland after her husband's death she had no intention of returning, that she voluntarily fixed upon London as the place where she would live in future, and that the character and circumstances of her residence there, which lasted practically without interruption from the time of her leaving Scotland until her death, showed a present intention to make London her home or permanent place of abode.

"The Sheriff-Substitute in dismissing the petition is not to be held as deciding that the petitioner is not entitled to be decerned executor to the deceased. It is not denied that by the law of England he has right to a share of the estate, and he may have right also to a share in its administration, but this question will be better considered on a new application than on any amendment of the present petition."

The petitioner appealed, and argued—The Sheriff was wrong in throwing upon the petitioner the *onus* of proof, for there could be no doubt that, looking to the facts of the case, Lady Elizabeth was a domiciled Scotswoman at the date of her husband's death—that was in 1883—and the only question to be determined was whether she between 1883 and 1888 (the year of her death) abandoned her domicile of origin, and acquired a domicile of residence; but the *onus* was on the respondent to displace this Scottish domicile of origin—*Steel* v. *Steel*, July 13, 1888, 15 R. 896; *Moorhouse* v. *Lord*, L.R., 10 H. of L. 272; *Donaldson* v. *M'Clure*, December 18, 1857, 20 D. 307. There was not on Lady Elizabeth's part any change of domicile *animo et facto* after her husband's death. She had no fixed residence, and no desire to make one. The mere circumstance of long-continued residence did not *per se* constitute a change of domicile—*Udny* v. *Udny*, December 14, 1866, 5 Macph. 164; *Bell* v. *Kennedy*, May 14, 1868, 6 Macph. H. of L., 96; *Patience* v *Main*, L.R., 29, Ch. Div. 976; *Munro* v. *Munro*, Aug. 10, 1840, 1 Rob. App. 492; Fraser on Husband and Wife, ii. p. 1265.

Argued for respondent — While admittedly Lady Elizabeth's domicile of origin was Scottish, and while she admittedly retained this up to the date of her husband's death, after that event she, by her permanent residence out of Scotland and mostly in London, acquired *animo et facto* a domicile of residence in England. So far as Lady Elizabeth had any fixed determination, it was not to return to Scotland. Her *animus* in the matter was to be gathered from her acts. It was possible that she did not realise what she was doing when she made London her home; but a person might by his acts acquire a domicile of residence, and his *animus* would be interpreted by his actings. By her not residing in Scotland, and by making London her permanent home, Lady Elizabeth had shown her intention of abandoning her domicile of birth. She was a widow whose home in Scotland was broken up, and this of itself favoured a change of domicile, while her most valued friends were resident in London, and her interests were after her husband's death all centred there. The Sheriff might have been wrong in ordering the petitioner to lead in the proof, but any *onus* which lay upon the respondent had been shifted, and the proof showed that Lady Elizabeth at the time of her death was a domiciled Englishwoman.

At advising—

Lord Adam—Lady Elizabeth Lee Harvey died intestate and without issue on the 13th January 1888. Thereafter the petitioner Francis Erskine Vincent, who is a minor, presented a petition to the Commissary of Edinburgh praying to be decerned executor-dative *qua* next-of-kin to her along with his father as his curator.

The petition is presented on the footing that Lady Elizabeth Lee Harvey was at the time of her death domiciled in Scotland.

It is not disputed that the petitioner is the only child of Lady Margaret Erskine or Vincent, and that she and Lady Elizabeth Lee Harvey were the only children of the second marriage of the Earl of Buchan, and that therefore the petitioner is the deceased's sole next-of-kin by the law of Scotland. The petition, however, is opposed by the Earl of Buchan, who is the eldest brother consanguinean of Lady Elizabeth Lee Harvey. He alleges that he is one of her next-of-kin according to the law of England, and that by that law brothers and sisters consanguinean are entitled in cases of intestacy to participate in the division of the deceased's estate equally with the brothers and sisters german, and he further alleges that Lady Elizabeth Lee Harvey was at the time of her death domiciled in England.

The question at issue between the parties, and the only one that was argued to us, is, whether Lady Elizabeth Lee Harvey was at the time of her death domiciled in Scotland or England?

The Sheriff Commissary, on considering the proof, pronounced on 29th June 1888 an interlocutor by which he found that the deceased died domiciled in England, and dismissed the petition.

It is against this interlocutor that the present appeal is brought.

Lady Elizabeth Lee Harvey was the daughter of the Earl of Buchan, who was a Scottish Peer and a domiciled Scotsman. She was born in Edinburgh, and was married in 1855 to Mr Lee Harvey of Castle Semple, who was also a domiciled Scotsman, and the proprietor of that estate in Scotland, where she principally resided with him until his death in May 1883. There can be no doubt or question therefore that Lady Elizabeth Lee Harvey was from her birth down to this date, 1883, a domiciled Scotswoman. It is at this date accordingly that the respondent alleges that Lady Elizabeth changed her domicile.

That being so, the *onus* undoubtedly lies upon the respondent of proving the change he alleges, and I may remark in passing, although it is not very material now, that the interlocutors of the Sheriff-Substitute of 16th and 31st March 1888 respectively were erroneous, in respect that by ordering the petitioner to lead in the proof they failed to recognise the *onus* thus lying on the respondent. What that *onus* is, and what the respondent must prove in order to establish a change in the domicile of origin, is, I think, quite settled in law, and I need only to refer to the recent case of *Steel* v. *Steel*, 15 R. 896, and to the authorities there cited. These cases settle that the respondent must prove not only that Lady Elizabeth intended to abandon her Scotch domicile after the death of her husband, but also that she actually acquired *animo et facto* a domicile in England. The domicile of origin cannot be lost until another is acquired—merely to prove therefore that Lady Elizabeth when she went to England did not intend to return to Scotland to reside there would *per se* avail the respondent nothing. I think that it is equally well settled in law and in reason that an intention to abandon the domicile of origin is not easily to be presumed. It is not easily to be presumed that a person intends to abandon those civil rights which he has hitherto enjoyed, and which have hitherto regulated his life, and to subject himself to foreign laws. But this no doubt is a question of degree, and it may more easily be presumed, for example, that a Scotsman may have intended to subject himself to the laws of England than to those of a purely foreign country.

From a careful consideration of the evidence I am satisfied that when Lady Elizabeth, upon the death of her husband in 1883, having no longer a residence in Scotland, went to reside in London she had no intention of abandoning her Scottish domicile. I think she had no settled intention of residing in London or elsewhere in England. I think the state of her mind was, that she had resolved to have no permanent home anywhere, but to reside either in England or abroad from time to time as best suited her health and convenience at the time, and I think that this continued to be the condition of her mind until her death.

If this be the right view of the evidence, then the respondent's case must fail, because in that case Lady Elizabeth never had the *animus* to change her domicile, which was necessary as the first condition for the acquisition of a new domicile. That Lady Elizabeth should not have desired to form a permanent residence at any particular place was, I think, in her circumstances very natural. There had been only one child of the marriage between her and her husband, a daughter, but she had died, and Lady Elizabeth after her husband's death was left very much alone in the world. She seems to have had few ties left, and no particular reason for selecting one place rather than another for a permanent residence. As regards Scotland, Castle Semple was entailed, and had passed into the hands of comparative strangers, so that she had no longer any residence there. She seems to have had few or no friends in England except her Scottish relatives, and of them she seems to have been most attached to her stepmother Lady Buchan, an aged lady, who had brought her up. There is, however, evidence as to what Lady Elizabeth's intentions were as regards her future life.

Lady Buchan, who I think is more likely than anyone else to have known her intentions in this respect, says—"Her first idea, I believe, in the world was, that she never would have a home again after losing her husband and child. Then she came to London, and she always disliked London excessively, and came, I believe, only because she knew I was so much attached to her. (Q) Did she ever speak to you about living abroad?—(A) No; she always said she never would live anywhere, but she meant to go abroad. I daresay it would have ended in her living chiefly abroad, and only coming to England and Scotland occasionally." And again Lady Buchan says, in answer to the question, "Do you believe that she had any intention in her mind as to where she would live when she was in London?—(A) I am quite sure of her mind so far that she was determined she never would, you might say, 'live' anywhere. One cannot tell what might have happened, but I am quite sure it would not have been London or England—any part of England. But I do not believe she ever would have settled. I do not believe so." Then again Lady Buchan says, with reference to Lady Elizabeth having sold her furniture—"She told me she sold the things because she did not want them any more, and never could want them again. I have heard her say that very often. (Q) Did she say why she would not want them again?—(A) Because she said she never could be happy in this world, and she never would attempt to make a home for herself again. She said that to me in different words, but implying that. That was the only thing in fact I think that she had clear in her mind."

Mrs Dr Garrett Anderson, who attended her professionally for a number of years, says on this subject, in answer to the question, "Did she speak to you as to her intentions at any time?—(A) As to staying do you mean? Yes.—The only thing that I can remember bearing upon it at all was that once or twice I tried to interest her in different things in London, and she always said, 'Oh, it was not worth while taking up things in London; I am here only passing; I am here

as it were for the time.' I remember her saying that, and I think that is all."

Mr Ligertwood, who is a very reliable witness, speaking to a conversation which took place in 1886, is asked—"Did she say anything on that occasion as to where she was going to live?—(A) Not much; she thought it would end in her living abroad, as she thought the climate suited her better. "(Q) Did she ever make use of any expression that gave you to understand that she had any intention of residing permanently at any particular place?—(A) No, but I thought when she spoke about living abroad it would be Carlsbad as she was very fond of it. (Q) Did she use any expression to make you think that she thought of living in London or any other place?—(A) No, I don't think so." And Dr Campbell, who is a witness for the respondent, and who had been her medical attendant for several years, says on this subject—(Q) "In the course of your conversation with her did she ever say anything which showed her intention as to the place of her residence?—(A) Not the slightest. She seemed to have no wish at all. She seemed to be absolutely indifferent as to where she was."

There is also a voluminous correspondence produced containing many of Lady Elizabeth's letters, principally upon business matters, but it does not throw much, if any, light on her intentions in this respect. I may, however, refer to one, of date 25th August 1883, addressed to Mr Ligertwood, in which she writes—"Of course I shall be more in London now than anywhere else." That is exactly what she was doing during the few future years of her life, but that is a very different thing from being settled permanently there.

As regards the evidence of the servants I do not think it is of any weight. Lady Elizabeth seems to have said to them one thing to-day and another thing to-morrow; that she was going to live in London, in Germany, or in Paris, just as she happened to be pleased with her surroundings at the time.

Nor do the circumstances of her residence in London after her husband's death afford any presumption that she intended to reside there permanently. Her husband had left her by disposition and settlement everything in his power, and among other subjects a house in St George's Square, London, in which they had resided for a part of the year, and in which she was residing when he died. But she broke up her establishment there, sold the most part of the furniture, and ultimately the house also. Too much weight must not, however, be attached to the sale of the house, because she thought it too large for her, and did not like the situation. After breaking up her establishment in St George's Square she lived for some time in lodgings, and then successively in three furnished houses in Cadogan Place, which situation she liked, and she ultimately died there in lodgings or furnished apartments. Every year, except one when she travelled in England, she resided for some months abroad. This mode of life does not appear to me to suggest any element of permanency of residence, but rather a desire on her Ladyship's part to be able to move about when and where she pleased.

On the other hand, as regards Scotland, it is true that she had no residence there, and only visited it twice after her husband's death. She had two farms in Renfrewshire which her husband had left her, and although when bad times came, and she had trouble with her tenants, she wished to sell these farms, they had not been sold at the time of her death. Her husband had also left her between £14,000 and £15,000 of moveable property. This was all invested in Scotland, and her whole business matters were managed by her agents in Scotland, and she continued to contribute through Mr Ligertwood to numerous local charities there. These facts might have been of little avail if the question had been whether they were sufficient to maintain a domicile of choice, but they are sufficient to show that Lady Elizabeth had never severed her connection with Scotland.

I think the error into which the learned Sheriff-Substitute has fallen lies in this, that he has failed to appreciate the difference between a domicile of origin and a domicile of choice, and on the whole matter I am of opinion that the respondent has failed to prove that Lady Elizabeth took up her residence in England with the intention of permanently residing there, that consequently she never lost her Scottish domicile, and that the interlocutor appealed against ought to be reversed.

Lord President—I am entirely of the same opinion, and I think everything in this case is so very clear that I cannot understand how the learned Sheriff-Substitute arrived at the result he did, except in consequence of the mistake which he made at the outset of throwing the *onus* upon the petitioner of proving that Lady Elizabeth Lee Harvey died domiciled in Scotland. She was resident in London at the time of her death, and accordingly the Sheriff-Substitute seems to have thought that in consequence of this circumstance it fell upon the petitioner to show that she had retained her Scottish domicile. That, however, is not the case. The question for determination is, whether or not Lady Elizabeth lost her Scottish domicile, and that it is clear she could not have done without at the same time acquiring a new domicile. The *onus* is upon the respondent of proving this, especially as Scotland was admittedly the domicile of origin by the existence of a domicile of origin.

The Lord President intimated that Lord Muir (who was absent from illness) concurred in the judgment.

Lord Shand was absent from illness.

The Court recalled the interlocutor of 29th June 1888, repelled the pleas-in-law for the respondent, sustained the plea-in-law for the petitioner, and remitted the case to the Sheriff Commissary to decern the petitioner executor-dative in terms of the prayer of the petition.

Counsel for the Petitioner—Balfour, Q.C.—Graham Murray. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.

Tuesday, March 19.

SECOND DIVISION.

CAIRNS *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Personal Injury — Master and Servant — Known Danger — Fault — Want of Reasonable Precautions.

A surfaceman, while working in sidings where there was much noise and constant whistling, was knocked down and fatally injured by a railway engine entering the sidings, tender first, for the purpose of being turned. The engine-driver had great difficulty in looking ahead because of the position of the tender (which in the circumstances was justifiable), and was so occupied in watching the points that he did not see the surfaceman in time to prevent the accident. *Held* that the engine-driver was not to blame, but that the railway company were in fault for neglecting reasonable precautions to prevent the accident in a place where the ordinary warnings were insufficient, and that they were liable in damages to the widow of the injured man.

Mrs Mary Collins or Cairns, widow of Francis Cairns, surfaceman, Lochee, brought an action of damages in the Sheriff Court at Dundee against the Caledonian Railway Company, concluding for the sum of £600 for the loss of her husband, who had died from injuries sustained while in the company's employment.

Between seven and eight o'clock on the morning of the 8th July 1887 the deceased was engaged as one of a gang of plate-layers in packing sleepers in the defenders' railway sidings, near the engine-sheds at Dundee (West) Station, when he was knocked down by the tender of a goods engine which had just brought a train from Carlisle, and was being backed into the goods shed for the purpose of being turned.

The pursuer averred that while the deceased was engaged in his work he had to stoop, and was in such a position that he could not see any approaching train, engine, or other danger. She also averred "that the said siding where deceased was working was a very dangerous place in respect of the shunting of trains and engines at irregular intervals," and that "it was the duty and custom of the defenders, while the deceased was engaged as aforesaid, to have a flagman or other person to watch the said sidings and lines in order to warn the drivers of any approaching trains or engines, and also to warn the deceased of any approaching danger. The defenders carelessly and recklessly failed to have or provide such flagman or other person."

The defenders explained "that the deceased was well acquainted with the nature of the work, the working of the trains, and the risk and precaution necessary to be taken for his own safety; that the accident was caused by, and was the unavoidable result of, and would not have occurred, but for the fault of the said Francis Cairns in not keeping a proper look-out, which he should have done, particularly when he was working with his face in the direction which the engine approached, and knew or ought to have known of its approach, and in remaining in danger after the usual signal was given by the driver of the engine and the line signalled clear. Explained further that it is not the practice on the railways of the defenders, nor on those of other railway companies, nor is it necessary to send out a flagman unless there is a disturbance of or an obstruction on the permanent way of the railway, and then the flagman is sent out only for the protection of trains approaching and not for the protection of platelayers. This was well known to the deceased, who never asked that such a precaution as is here mentioned should be taken."

The pursuer pleaded — "(1) The deceased Francis Cairns having been working, as condescended on, under the instructions of defenders' superintendent or foreman, and the defenders having carelessly and recklessly failed to have or provide a flagman or other person, all as stated, whereby deceased was killed, the defenders are liable to make compensation to the pursuer, all as prayed for, with expenses. (2) The said deceased's death having resulted from the carelessness and recklessness of the defenders, they are liable to make compensation to the pursuer both under the Employers Liability Act 1880 and at common law."

The defenders pleaded—"(1) The averments of the pursuer, or at least the averments so far as founded on common law, being irrelevant and insufficient, the action, or at least the action so far as founded on common law, should be dismissed. (2) The death of the said Francis Cairns not having been caused by the fault or negligence of the defenders, or of those for whom they are responsible, they are entitled to absolvitor. (3) The accident to the said Francis Cairns having been occasioned, or at least having been materially contributed to, by his own gross negligence or carelessness, the defenders are not liable to the pursuer in damages, and will fall to be assoilzied with expenses. (4) The accident to the said Francis Cairns being due to the fault, if any, of a person engaged in a common employment with him, or, in any event, being a risk of the deceased's employment, the pursuer is not entitled to claim compensation from defenders in respect thereof."

The Sheriff-Substitute (CAMPBELL SMITH) repelled the defenders' first plea-in law, and allowed a proof. This interlocutor was appealed to the Sheriff and affirmed, and the proof was accordingly led upon 26th July 1888.

From the proof it appeared that the engine came out of the goods station as usual that morning; that as there was an extra quantity of coals on the tender it made the look-out more difficult; that the engine whistled to have the signal put down and the points changed when about 150 yards from the signal and 300 yards from the signal-box; that the engine-driver was watching the signal and the points more closely than usual as the signal did not drop as far that morning as it generally did; that the gang were about 140 yards from the engine when it first whistled, but the driver did not see them until he was 50 yards from them; that he did his utmost to stop the engine; that the gang could have seen the engine at least 100 yards away, but that none of them noticed the whistle or saw the

engine until it was just upon them; that there is constant whistling at that place; that it is not usual on railways to employ anyone to watch when platelayers are working; that they know they must look out for themselves; and that red flags are only used when there is an obstruction on the permanent way, and that for the safety of trains and not for the benefit of platelayers.

Upon 8th August 1888 the Sheriff-Substitute pronounced this interlocutor—"Finds that on or about 8th July 1887 the pursuer's late husband, while working on the defenders' line of railway, was struck down by a tender driven in front of an engine, and sustained injuries from which he died in a few hours: Finds that his death occurred through the fault of the defenders, and to the loss, injury, and damage of the pursuer: Therefore finds the defenders liable in damages, assesses the same at £40 sterling, for which decerns in favour of the pursuer: Finds the defenders liable in expenses, &c.

"*Note.*—The pursuer's marriage, after subsisting for six weeks, was brought to an end by the death of her husband a few hours after sustaining very severe injuries in the defenders' service on the morning of 8th July 1887. He was a member of a 'flying squad' whose business it was to move from place to place to execute repairs on the permanent way. At the time of the accident this squad were engaged raising up a depression in the rails, and were beating packing under the sleepers which they had elevated a little in order to keep them in their position. The place where the pursuer's husband was struck down by the tender pushed in front of an engine is a very busy, noisy place situated between the end of the Magdalen Green and the defenders' passenger station in Union Street. There are a great many rails there covering acres of ground over a breadth, I should fancy, of 200 to 300 yards, and the noise of railway traffic and whistling is seldom long silent night or day. The necessary noise and crowded traffic of this locality is, I think, the most distinctive feature of the present case. When the deceased was at work in it along with his four comrades of the flying squad, one of them being the foreman, who was working like the others 'packing sleepers,' about seven o'clock in the morning an engine which had brought a goods train from Carlisle during the night, and had just cast it off at the goods station, was returning towards the west to be placed in the engine-shed till the evening, when it was to take another goods train back to Carlisle. The engine was pushing the tender before it, and the tender was so filled with coals that the engine-driver could not see along the line without projecting his head over the engine, and looking alongside of it. As he was doing this, trying to make sure that the proper points were open to permit of his passage to the shed at fifty yards' distance, he saw the pursuer's husband and his four comrades on the line of rails he was travelling on. He at once did all that could be done to stop the engine. But there was no time to stop until it stood over the body of the deceased, and until the wheels of the tender had almost severed his leg, and otherwise injured him. The other four escaped with difficulty, and but for the slowness of the speed, and the vigilance and energy of the engine-driver, they might have been all killed.

"I am most clearly of opinion that the death of the pursuer's husband falls within the category of preventable, indeed easily preventable, accidents; but as to how far he was himself to blame for his own death, and as to how far the railway company are to blame for it, there is room for complete divergence of opinion.

"The occupation in which the deceased was engaged was a dangerous occupation, and this was known to him as well as to the defenders, though not so clearly to him as it ought to have been to them, for he was an ignorant workingman, possessed only of knowledge which was very limited and special, whereas the defenders, as masters, knew or were bound to know all the dangers of the organisation of which they were the rulers, directors, and possessors. They say in substance that they gave their servant this dangerous employment, and committed his life to his own care, and they indicate that they paid him 2s. or 3s. a-week for the entire risk he ran, and that, if through failure in vigilance of his own eyes and ears he happened to be killed, that is no concern of theirs. I do not think the relation of master and servant in a dangerous work is so completely a matter of wages, and of a man insuring his own life and limbs at the rate of a few shillings a week. I am decidedly of opinion that, whatever the workman be supposed to have undertaken, it is the master's duty to use the master's means of knowledge, and to exercise that over-ruling intelligence which ought to be possessed by a master to take all usual and reasonable means to protect those who are doing his work and acting under his orders.

"The defenders took no precautions whatever to protect the 'flying squad,' but I cannot say that it has been proved to my satisfaction that in this they acted differently from other railway companies, or, in other words, that they failed in doing that which is 'usual' to be done. One by no means unintelligent witness stated that it was usual for squads of this kind to be protected by the foreman keeping watch for coming trains, or by the setting up or otherwise displaying a red flag or danger signal to cause trains to stop, but I do not think his experience was very extensive. I believe that both methods are sometimes adopted, and that the red flag is always used when the rails have been lifted or the permanent way so disarranged that a train could not pass over it. But that is a precaution for the sake of the train and passengers, and not for the safety of the workmen; and I do not think that in ordinary circumstances it would be a reasonable precaution to be stopping trains wherever a few men were wedging a rail or two, or giving a sleeper a better and more solid bed. I think that, at a distance from a noisy town, or a noisy and crowded station, a man's eyes and ears are quite sufficient to give warning to get out of the way of a train, if it be making the usual noise of a train, and not gliding silently down an incline.

"But the specialty of this case is that the locality in which this man was struck down is so full of distracting noises of all kinds, and of visions of passing trains and engines that a man's senses of sight and hearing are of very little use to him. If he gave his attention to every terrific shriek of engine whistles, and to every approaching train or engine, his much interrupted labour would not make much impression on the per-

manent way. And if it is the fact that of the five men forming the flying squad in question not one of them heard the approach of the tender and engine that killed the deceased, and that the first warning one of them had of it was the shadow on the rails flying to the westward by the morning sun behind it. Had the engine been going fast, instead of moving with low steam and at a reduced speed, all the five men might have been killed. I think the want of all precautions which exposed the lives of these five men to imminent danger, and destroyed one of them, was not in accordance with the duty, either legal or moral, of a master to his servants who are entitled to rely upon the master using his skill, experience, and knowledge for the protection of their lives.

"Several very slight and inexpensive precautions might have prevented the loss of this man's life. I do not know enough of railway matters to be able so much as to guess at them all, but I feel perfectly certain that it would not have required much intelligence and inventive skill, applied by anticipation, to have prevented this man's death; and I am of opinion that it is the duty of railway companies to devise special precautions for special localities—such as this crowded noisy locality—in order to avoid the sacrifice of human life, even to the extent of trying to preserve men and women against their own negligence. Now, the death in question could have been prevented had there been a man or boy or even a woman watching for the safety of the squad (and many a maimed victim of previous accidents would be glad to watch at a small remuneration); it could have been prevented by the use of a red flag, or rather of two red flags; it could have been prevented by placing fog-signals at a moderate distance from the squad, or a spring-gun that the engine would fire, or a bell that it would ring in passing, and in many other ways. Had the tender not been first, or had it not had too much coal built upon it, the engine-driver or the stoker would have seen the men. Further, they would probably have seen them had not the signal which indicated that the points were right not failed to fall so far as it ought to do and usually did, and caused their attention to be turned to look at the points instead of looking, as they best could, to see if the rails were clear. This little failure of the signal to drop far enough might have been utilised before a jury to show that the defenders' machinery relative to it was defective. I do not attach any importance to it, except as one of many concurring causes that led to the death of this poor man. But I hold that the true cause of his death, stated in its generality, was the failure of the defenders to take any precautions whatever for the safety of men working, as he was, at a dangerous work, more especially as this work was rendered doubly and trebly dangerous through being carried on in a locality where the distractions of the senses were such that the eyesight and hearing of a man engaged at work which attracted his eyes to the ground were quite insufficient to give adequate warning of danger. Had the defenders furnished a watchman or flag or fog-signals, and the deceased had failed to use them, or without remonstrance had permitted his foreman to do so, the fault might have been his own, but I cannot hold that it is a sufficient excuse for the preventable death of a servant for the master to say that he did what is usual, and that it is usual to do nothing at all. I hold that in a dangerous occupation the servant commits his life to his master's skill and care, and that it is the master's duty not to find out that others do nothing, but to find out what can be done, and to try such, not fantastic and extravagant expedients as promise to prove more effectual to protect life than mere nothing."

The defenders appealed to the Sheriff (Combie Thomson), who on 6th October 1888 pronounced this interlocutor:—"Sustains the appeal, recals the interlocutor appealed from, sustains the defences, assoilzies the defenders, and decerns; finds no expenses due.

"*Note.*— . . . There does not seem to be any case except at common law, as no fault can be imputed to anyone in the defenders' employment who in the sense of the Act of 1880 had 'superintendence entrusted to him.' The pursuer cannot succeed therefore unless she shall prove fault on the part of the defenders. . . .

"I am of opinion that no fault or neglect on the part of the defenders has been proved.

"On the one hand the deceased accepted an employment attended with a considerable amount of hazard, and which imposed upon him the duty while at work of keeping a sharp look-out for his own safety. On the other hand, the defenders were bound to adopt all usual and reasonable precautions to ensure his safety. 'Reasonable' is not an absolute or intrinsic, but a relative term, and I understand the law on the subject to be that those precautions will be deemed reasonable which a man of ordinary prudence and experience could, with due regard to the circumstances and nature of the business, be expected to adopt.

"Now, it appears that no such precaution as that desiderated by the pursuer on record, nor any of those suggested by the Sheriff-Substitute, are considered necessary, or have ever been adopted, or are in the view of practical men desirable. If that be so, it seems to me that the defenders are not to blame for their non-adoption." . . .

The pursuer appealed to the Court of Session, and argued—This was not the ordinary case of platelayers working where they could be easily seen by the engine-driver and duly warned, nor was the place of the accident one where the ordinary warnings and whistlings were sufficient. In such a place platelayers could get no work done if they had any respect for their safety. They were no doubt bound to look out for themselves, but that did not relieve their masters of using reasonable precautions, and "reasonable" was to be construed according to the dangers of the particular locality. There was fault here, because there was a defective system through want of a proper watch—*Murdoch* v. *Mackinnon*, March 7, 1885, 12 R. 810.

The respondents argued—There was no fault here except with the deceased, who took the occupation knowing it was a dangerous one. He was bound to look out for himself, and here was a known danger, for the engine came every morning. The precautions desiderated by the pursuer and by the Sheriff-Substitute were extravagant, unknown in the practice of the leading railway companies, and unreasonable.

Flags were never used except for the protection of trains.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case is the widow of a surfaceman who was employed on the Caledonian Railway between Dundee and Perth. The circumstances in which he met his death are very simple. He and the rest of a gang of surfacemen were making repairs on the line at a place which is not on the main line, but is in a mass of sidings by which goods trains are taken into the goods sheds. The place where the accident occurred is pretty near the junction with the main line, and the way in which the accident occurred was this. A goods train comes from Carlisle during the night, and it is the regular practice for the engine of that train, after it has arrived in the morning, to be taken into the goods shed to be turned. It has to come out of the goods station with the tender in front. The engine-driver had difficulty in seeing where he was going with the tender in front—piled with coals—and was occupied in looking to see whether the points were all right, when at the last moment he saw the platelayers who were working in the siding. He did his utmost to stop his engine, but could not do so until one of the wheels of the tender had gone over one of the men, who died shortly afterwards in the Infirmary. There is no reason to suppose the driver was wrong in going backwards or that he did not whistle; therefore, so far as the engine-driver is concerned, no blame attaches to him. He was in difficult circumstances, for he had to come out with his tender first. Something was said about speed. If anything turned upon that, I should be inclined to hold that the speed was somewhat high—seven or eight miles an hour—for the place, but nothing turns upon that, and the driver cannot be blamed for the speed.

The circumstances being so, the question remains whether the defenders are to be held liable for the accident on the ground that precautions were not taken to prevent it happening which should have been taken. This is a different case altogether from that of platelayers and of an engine-driver on the main line. These surfacemen would have had a view for some considerable distance, and the driver too would have had a full view and ample time to whistle. Consequently it is a very rare thing for platelayers to be run over on the main line. The railway company knew perfectly well that every engine which went into the goods station could not come out backwards, making the look-out difficult, and that the place was one where there was constant whistling backwards and forwards, and where therefore a whistle did not give the same warning as on the main line. I have to confess that I do not think the railway company were justified in working those sidings without taking some extra precautions, seeing that the ordinary ones were not available.

I agree with the Sheriff where he says—"The deceased accepted an employment attended with a considerable amount of hazard, and which imposed upon him the duty while at work of keeping a sharp look-out for his own safety," but at the same time no one would say that that doctrine, as applied to platelayers, did not also make it incumbent upon the company to protect them from engines in such a place. I agree again with him when he says that "those precautions will be deemed reasonable which a man of ordinary prudence and experience could, with due regard to the circumstances and nature of the business, be expected to adopt."

Now, in the place where all this happened there was no need for hurry; trains do not come in here at a high speed, nor go out on to the main line at a high speed. This was therefore not a case where traffic would have been hindered if further precautions had been taken. There might have been some signal near which the engine-driver would not have been entitled to pass until told—by hand would have been sufficient—that the line was clear of platelayers. An engine going slowly makes all the less noise, and renders such a signal all the more necessary.

I think, then, that the railway company in such a place, and amid such surroundings, should have taken some precautions such as I have suggested, and that having taken none they must be held liable to the pursuer in damages, which I should fix at £100.

LORD YOUNG and LORD LEE concurred.

The Court pronounced this interlocutor:—

"Find that on the occasion libelled the deceased Thomas Cairns, husband of the pursuer, while engaged with other surfacemen in ballasting a siding of the defenders' railway leading from the main line from Dundee to Perth to their engine sheds, was knocked down and mortally injured by the tender of an engine belonging to the defenders which was being shunted from the goods siding, tender first, and that it could not be brought out of the goods siding in any other way; that the driver of the engine was prevented from seeing him by the tender with its load of coals which was being backed in front of the engine, and it was only when stretching out to see a point on the line that he caught sight of the workman and instantly pulled up the engine, but not in time to avoid them; that the place at which the deceased was working was one at which there was much noise and whistling from railway engines; that the accident was due to the fault of the defenders in failing to take precautions for securing that the line should be cleared before engines moving tender first were allowed to pass at such a place as that in which deceased was working, and that they are liable in damages to the pursuer accordingly: Therefore sustain the appeal: Recal the judgment of the Sheriff appealed against: Affirm the interlocutor of the Sheriff-Substitute in so far as said interlocutor pronounces findings in fact and in law: Recal said interlocutor in so far as it asseses damages at Forty pounds: Ordain the defenders to make payment to the pursuer of the sum of One hundred pounds in name of damages: Find them liable to her in expenses in the Inferior Court and in this Court: Remit to the Auditor to tax," &c.

Counsel for the Pursuer—Law. Agent—Alex. Nicholson, S.S.C.

Counsel for the Defenders—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Exchequer Cause.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY AND OTHERS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Case under the Taxes Management Act 1880 (43 *and* 44 *Vict. cap.* 19), *sec.* 59—*Expenses.*

In this case, which was presented under the Taxes Management Act 1880, the Auditor in taxing the account of the Scottish Union and National Insurance Company and others disallowed all charges for the preparation and adjustment of the case before it appeared in the rolls of Court. An objection to the Auditor's report upon this ground *repelled.*

At advising—

LORD PRESIDENT—We know nothing about Inland Revenue cases till they come into Court, and it is understood that such cases are prepared by the Commissioners, and that there is nothing left for the Court save to hear parties. The expenses in the ordinary case would be the expenses of the proceedings before the Court, not expenses incurred in arguing with the Commissioners, who are the proper persons to determine what the case should be.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

The Court pronounced the following interlocutor:—

"The Lords having heard Counsel for the parties on the Auditor's report on the appellants' account of expenses, No. 10 of process, taxing the same at the sum of £98, 1s. 6d., and a note of objection for the appellants to the said report, No. 11 of process: Repel the said objections, approve of the Auditor's report: Find the appellants liable in the expenses of this day's discussion, modify the same at the sum of £3, 3s., and decern against the respondents for the said sum of £98, 1s. 6d. sterling, but under deduction always of the said sum of £3, 3s. of expenses hereby found due to them."

Counsel for the Insurance Company—Jameson. Agents—Cowan & Dalmahoy, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* CHISHOLM.

Expenses—Reserved Expenses.

Where in the course of a litigation expenses have been reserved, and there is in the final interlocutor a general finding of expenses in favour of the successful party, the reserved expenses are carried by that finding.

This was an action by the Caledonian Railway Company against John Chisholm, sack contractor, Perth, for payment of a sum alleged to be due for the carriage of the defender's sacks over the pursuers' lines of railway.

As the basis of their claim the pursuers lodged with the summons an account of the amounts alleged to be due. For this account they subsequently proposed to substitute another. This proposal was resisted by the defender, and after considerable discussion the Lord Ordinary (M'LAREN) by interlocutor of 30th October 1886 refused to allow the substitution.

Against this interlocutor the pursuers reclaimed, and on 10th December 1886 the First Division recalled the interlocutor of the Lord Ordinary, and allowed "the record to be amended by substituting the account, No. 34 of process, for the account lodged with the summons, and also by making the additions now proposed at the bar, reserving all questions of expenses."

On 13th March 1888 the Lord Ordinary pronounced the following interlocutor:—"Finds that by the written contract between the pursuers and the defender, relating to the hire of the defender's sacks during the period of seven years commencing in 1874, the defender had an unqualified right of free carriage over the Caledonian Railway for all his sacks: Therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses," &c.

The pursuers reclaimed, and on 8th February 1889 the First Division adhered to the interlocutor reclaimed against, refused the desire of the reclaiming-note, found the defender entitled to additional expenses, allowed an account thereof to be given in, and remitted the same to the Auditor to tax and report.

The Auditor taxed the defender's account at £1588, 8s. 4d., "reserving for the determination of the Court the question of the liability of the pursuers for the Inner House expenses claimed by the defender in connection with the reclaiming-note for the pursuers against Lord M'Laren's interlocutor of 30th October 1886, amounting, as taxed by me, and noted on the margin of the account, to the sum of Twenty-four pounds, fourteen shillings (£24, 14s.), included in the taxed amount now reported.

"*Note.*— . . . The expenses in connection with this reclaiming-note are the expenses referred to in the reservation in my report. As entered in the account they amount to £47, and as taxed by me, to £24, 14s. It humbly appears to me that this portion of the account should be disallowed, the substitution of the one account

for the other did not in any way affect the conclusions of the summons, or even the amount sued for. The pursuers, by reclaiming, obtained what they sought from the Lord Ordinary, and while I think it only reasonable that they should pay the expenses incurred by the defender in the Outer House discussion, I consider it too great a penalty that, after succeeding in obtaining a recal of the Lord Ordinary's interlocutor, they should have to pay, in addition to their own Inner House expenses, the expenses incurred by the defender in opposing them unsuccessfully. The reservation attached to the Inner House interlocutor might, I assume, have been obtained from the Lord Ordinary. Of course all previous expenses properly incurred by the defender in connection with the account No. 6, and rendered of no avail by the substitution of No. 34, must be allowed, and in the audit I have endeavoured to give effect to this view. In regard to this point I have only to add, that while in the great majority of cases 'reserved expenses' follow the issue of the cause, it has been held by the Court that there is no absolute rule withdrawing such expenses from the consideration of the Auditor."

The defender argued—He had been found entitled to these expenses. The meaning of a reservation of expenses was that they were reserved till the cause was finally disposed of. If there was a general finding of expenses in favour of one party in the final interlocutor that carried all reserved expenses unless there was some special finding to the contrary—*Gardiners* v. *Victoria Estates Company (Limited)*, October 27, 1885, 13 R. 80; *M'Fie* v. *Blair*, December 12, 1884, 22 S.L.R. 224.

The pursuers argued—The defender was not entitled to these expenses, as he had been unsuccessful so far as they were concerned. These expenses also had not been disposed of by the Lord Ordinary, as there was no remit to him to dispose of them. Nor were they disposed of afterwards on the reclaiming-note.

At advising—

Lord President—As regards the question reserved by the Auditor, I am of opinion that when expenses are reserved, whether these are expenses appertaining to some incidental proceeding, such as a reclaiming-note on point of form, or any expenses in the course of the litigation which it is not convenient to dispose of at the time, the reservation means that they are to fall under the general account of the winning party. There may very well be reasons for suggesting that reserved expenses should not form part of that account, but the answer is that the other party should bring these under the view of the Judge deciding the case. If nothing is said they are carried by the general finding with regard to expenses. In the present case the judgment of the Lord Ordinary assoilzied the defender and found him entitled to expenses. That finding disposed of the reserved expenses. If not, the case would have been in a curious position. That interlocutor might have been acquiesced in, and in that case these reserved expenses might have remained reserved to the end of time.

I am fortified in the view I take of the subject by the opinions in the case of *Gardiner*, and I see that in the case of *M'Fie* v. *Blair* there is a judgment of Lord Kinnear's to the same effect. That judgment was not brought under the review of the Court, but there is a very valuable note of his Lordship's expressing his opinion on the question of reserved expenses.

Lord Rutherfurd Clark—I concur. It has always been my view that when any expenses are reserved in the course of a litigation the meaning of the reservation was that they were reserved for the determination of the Court deciding the general question of expenses, whether that Court were the Lord Ordinary or the Inner House. Being reserved, they must be disposed of by the Judge who decides the case. I therefore hold that when the Lord Ordinary found the defender in this case entitled to expenses generally he included the expenses reserved.

Lord Adam—I also concur. When the question of expenses is reserved, it is reserved for the consideration of the Court when the case is finally determined. The unsuccessful party, if he had anything to urge with regard to the reserved expenses, ought to have brought it before the Lord Ordinary. The general finding as to expenses by the Lord Ordinary disposed of these reserved expenses, and the fact that there is no special finding dealing with these expenses does not make it allowable for the Auditor to move in the matter as judge. The general finding of the Lord Ordinary necessarily carried a finding in favour of the defender with regard to the reserved expenses.

Lord Mure and Lord Shand were absent.

The Court pronounced this interlocutor:—

"Remit to the Auditor to reconsider the portions of the account amounting to £357, 18s. and £115, 2s. 2d. respectively, and to allow so much thereof, if any, as consists of necessary outlays reasonably charged: *Quoad ultra* approve of the Auditor's report, and decern *ad interim* against the pursuers for payment to the defender of the sum of Fifteen hundred pounds sterling to account of the said expenses, and reserve the question of the expenses of this day's discussion."

The reserved expenses were accordingly included in the taxed amount of the defender's account.

Counsel for the Pursuer—Balfour, Q.C.—Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defender—C. S. Dickson. Agents—J. & A. Peddie & Ivory, W.S.

Wednesday, March 6.

FIRST DIVISION.

[Exchequer Cause.

ALLAN *v.* MILLER.

Revenue — Inhabited House-Duty — Different Tenements—Tenement Occupied for the Purpose of Trade—Exemption—Act 41 Vict. cap. 15, sec. 13, sub-sec. 1.

This sub-section provides that "when any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business," the premises occupied for the purposes of trade or business shall be exempt."

Where two separate tenements in one building were occupied from year to year by a tenant at a *cumulo* rent of £25—one tenement being occupied for the purposes of trade, and the other as a dwelling-house—neither tenement taken separately being of the annual value of £20, the Court *held* that the tenant was entitled to exemption from inhabited house-duty.

Mr William Miller, baker and spirit retailer, appealed against an assessment made upon him for the year 1887-88, of 12s. 6d., being the inhabited house-duty at the rate of 6d. per £ on £25, the annual rent of dwelling-house and shop occupied by him at 59 Main Street, Rutherglen.

The appellant was tenant and occupier from year to year of the above-mentioned premises at a *cumulo* rent of £25. The premises consisted of a front building of one storey and attics, and two back buildings separate from one another and attached to the front building. One back building had internal communication with the attics of the front building, and along with the attics was occupied by the appellant as his dwelling-house. The other back building had internal communication with the ground floor of the front building, and was along with the said ground floor occupied by the appellant for the purposes of his business. There was no internal communication between the ground floor and the attics of the front building. It was agreed that if the premises occupied by the appellant as his dwelling-house and the premises occupied by him for the purposes of his business were to be deemed separate tenements, neither would be liable in house-duty in respect that the proportion of rental applicable to each tenement would be under £20.

The Commissioners after hearing parties sustained the appeal and discharged the assessment.

"*Note.*—The decisions in the cases Nos. 22 and 23 referred to by the Surveyor (*Russell*, 4 R. 1143, and *Salmond*, both decided by Lord Curriehill, March 6, 1877), were given solely on the terms of the 48 Geo. III. cap. 55, Schedule B. rule 33, which enacts that 'All shops and warehouses which are attached to the dwelling-house or have any communication therewith, shall, in charging the said duties, be valued together with the dwelling-house.' The exempting Act, 41 Vict. cap. 15, has since been passed, and provides (section 13, sub-section 1), that 'when any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business,' the premises occupied for the purpose of trade or business shall be exempt.

"The Commissioners cannot distinguish between the present case and the case of *Smiles* v. *Crooke*, March 6, 1886, 13 R. 730, referred to by the appellant. They do not think that anything turns, as is suggested by the Surveyor, on the regularity of the structure of the premises, and on this point would refer to the earlier case of *Corke* v. *Brims*, July 7, 1883, 10 R. 1128, in which the dwelling-house was situated partly behind and partly above the business premises, and both opened into a common vestibule situated in the inside of the street door. The only real difference between *Corke* v. *Brims* and the present case is, that in the former case the dwelling-house and business premises were let to different tenants, while in the present case they are let to the same tenant. But in this respect the present case is identical with *Smiles* v. *Crooke*, which decided that the first sub-section of the 13th section of the 41 Vict. cap. 15, applied, and the exemption took effect even although the dwelling-house and business premises were let to the same tenant at a *cumulo* rent."

At the request of the Surveyor the present case was presented under the Taxes Management Act 1880 for the opinion of the Court.

The Act 48 Geo. III. cap. 55, Schedule B, rule 33, enacts that "All shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall, in charging the said duties, be valued together with the dwelling-house."

By the Act 41 Vict. cap. 15, sec. 13, sub-sec. 1, it is enacted that "When any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business," the premises occupied for the purpose of trade or business shall be exempt.

Argued for the Surveyor—The dwelling-house and shop formed one assessable subject in the occupancy of one tenant, held at one *cumulo* rent, and was clearly chargeable under 3rd rule of Schedule B. of the Act 48 Geo. III. cap. 55. The premises were neither divided into nor let in different tenements as required by the recent statute. The case was entirely different from that of *Smiles* v. *Crooke*, where the premises consisted of four storeys, each forming a separate and distinct tenement.

At advising—

Lord President—There is one point where it is possible to make a distinction between the present case and the case of *Smiles* v. *Crooke*, and the question is whether that is a material point. In the case of *Smiles* v. *Crooke* there was a written lease, and the tenements let were described as separate subjects in the lease. Here there is no written lease, and the subjects are just occupied from year to year. But if in fact they are separate tenements so as to answer the description of "different tenements" under section 13, sub-section 1 of the Act 41 Vict. cap. 15, then if there had been a lease they must have been separately described or they would have

been imperfectly and improperly described. I think therefore the distinction taken is not a material one, and that the case is ruled in terms by the judgment in the case of *Smiles* v. *Crooke.*

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Respondents—Vary Campbell—Gillespie. Agents—Wylie & Robertson, W.S.

Wednesday, March 20.

FIRST DIVISION.

[Lord Trayner, Ordinary.

GARDINER AND OTHERS *v.* MACFARLANE, M'CRINDELL & CO. AND ANOTHER.

Ship—Charter-Party—Demurrage—Undue Detention—Damages—Lien on Cargo.

A charter-party provided, "Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage."

Held, in the absence of anything in the charter-party showing that the parties intended otherwise, that "demurrage" fell to be interpreted in its strict legal sense; and that the owners' lien on cargo for demurrage did not free the charterers from an action of damages for the undue detention of the vessel at the port of loading.

Observed (*per* Lord Adam) that "demurrage" ought always to be so construed, unless the charter-party made it clear that it was the intention of parties that the word should be used in another and a wider sense.

This was an action by the owners of the ship "Lismore" against the charterers for damages for undue detention of the vessel at the port of loading. The charterers pleaded that the action was excluded by the terms of the charter-party, which, *inter alia*, provided that the "Lismore," then at Hull, should proceed to Sydney, and there receive from the charterers' agent a cargo of coals, and being so loaded should proceed to San Diego, and deliver them there, the freight being a specified rate per ton. The charter-party contained the following among other clauses—"To be loaded as customary at Sydney, N.S.W. To be discharged as customary . . . and at the rate of not less than 100 tons of coal per working-day, to commence when the ship is in berth and ready to discharge, and notice thereof has been given by the master in writing; and ten days on demurrage, over and above the said laying-days, at 4d. per register ton per day." . . . Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage."

The "Lismore" arrived at Sydney on or about 15th August 1888, but she was not loaded with her cargo, and did not sail for San Diego until 2nd December.

James Gardiner & Company, the registered owners of the "Lismore," raised the present action against Macfarlane, M'Crindell, & Co., merchants, Liverpool, and George Gray Macfarlane, merchant, Glasgow, the only known partner of the said firm, concluding for £5000 as damages for undue detention of the vessel at Sydney.

The pursuers averred that upon the arrival of the "Lismore" at Sydney due notice was sent to the defenders' agents, and that they were requested to arrange for loading her under the charter-party; that to enable the outward cargo to be fully discharged 500 tons of coals were required for stiffening; that it was not until 10th September that the full 500 tons were supplied, and that thus there was delay in getting the outward cargo discharged, for which the charterers were responsible. The pursuers averred further that the "Lismore" ought to have been loaded by the 4th October; that by her detention till December the bottom of the vessel became so foul that they had to place her in dock to be cleaned, and that considerable expense was thereby occasioned through the defenders' fault. They also averred that they had suffered loss by the detention of the vessel, and by the defenders' failure to provide cargo.

The defenders alleged that any delay that had occurred arose from a strike at the collieries near Sydney; that the ship was not ready to load her cargo until 14th September; that she was loaded in regular colliery turn with a full cargo; and that any delay which took place in loading the ship at Sydney was due entirely to causes for which, in terms of the charter-party, the charterers were not responsible.

The pursuers pleaded, *inter alia*—"(3) That the defenders were not freed by the terms of the charter-party from liability for detention at the port of loading."

The defenders pleaded, *inter alia*—"(1) Irrelevancy. (2) The ship having loaded a cargo worth the freight at the port of discharge, the defenders are, in terms of the charter-party, freed from all responsibility to the pursuers for the damages claimed."

On 28th February 1889 the Lord Ordinary (TRAYNER) repelled the defenders' first and second pleas-in-law, and allowed the parties a proof of their averments.

"*Opinion.*—The charter-party founded on in this case provides that the 'Lismore' shall proceed to Sydney and there load a complete cargo of coals, with which she shall proceed to San Diego. The 'Lismore' arrived at Sydney about the 15th August last, but she was not loaded with her cargo, and did not sail for San Diego until the 2nd December. The present action is brought to recover damages from the charterers on the ground that the 'Lismore' had been unduly detained by them at Sydney; and the defence urged *in limine* (and the only defence I have now to consider) is that, in respect of the cesser and lien clauses in the charter-party, the defenders are not liable in the damages claimed.

These clauses are expressed thus:—'Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage.'

"Clauses of similar import have already been the subject of judicial consideration in one or two cases in Scotland, and in a considerable number of cases in England. I cannot say that the decisions in the cases I have referred to are conflicting, but there are *dicta* in one or two of the later cases in England which are of a tendency to throw doubt upon the decisions formerly given. It is not necessary for me to go over all the cases to which reference was made in the argument, but I may refer to a very useful digest of them given by Mr Scrutton in his work on Charter-Parties and Bills of Lading, page 103, *et seq.* One rule or principle recognised in all the cases is this—that the cesser and lien clauses must be co-extensive, and that any particular liability enforceable against the charterer will not be held extinguished by the cesser clause unless the lien clause enables the shipowner to enforce that liability against the cargo or its owners or consignees. In short, the personal liability of the charterer is not extinguished unless a lien over the cargo is substituted for it. The application of this principle seems to me to afford a solution of the question now raised.

"The charter-party in this case confers a right of lien in favour of the shipowners over cargo for 'demurrage;' and if the pursuers' claim was for demurrage, incurred either at the port of loading or the port of discharge, I think it must be taken to be settled by authority that the defenders would be entitled to absolvitor in respect of the cesser clause. But the claim now made is not for demurrage, but for damages for undue detention at the port of loading. Does the lien for demurrage cover such a claim? The defenders say that it does, because the word demurrage is popularly used among mercantile men to mean not only demurrage proper, but also detention beyond the demurrage days, as well as detention where no demurrage has been stipulated for. There can be no doubt that the word is popularly used as the defenders represent; and that popular use and meaning has been recognised by some of the English Judges in their opinions. In Scotland, however, so far as I know, the two things—demurrage and improper detention—have always been kept distinct, and in my opinion properly so. They are quite distinct in character and in origin. A claim for demurrage arises from contract; it is a payment fixed and determined by the contracting parties, in respect of which the charterer may detain the ship for a period longer or shorter beyond the lay-days. The claim for undue detention arises from fault, not contract, and the liability of the charterer is for the whole damage which his fault may have occasioned to the shipowner, whether greater or less than the sum which would in ordinary circumstances be stipulated for as demurrage for the same vessel.

"This distinction is as well known to merchants as to lawyers, and the disregard of that distinction appears to me to have led to the differences of opinion which are to be found in some of the cases on demurrage questions. Regarding the two things as entirely distinct, I am of opinion that the lien conferred in the present case for demurrage does not cover a claim for damages on account of undue detention; and that the lien clause not being, therefore, co-extensive with the charterers' personal liability, the cesser clause does not absolve them from the claim now made.

"Assuming, however, that the word 'demurrage' in the lien clause would cover not only demurrage proper but also damages for detention beyond the demurrage days stipulated for, I am of opinion that the cesser clause in question does not free the defenders from the present claim. If the charter-party stipulated for demurrage only at the port of discharge, the lien clause for 'demurrage' will only be enforceable for that, and will not cover undue detention at the port of loading. Accordingly, upon the principle I have already stated, the charterers' personal liability in such a case for undue detention at the port of loading will not be affected by the cesser clause. And that is the case here. The provision in this charter-party regarding the loading of the cargo is thus expressed—'To be loaded as customary at Sydney.' This provides only for the mode of loading, and has no reference whatever to the time in which it shall be done—*Lawson* v. *Burness*, 1 H. & C. 400; *Tapscott* v. *Balfour*, L.R., 8 C.P. 52-3; *Lamb* v. *Kaselack, &c.*, 9 R. 490. There being no time for loading stipulated, directly or indirectly—that is, no lay-days—there could be no stipulation for demurrage. With regard to the discharge, however, there is stipulation. It is provided that the cargo shall be discharged 'at the rate of not less than 100 tons of coals per working-day, to commence when the ship is in berth and ready to discharge . . . and ten days on demurrage over and above the said laying-days, at 4d. per register ton per day.' The time allowed for discharging (that is, the lay-days) is thus fixed and limited, and the demurrage days over and above the lay-days, and the rate of demurrage are also fixed. For such demurrage, if incurred, the owners have a lien over the cargo. The lien clause, however, for 'demurrage' cannot be extended beyond the 'demurrage' stipulated for; the same word in the same charter must be held to refer to the same thing. In such a charter the lien for demurrage cannot in my opinion be extended to cover claims not stipulated for, although they may be of the same nature.

"The case of *Lockhart* v. *Falk*, L.R., 10 Exch. 132, is quite in point. In that case the charter-party provided that the charterer should load the cargo 'in the customary manner,' that the cargo should be discharged in ten working-days, with demurrage at '£2 per 100 tons register per day,' that the ship should have an absolute lien on cargo for freight and demurrage, 'the charterer's liability to any clauses in this charter ceasing when he has delivered the cargo alongside ship.' It was held that undue detention at the port of loading was not demurrage, and that the charterer was liable for such detention notwithstanding the cesser clause. That decision has never been overruled. But the defenders say that its authority has been doubted or questioned in later cases, where opinions have been delivered inconsistent with its ruling. Even if this had been so, I would have been prepared

for my own part to maintain its authority. But I think its authority is not even questioned.

"The first case cited as impugning the authority of *Lockhart's* case was *Kish* v. *Cory*, L.R., 10 Q.B. 553. There the charter-party provided that the cargo was to be loaded 'in thirteen working-days,' and to be discharged at not less than thirty-five tons per working day. 'Ten days' demurrage for all like days above *the said days* to be paid at the rate of 4d. per registered ton per day,' and 'charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage.'

"The vessel was detained in loading five days beyond the thirteen provided lay-days, and the charterer was held not liable, because the claim was for demurrage, and that therefore the cesser clause applied. The difference between the cases of *Lockhart* and *Kish* is obvious, and they are in no way conflicting. In *Lockhart's* case there were no lay-days for loading, and no demurrage or lien for demurrage stipulated in reference to the loading. In *Kish's* case there were lay-days for loading and a provision for demurrage in reference thereto. Consequently the lien clause for demurrage which included demurrage at the port of loading having been substituted for the charterer's liability, the cesser clause took effect. But in *Kish's* case it was not suggested that *Lockhart's* case (referred to in argument) had not been rightly decided. On the contrary, the three Judges who decided *Lockhart's* case took part in the decision of *Kish's* case, and made no reference whatever to their former judgment. The essential difference between the cases which I have pointed out fully accounts for this.

"I was, however, specially referred to the following expressions of opinion by Mr Justice Brett in *Kish's* case as throwing doubt upon the authority of *Lockhart's* case:—'I feel certain that when the occasion arises it will be held upon a clause like this, containing a cesser of liability of the charterer and a lien for demurrage, that 'demurrage' includes not only demurrage proper, but also that which is in the nature of demurrage, viz., detention at the port of loading.' I have some difficulty in understanding this observation, and certainly cannot read it as indicating any dissent from the decision in *Lockhart's* case. If Mr Justice Brett meant to say that in cases where lay-days had been stipulated in regard to loading, followed by a general clause as to demurrage, that 'demurrage' would be construed as including 'that which is in the nature of demurrage, viz., detention at the port of loading' (that is, detention after the demurrage days had expired), then the observation has no application whatever to the case where lay-days are not stipulated with regard to loading, and consequently has no bearing upon *Lockhart's* case or the present case. But if the observation I have quoted meant that a stipulation as to demurrage at the port of discharge would be construed, when the occasion arose, so as to cover a claim for improper detention at the port of loading, I can only say that the occasion had arisen before the decision in *Kish* v. *Cory*, and that the demurrage clause was not so construed. The reverse was decided in *Gray* v. *Carr*, L.R., 6 Q.B. 522, Justice Brett concurring in the judgment, and (on page 537, while throwing doubt on the decision in *Bannister* v. *Breslauer*) stating without objection the very proposition on which *Lockhart's* case was decided.

"I was also referred to the case of *Sanguinetti*, L.R., 2 Q.B. Div. 238. In that case the charter-party provided that the ship should be loaded and discharged at so many tons per day, 'demurrage to be paid for each day beyond the said days allowed for loading and discharging at the rate of 3d. per registered ton per day.' The cesser and lien clauses were in the usual terms. The only peculiarity in the case is this, that the number of demurrage days is not limited, but every day beyond the days allowed for loading and discharging is treated as a demurrage day. The ship was detained in loading beyond the lay-days, and was therefore on demurrage during the whole detention. The Court held that the charterer was not liable, because the claim was for demurrage, and a lien had been given over cargo for demurrage. No question was raised, nor could have been raised, as to the charterer's liability for damages for undue detention, as distinguished from demurrage. The case of *Lockhart* (although referred to in argument) was not referred to in the decision, much less questioned or doubted.

"Another case referred to is that of *Harris* v. *Jacobs*, L.R., 15 Q.B. Div. 247. In that case the ship was to be discharged 'as fast as steamer can deliver.' A day was lost by the consignee not having a ready berth for the vessel, and the claim made upon that account was held to be covered by the clause which gave a lien for demurrage. Some observations were made as to the term 'demurrage' being elastic, and sufficient to cover this claim, which it was said was not 'strictly demurrage.' It appears to me to have been demurrage, and nothing else. 'The ship was to be discharged as fast as she could deliver,' and 'demurrage to be at the rate of £30 per running day'—that is, £30 a-day for each day the cargo was not discharged as fast as the ship could deliver. The day the vessel was detained from want of a berth (which it was the consignee's duty to provide) was just a day on which cargo was not taken delivery of at all, and was the same, so far as demurrage was concerned, as if the ship being in a berth no cargo had been taken by the consignee. If the steamer had got into her berth when she arrived her discharge would have been completed a day sooner than it was. That day was a day beyond her lay-days, and was therefore a day on demurrage. However this may be, *Harris* v. *Jacobs* does not directly or by implication question the authority of *Lockhart* v. *Falk*.

"The last case to be noticed is that of *Salvesen* v. *Guy*, 13 R. 85, in which the charter-party stipulated for twenty working-days in loading and sixteen days for discharging, 'with ten days on demurrage over and above the said laying-days.' Twelve days beyond the lay-days were occupied in loading, and demurrage for these twelve days was claimed from the charterers. The charterers pleaded the cesser and lien clauses in defence, and their defence was sustained. Now, here undoubtedly the Court in effect held that the demurrage clause covered two days for which demurrage proper could not be claimed. But the distinction between demurrage and damages for detention does not appear to have

been adverted to even at the argument. The point raised and decided was the general one that where a lien is given over cargo for demurrage, the charterer is by the corresponding cesser clause freed from personal liability for demurrage, and that irrespective of whether the demurrage has been incurred at the port of loading or port of discharge. It is obvious that the question raised and decided in *Lockhart* v. *Falk* was not before the Court. The case does not appear to have been cited. *Gray* v. *Carr* seems to have been cited either to show that Baron Bramwell doubted the decision in *Bannister* v. *Bresslauer*, or in support of the view that the cesser clause could not be pleaded because the cargo had not been 'shipped in terms of the charter-party.' The law laid down in *Lockhart* and *Gray* was not discussed, nor the decision in either case doubted.

"But even if the Court had intentionally decided (in agreement with the *dictum* of Mr Justice Brett in *Sanguinetti's* case) that a clause providing for demurrage at the port of loading should be construed so as to cover damages for detention at that port beyond the stipulated demurrage days, that would in no way conflict with *Lockhart* v. *Falk*, or with the judgment I am now pronouncing. In *Lockhart*, as here, there is no demurrage stipulated for at the port of loading at all. The demurrage clause has reference to the lay-days, and the lay-days have only reference to the port of discharge. Whatever therefore the Court might consider covered by a demurrage clause actually existing and forming part of the charter, and however much they might extend the limits of such a clause, it is clear that they could neither construe, extend, or limit a clause which did not exist.

"I agree with the view expressed by the Lord Chief-Justice (Coleridge) in *Kish* v. *Cory*, and by Lord Kinnear in *Salvesen* v. *Guy*, that as mercantile contracts are expressed with reference to decided cases in which the language used in such contracts has been judicially construed 'it is important *stare decisis*.' I therefore follow the direct authority of *Lockhart* v. *Falk*, which I humbly think to be a sound decision, and the authority of which has not been impaired by any subsequent decision.

"There is another point in this case to which I must allude, but upon which, after what I have said, it is not necessary I should pronounce any judgment. The present action was raised before the cargo in question was shipped, and the pursuers' claim is not limited to damages for the time lost by improper detention, but also for damage of another kind, directly attributed to the detention (Cond. 5). The damages claimed on this latter ground would certainly not be covered by the lien clause. But taking the case as if it were for improper detention alone, I incline strongly to the opinion that the action having been raised against the charterers before the cargo had been loaded, and therefore before the cesser clause became operative, that claim could not be avoided simply by the subsequent loading of the cargo. The claim must be looked at as at the date of raising the action, and it was then a claim enforceable against nobody but the charterers. The subsequent acceptance of the cargo does not seem to me, in the present state of my opinion, to be in itself a waiver of the pursuers' claim."

The defenders reclaimed, and argued—This action could not be maintained, as the cesser clause was so expressed as to free the charterers in the circumstances which had arisen from all responsibility, for the cargo which was put on board was far above the amount of the freight. The circumstance that the lien was for a future and unascertained amount was not sufficient to nullify this claim; there was here a good lien on the cargo for dead freight, it was an unascertained claim, and yet it did not render the clause null. "Demurrage" might be used in two senses—(1) In a strictly legal sense—1 Bell's Comm. (7th ed.) 624; Bell's Prin. sec 231; *Salvesen* v. *Guy*, October 28, 1885, 13 R. 85. (2) As including damages for undue detention—*Bannister* v. *Bresslauer*, 1867, L.R., 2 C.P. 497; *Gray* v. *Carr*, 1871, L.R., 6 Q.B. 522; *M'Lean & Hope* v. *Fleming*, March 27, 1871, 9 Macph. (H of L.) 39; *Lockhart* v. *Falk*, L.R., 10 Exch. 132. Demurrage was used in the latter and wider sense in this charter-party. The words "as customary" were different from and meant something more than "in the customary manner," which was the usual expression; they meant "as customary" in point of time, and referred to the custom of the port of loading. Demurrage was contracted for at the port of discharge; it was implied at the port of loading, for there was no reason why the charterers' liability should cease at one end of the voyage and continue at the other. No information as to the intention of parties was to be gathered from the charter-party itself (apart from the clauses narrated), or from their position in the deed, as a charter-party was an informal document, but it was clear that both the cesser and the lien clauses were quite universal in their application. The English authorities on the construction of the word demurrage in a charter-party like the present were not binding, while the Scotch authorities, so far as they went, favoured the defenders' contention.

Argued for the respondents—The contention of the defenders was untenable; they sought to mix up demurrage proper, which arose *ex contractu*, with undue detention, which arose *ex delicto*—1 Bell's Comm. (7th ed.) pp. 588 and 622. In demurrage proper it was not necessary to fix the number of days provided a rate *per diem* was fixed, and for this a lien over the cargo could quite competently be given, though it could not be given for an illiquid claim for debt—*Lamb* v. *Kaselack*, Jan. 31, 1882, 9 R. 482. As to termination of lay-days and commencement of demurrage—*Holman* v. *The Peruvian Nitrate Company*, Feb. 8, 1878, 5 R. 657; *White* v. *Steamship "Winchester" Company*, Feb. 1886, 13 R. 524. As there was no demurrage stipulated for at the port of loading, undue delay there could only be met by damages, and no lien could be given over the cargo for an illiquid claim of damages. In the construction of a charter-party such an interpretation must be put upon the words as not gratuitously to discharge the security of the shipowner for freight, and the charterer could escape liability until he has secured the shipowner by a valid lien over the cargo—*Christoffersen* v. *Hansen*, 1872, L.R., 7 Q.B. 509. There could here be no discharge of the charterers prior to the vessel obtaining a full cargo, for it was only then that their liability

was to cease. But the delict had been committed prior to that, so it was impossible that the shipowners could recover damages from the cargo. In the construction of a charter-party demurrage must be held to be used in its strict legal sense, unless it was clearly shown that parties intended it to have a different and a wider meaning—Authorities cited in Lord Ordinary's note.

At advising—

Lord Rutherfurd Clark—This is an action at the instance of the owners of the ship "Lismore" against the defenders, who chartered the vessel for the voyage from Sydney to San Diego. The pursuers seek to recover damages on the ground that the "Lismore" was unduly detained by the charterers at the port of loading, while the defenders on the other hand maintain that the pursuers' claim is excluded by the terms of the charter-party. The Lord Ordinary has repelled the defenders' pleas founded upon that contention, and the question which we have to determine is, whether the Lord Ordinary was right in so doing. The charter-party in the present case, while closely resembling the ordinary class of document of this kind, has one clause in it which may be noticed in passing. It provides that the "Lismore" was to proceed to Sydney, and there she was to load a complete cargo of coals, with which she was to proceed to San Diego. The loading at Sydney was to be "as customary," and the unloading was also to be "as customary," and at the rate of not less than 100 tons of coal per working-day. The charter-party further provided for the ship being ten days on demurrage, over and above the lay-days, at 4d. per register ton per day. It is to be observed that there is no stipulation as to lay-days or demurrage at the port of loading; all that the charter-party says as to that is, that the vessel is to be loaded "as customary." It does not appear to me to be material whether the word customary be held to mean within the customary time, or in the customary manner. If it be held to mean within the customary time, then, instead of providing for the vessel being loaded in a reasonable time, the stipulation is, that it is to be loaded within the usual or customary time. The important fact to be kept in mind is, that so far as the port of loading is concerned, there is no agreement between the parties that the ship is to remain at Sydney on demurrage.

At Sydney the pursuers allege that the vessel was unduly detained by the defenders, and that she was so detained in breach of the contract between them, and they aver that in consequence of this undue detention of the vessel they have suffered damages. Against this the defenders urge that they are discharged from all liability for this detention by the following clauses in the charter-party—"To be loaded as customary at Sydney, N.S.W. To be discharged as customary . . . and at the rate of not less than 100 tons of coals per working-day, to commence when the ship is in berth and ready to discharge, and notice thereof has been given by the master in writing; and ten days on demurrage, over and above the said laying-days, at 4d. per register ton per day." . . . "Charterers' responsibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. Owners to have lien on cargo for freight, dead freight, and demurrage." The defenders further say that they put on board a full cargo, and that having done so, their responsibility under the charter-party ceased.

Among the numerous authorities which were cited in the course of the discussion there is, I think, one important case which decides the interpretation which is to be put upon clauses of this kind, and that is the case of *Christofferson*, 7 Q.B. 509. It is the more important as I understand its authority is not disputed upon either side. The decision in that case was that such a clause as we have here applied only to future liability unless the liability for illegal detention was by another clause in the charter-party transferred to freight. What the defenders therefore really maintain is, not that the pursuers are not entitled to recover for the loss which they allege that they have sustained through the detention of the vessel, but that that loss ought to be made good by the cargo, over which a lien for any such loss was granted, and that in consequence of this lien they (the charterers) are free.

What we have to do therefore is to construe the clause in the charter-party which is said to create this lien. The words are, "Owners to have lien on cargo for freight, dead freight, and demurrage."

The question therefore comes to be, what is intended to be included in the word "demurrage"—is it intended by it to cover damages for undue detention in breach of the contract, or is it limited to demurrage proper. Now, the answer to that question must depend to a large extent, if not entirely, on the terms of the present contract as to the interpretation of which little or no authority can be got from other cases. What has to be considered is, what is the fair meaning of the word demurrage in the present case? If the view of the defenders is right, then it is to be held that a lien has been effectually constituted over the cargo of this vessel for an entirely illiquid claim. It is quite possible that such a lien might be validly contracted for, but it is clear, I think, that this would require to be done in very distinct and explicit terms. In the case of *M'Lean & Hope* such a lien was admitted, because it was for dead freight, and was specially contracted for.

The question here therefore comes to be, whether we are to hold that these damages which are claimed by the pursuers for the undue detention of this vessel at Sydney are to be liquidated by the defenders, or whether it was the intention of the parties that an effectual lien for them should be constituted over the cargo, and that this intention has been effectually expressed. Looking to this charter-party as a whole, I think that what the parties stipulated for was demurrage in the proper legal sense of the word. The word occurs twice in the deed. As to its meaning upon one of those occasions there can, I think, be no question, and I am not prepared, without some very distinct reason, to attach different meanings to the same word occurring twice in the same charter-party. I think therefore that it was not the intention of the parties that the owners were to have any lien on the cargo for damages arising from the undue detention of the vessel by the charterers at the port of loading. Taking, then, this view

of the charter-party, I do not think it necessary to consider any of the cases to which we were referred. I need only add that the cases of *Lockhart* and *Guy* confirm the view which I have taken as to the meaning of the word demurrage in this charter-party.

Lord Adam—I concur in the result arrived at by Lord Rutherfurd Clark, and for the reasons stated. This is an action against the charterers of this vessel for alleged wrongful detention at the port of loading. The vessel reached the port of loading about the 15th of August, but she was not loaded with her cargo and did not sail for San Diego until the 2nd December. Now, it is clear that the charterers' liability for the loss arising from this undue detention of the ship cannot be got rid of unless that liability can be transferred from the charterers to the cargo. I think, however, it is quite clear that the clause in the charter-party will not bear the construction proposed by the defenders unless demurrage is to be held as including undue detention. The case accordingly turns upon the interpretation which is to be put upon this word. I agree with the reading proposed by Lord Rutherfurd Clark, and think that apart from the word demurrage being used here in its strictly legal sense, it should always be so read unless there is something in the terms of the deed which demonstrates that it was the intention of the parties that it was to be interpreted in a different and in a wider sense.

Lord President—This portion of the charter-party may be viewed as containing either one or two clauses. If it be dealt with as containing two clauses, then the one may be taken as the counterpart of the other—that is to say, the cessation of the charterers' liability was to be given in exchange for a lien over the cargo. The question therefore between the parties here turns, as has been pointed out, on the construction which is to be put upon the word demurrage. *Prima facie* it is a stipulated payment contracted for in the charter-party, in respect of which the vessel may be detained in dock for a certain time beyond the lay-days. It is said, however, that the word is used in this charter-party in another and in a wider sense, and that it was intended by the word demurrage to cover damages for undue detention of the vessel. If no demurrage, in the strict sense of the word, had been stipulated for, then there might have been a good deal to say for this use of the word, but a little further on in the charter-party demurrage is stipulated for as matter of contract, not at the port of loading, but at the port of discharge.

In considering whether a lien of the kind contended for by the defenders has been validly constituted or not, it may be well to consider what the effect might be of adopting one construction of the word demurrage rather than another. If we look at the pursuers' claim we see it is based partly on the defenders' negligence, as set out in article 4 of the condescendence, and partly on the fouling of the ship's bottom in consequence of the delay caused by this negligence (Cond. 5). Now, these two grounds of claim suggest that their settlement depended upon the determination of certain facts. When the ship reached her destination, was there fouling? What was it caused by, and what was the expense to which the owners were put thereby? It is clear, I think, that if an inquiry of this kind was to proceed while the cargo was still on board, the consequences would be most serious to all parties; and yet if there was to be a lien over the cargo for damages in the event of these being found due, then clearly the cargo could not be discharged until these questions of fact had been determined. In construing demurrage, then, in this charter-party all these considerations must be kept in mind, and I have no doubt that looking to the circumstance that the word is used again in the deed, and that there can be no question that upon this subsequent occasion it is used in its strict legal sense, that it was the intention of the parties that when used in the clause which we have had to construe it was not intended to cover damages for the undue detention of this vessel.

Lord Mure and Lord Shand were absent from illness.

The Court adhered.

Counsel for the Pursuers—Asher, Q.C.—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Balfour, Q.C.—Ure. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, March 20.

SECOND DIVISION.

KIPPEN'S TRUSTEES *v.* LEITCH AND OTHERS.

Succession—Vesting—Heritable and Moveable—Conversion—Power of Sale.

A testator by trust-disposition and settlement, dealing with his whole estate, directed his trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." He also directed his "trustees at the first term after his wife's death, if she survived him, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of capital which may have been made to her by my trustees." . . . The trustees were empowered, "for accomplishing the purposes of this trust," to sell and dispose of the truster's whole estate, heritable and moveable, and convert it into money. His wife survived, and died leaving a testament disposing of her whole moveable estate without having asked or received any money from the capital of her husband's estate. Part of said estate consisted of house property, which remained unconverted during the widow's lifetime, but was sold after her death.

Held that the widow's right to half of her

husband's estate was moveable, and that half of the price realised for the house property fell under her testament.

Duncan Kippen, spirit merchant, 25 Richmond Place, Edinburgh, who died on 24th April 1879, by his said trust-disposition and settlement and relative codicils conveyed to and in favour of certain trustees therein mentioned his whole heritable and moveable means and estate in trust under the burdens, with the powers and provisions, and for the uses, ends, and purposes therein mentioned.

The fifth purpose of the trust was—"For payment to my wife the said Mrs Janet Mackintosh or Kippen, if she shall survive me, during all the days of her life thereafter, of the free yearly interest, dividends, or other annual income of the trust-estate above conveyed (after payment of my deathbed and funeral expenses, the expenses of this trust, and any legacies or bequests I may leave as aforesaid), and that half-yearly as the same shall be received, beginnipg the first term's payment thereof at the first term of Whitsunday or Martinmas which shall happen after my death."

By the sixth purpose of the trust the truster directed and appointed his "trustees to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire, but declaring that in case any such payments are made to her, the liferent above provided to her shall be restricted to the liferent of the remainder of the residue."

By the seventh purpose of the trust the truster directed and appointed his "trustees, at the first term of Whitsunday or Martinmas which shall happen six months after the death of my wife, in case she shall survive me, to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of the capital which may have been made to her by my trustees under the sixth purpose of the trust, and which are to be imputed towards payment of said half;" and further, in the event of his said wife predeceasing him, he thereby directed his "trustees, at the first term of Whitsunday or Martinmas which shall happen six months after my death, to pay and assign to her heirs, executors, and assignees the said one equal half of the free residue and remainder of the trust-estate."

Lastly, with regard to the other equal half of the residue and remainder of the trust-estate, he thereby directed and appointed his said "trustees, at the said term, to divide the same into six equal shares, and to pay and assign the same as follows, *videlicet*:—One-sixth share thereof to my brother the said Robert Kippen, whom failing to his children equally between them, share and share alike; another sixth share," &c. The said trust-deed also contained the following clause—"And for accomplishing the purposes of this trust, I hereby specially authorise and empower my said trustees and their foresaids to sell and dispose of my whole estate, heritable and moveable, real and personal, hereby conveyed, and to convert it into money, and that either by public sale or private bargain," &c., all as more fully set forth in said trust-disposition and settlement and relative codicils.

The truster, who had no children, was survived by his wife the said Mrs Janet Kippen, and under said deed she enjoyed the liferent of the residue of her husband's estate until her death, which occurred on or about 12th January 1888. She did not request, and did not receive, any payments out of the capital of the trust-estate as provided for by the sixth purpose of the trust.

The residue of the trust-estate at the truster's death, *inter alia*, consisted of certain house properties in Buccleuch Place and Gladstone Place, Edinburgh, which were sold in February 1888, with entry at Whitsunday 1888, and realised respectively £550 and £404. One equal half of these sums fell to be retained by Mr Kippen's trustees to be disposed of in terms of the last purpose of the trust. A difficulty arose as to the disposal of the other half of these sums, amounting to £477.

The truster's widow left a testament dated 15th October 1883, by which she appointed certain parties her executors, with full power to them "to intromit with my whole moveable estate and executry of every description," and to pay the debts, and pay and deliver the legacies therein mentioned, and whatever residue there might be "of my said means and estate falling under this testament," she ordained the same to be divided as therein mentioned, as more fully set forth in said testament.

The sum of £477 was claimed by Mrs Kippen's executors on the ground that on a sound construction of the trust-disposition and settlement the bequest made by the seventh purpose thereof was moveable, and passed to her testamentary executors. On the other hand, the sum was claimed by James Mackintosh, the heir-at-law of Mrs Kippen, on the ground that the bequest was heritable, and passed to her heir-at-law.

In these circumstances Duncan Kippen's trustees did not feel justified in paying this sum without obtaining the opinion and judgment of the Court, and accordingly a special case was prepared by the said trustees of the first part, Mrs Kippen's executors of the second part, and Mrs Kippen's heir-at-law of the third part, to have the following question of law answered by the Court, viz.:—"Is the said sum of £477 to be regarded as moveable or heritable, and to whom does it fall to be paid?"

Argued for the executors—The right which vested in the widow upon her husband's death was a right to moveables. All the words used in Mr Kippen's trust-deed, *e.g.*, "pay and assign," were applicable to moveables. He only gave his widow right to demand payment of certain sums of money, not to demand a conveyance of his heritable estate. The words "pay and assign" always pointed to conversion unless there were specialties in the deed showing that conversion was not intended. The truster here spoke of "income," "dividends," "interest," not of heritage. The purposes of the trust could not have been carried out without converting the estate into money. The two equal halves could not have been determined unless the houses had

been sold. The number of the heritable subjects, the number of the beneficiaries, and the whole provisions of the deed made conversion indispensable, so that even if the rule laid down in the case of *Buchanan* v. *Angus*, and recognised in the case of *Sheppard's Trustee*, were followed, the executors were entitled to succeed, but there were specialties in the latter case, which was only decided by a majority of the Judges consulted—*Weir* v. *Lord Advocate*, June 22, 1865, 3 Macph. 1006, and *Baird* v. *Watson*, Dec. 8, 1880, 8 R. 233.

Argued for heir-at-law—It might have been necessary to convert if Mrs Kippen had made a claim in her lifetime, but until her death the property remained heritable. She knew it was heritable, and her share of it must go to her heir-at-law. There was no necessity to convert after her death. It might be troublesome to prepare the necessary conveyance of the heritable property without conversion, but it was possible. Since the case of *Sheppard's Trustee* v. *Sheppard, &c.*, July 2, 1885, 12 R. 1193, the rule laid down by the House of Lords in the case of *Buchanan* v. *Angus*, May 15, 1862, 4 Macph. 374, governed such cases, and it only allowed conversion where "indispensable to the execution of the trust." The number of beneficiaries interested would not infer conversion unless there was an indication in the deed that conversion was intended—*Duncan's Trustees* v. *Thomas*, March 16, 1882, 9 R. 731. There was no such intention expressed here—*Auld* v. *Anderson*, Dec. 8, 1876, 4 R. 211.

At advising—

Lord Justice-Clerk—Duncan Kippen, who died on 24th April 1879, left a trust-disposition and settlement dealing with his whole estate. The only purposes of that settlement with which we are at present concerned are the sixth and seventh. By the sixth he directs his trustees "to pay to my said wife, in case she shall survive me, for her own use and disposal, out of the capital of the trust-estate, any sum or sums of money she may require, not exceeding in all the one equal half of the residue and remainder of the trust-estate, and that at any time, or from time to time, as she may desire." . . .

By the seventh he directed his trustees at the first term after his wife's death, if she survived him, "to pay and assign to her heirs, executors, and assignees the balance, if any, which shall remain unpaid to her of the equal half of the free residue and remainder of the trust-estate, after reckoning the payments out of capital which may have been made to her by my trustees under the the sixth purpose of the trust."

The trustees were, "for accomplishing the purposes of this trust," empowered to sell and dispose of the truster's whole estate, heritable and moveable, and convert it into money.

Mrs Kippen survived her husband, and died in 1888, having never applied for or received payment out of the capital as provided in the sixth purpose of the trust.

The residue of the trust-estate consisted, *inter alia*, of certain house property in Edinburgh which has been sold since Mrs Kippen died. One-half of the price is £477, and in this special case we are asked to decide whether it is heritable or moveable. On the one hand her heir claims it as heritable, on the other her executors under her will, which conveyed her whole moveable estate, claim it as carried thereby to them.

I have come to be of opinion that the contention of the heir cannot receive effect. The trustees were directed under the husband's trust to allow the widow to draw out of the capital, sums to the extent of one-half thereof—to find for her sums of money up to half that value. She did not indeed exercise the right, being satisfied with what the income of her husband's estate, given her under the fifth purpose of his settlement, afforded her, but she had such a right, to which the trustees had no answer. All they could ask was reasonable time to convert estate into money and pay it to her. I think that shows that her right was moveable, and if it was moveable it fell within her testamentary conveyance of her whole moveable estate.

Lord Young concurred.

Lord Lee—The leading purposes of the testator's settlement are, *first*, to give his wife a liferent of the whole trust-estate, and, *second*, to pay to her, in case she survive him, "for her own use and disposal," any sum or sums not exceeding a half of the residue, it being provided that her liferent shall be restricted to the remainder, but but that if she does not personally receive the half the balance unpaid shall be paid to her heirs, executors, and successors. It was also provided, *thirdly*, that if she predeceased the testator "the said half of residue shall be paid to her heirs, executors, and assignees;" and in the *fourth* place, that the trustees were to divide the other half of the residue at the first term after the death of the longest liver into six parts, which were to be given among the testator's own relatives.

If the wife had predeceased the testator, or if her share of residue did not vest in her, I think that conversion would not take place under the deed in the circumstances stated.

But my opinion is that a vested right to the extent of one-half of the residue was conferred on the wife herself by the terms of the deed.

I think she had a power of disposal to that extent either by assignation or testament, and that this is made clear by the terms of the first portion of the seventh purpose, which directs that in so far as she shall not have personally received the amount it shall be paid—as unpaid balance belonging to her—to her heirs, executors, and assignees.

It appears to me that the case of *Clark's Executors* v. *Paterson*, 14 D. 141, which has always been regarded as authoritative, proceeds on a principle entirely applicable to the present case. That principle is stated by Lord Fullerton as follows (p. 145)—"There may be cases in which a destination to heirs and assignees and a power of testing are not conclusive in favour of vesting, but these must be cases in which the words of the deed cannot be reconciled to vesting. . . . . But postponed payment is as consistent with vesting as with not vesting. I apprehend that when a legacy is so granted that the legatee has the power of testing upon it, or assigning it; to all intents and purposes that legacy vests unless there is the strongest evidence of intention that it shall not vest."

Accordingly that case has been treated by the

writers on the law of testamentary succession as a leading authority, for the proposition that a destination to heirs and assignees of the legatee implies that the legacy is to vest immediately. It in no way conflicts with the decision in *Bell* v. *Cheape*, May 21, 1845, 7 D. 614. For in *Bell* v. *Cheape* it was clear, and was conceded (as appears from the opinion of Lord Mackenzie), that there could be no vesting, the legatee having predeceased the period of vesting.

Such being my opinion on the effect of the deed, I think that the legacy stood vested in the person of Mrs Kippen as moveable estate belonging to her at the time of her death, being merely a claim to the sum which she might have demanded during her life. The amount and position of the estate, as explained to us, were such as permitted of the sum being paid without selling the heritable subjects, and I think that her right to it is carried by her testament as a part of her moveable estate.

I think it contrary to the meaning of the trust-settlement to recognise a right in her heir-at-law to dispute her power of testing upon the amount bequeathed to her under the description of "a sum or sums of money not exceeding one-half of the residue and remainder of the trust-estate."

Lord Rutherfurd Clark was absent.

The Court pronounced the following interlocutor:—

"The Lords having considered the special case, and heard counsel for the parties thereon, are of opinion that the sum of £477 mentioned in the question therein stated is moveable: Find and declare accordingly, and decern."

Counsel for the First and Second Parties—Guthrie—Gunn. Agents—Whigham & Cowan, S.S.C.

Counsel for the Third Parties—D.-F. Mackintosh, Q.C.—Young. Agents—John Baird, L.A.

Wednesday, March 20.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

LAMING & COMPANY *v.* SEATER AND OTHERS.

Ship—Charter-Party—Rights of Mortgagees.

Mortgagees of a ship are entitled to prevent her sailing under a charter-party if their security would thereby be materially prejudiced.

The owner of a steamship, who had obtained advances by mortgages upon the ship, sent her in October to have certain repairs executed. In February, with the view of paying for such repairs, he got additional advances from the same parties by increasing the amount of their mortgages. He made a part payment of their account to the shipbuilders, and gave promissory-notes for the balance, and he also granted them a second mortgage over the ship. The shipbuilders in return renounced any right of lien they might have over the ship, and undertook to have her ready for sea within one month. The owner further undertook to keep the ship insured in favour of the mortgagees, but this was never effected.

Upon 15th April, and while he was still in possession of the ship, the owner chartered her to a firm of merchants for a voyage. On 22nd April the mortgagees entered into possession, declined to give up the ship to the charterers, and on 20th June the ship was sold under the orders of the Court of Session.

The ship was unfit for sea in April, and probably until the middle of August, when she was delivered to the charterers.

Upon 27th June the charterers demanded immediate delivery as they had re-chartered the vessel, and the sub-charterer was pressing them for delivery, and upon 4th July they brought an action against the new registered owner and the mortgagees for delivery, and failing delivery for damages. After delivery had been made in August they restricted the action by minute of 15th November to one of damages.

Held (Lord Lee *diss.*) that the defenders should be *assoilzied*, as the mortgagees had only protected and rendered effectual their legal rights, which would have been materially prejudiced had the vessel been allowed to sail uninsured and in an unseaworthy condition.

Process—Amendment of Record—Court of Session Act 1868, *sec.* 29.

An action was raised to have a steamship forthwith delivered to the pursuers, "or alternatively, in the event of the defender . . . failing so to deliver to the pursuers the said steamship," to have the whole defenders found liable in damages. After evidence had been led, which dealt with damage sustained before the raising of the action, and judgment had been pronounced in the Outer House, the pursuers and reclaimers moved to be allowed to substitute for the words quoted above, the words "and in any event."

Held that the amendment was incompetent, as thereby a "larger sum" and "another fund than that specified in the original summons" would be submitted to the adjudication of the Court.

By charter-party dated 9th October 1886 Messrs William Hunter & Company, shipowners, 12 Waterloo Street, Glasgow, chartered the steamship "Mula," of which Mr William Hunter was the registered owner, to Messrs Alfred Laming & Company, steam shipping agents, 8 Leadenhall Street, London, for a voyage from the United Kingdom to the Mediterranean and back. The voyage under the charter-party was to commence on 25th October 1886, at which date the "Mula" was to be placed at the disposal of the charterers at Tyne, Tees, or London, in their option, the vessel being then in every way fitted for the service. The ship was not delivered to the charterers in terms of the charter-party, but by agreement dated 15th April 1887 the parties thereto agreed that the charter-party should remain in force, the hire being reduced to £240 per calendar month for the first

voyage, and the charterers having the option of re-chartering the steamer for certain further periods upon giving certain notices at £250 per month.

Hunter & Company had in September 1886 mortgaged the ship to Messrs Thomas Barr, John Forrester, and David Inglis Urquhart, all merchants in Glasgow, in security for a loan of £1350. In the following month (the month when the first charter-party was entered into) the "Mula" was by her owners put into the hands of Messrs Ramage & Ferguson, shipbuilders and engineers, Leith, for the execution of extensive alterations and repairs. The owners being unable to pay the shipbuilders' account an agreement was entered into in February 1887 between Barr, Forrester, and Urquhart, of the first, second, and third part respectively, Ramage & Ferguson of the fourth part, and William Hunter of the fifth part. It was arranged that the first three parties should increase their total advances to £2650, and receive a first mortgage over the ship for that amount; that the fourth parties should receive £1300 in cash, and promissory-notes, and a second mortgage for the balance of their account; and that the fifth party should keep the ship insured at Lloyd's for the sum of the £4000 at least in name of the first, second, third, and fourth parties. The fourth parties (Ramage & Ferguson) further "renounce and discharge any claim for a lien present or future over the said vessel in connection with or arising out of said repairs, and undertake and bind and oblige themselves fully to execute and complete all repairs on said vessel which may be required to make her fit and ready for sea in every respect, and they further undertake and bind and oblige themselves that the said vessel shall, when said repairs are executed, pass the Board of Trade's Surveyor at Leith, and that all within the space of one month from the last date hereof (9th February)." . . .

The insurance promised was never effected.

Upon 22d April 1887 Barr and Forrester and Urquhart entered into possession of the ship as mortgagees. Upon 28th April they obtained an interim interdict forbidding its removal, and on the following day they raised an action of payment, declarator, and sale in the Court of Session against the said William Hunter, to which Messrs Laming & Company were not called, and upon 9th June the following advertisement appeared in the *Glasgow Herald*, *The London Shipping Gazette*, and other newspapers:—

"To be Sold by Auction

(*By Warrant of the Court of Session, Scotland*)

"Within the Commercial Hotel, Commercial Street, Leith, on Monday the 20th June 1887, at Two o'clock afternoon (subject to such Conditions of Sale as will be there and then produced), Upset Price, £4500 Sterling,

"The Iron Screw Steamer 'Mula,' of London, 671 tons gross, 513 net register, as she now lies in the Edinburgh Dock, Leith, together with her boats, stores, &c., as per inventory.

. . . . . .

"The articles and conditions of sale, the inventory of the steamer and her stores, and a copy of the charter-party or contract betwixt the late managing owners and Alfred Laming & Co., can be seen." . .

This advertisement only appeared once, and as subsequently inserted omitted all reference to the charter-party.

The interdict was declared perpetual upon 9th May. Upon 14th June an agreement was entered into between Barr, Forrester, and Urquhart of the first part, and Ramage & Ferguson of the second part, to have the ship bought in if no one bid more than the upset price of £4500. By said agreement Messrs Ramage & Ferguson also undertook "(first) that they shall bear the whole maintenance, risk, and expense as aforesaid of the vessel in implementing the said charters entered into by the owner until after the completion of the first voyage under the charter-party with Laming & Company as aforesaid; and (second), that they shall bear and pay the whole claims against the ship, including as aforesaid up to the date of raising the said action (29th April 1887), and the expense of disputing such claims if they elect to do so, all charges and expenses subsequent to said 29th April being borne by the parties hereto, according to their respective interests as aforesaid, until the vessel sails on her first voyage from Leith: It being the meaning and intention of the parties that until the ship is freed from all obligations entered into by, or incurred on behalf of, the owner, in so far as enforceable against the vessel as preferable to the mortgages under Laming & Company's charter up to the end of the first voyage and she is in a position to earn clear freight for the whole parties, any charges or expenses enforceable against the vessel preferably to the mortgagees shall be borne solely by the second party."

Upon 20th June the ship was sold under decree of the Court to John White Seater, shipbroker, 56 Bernard Street, Leith, who proved to be the nominee or agent of Messrs Ramage & Ferguson.

Messrs Laming & Company, the charterers, after repeatedly pressing Messrs Hunter & Company for delivery of the "Mula," and after writing to them and to the mortgagees that they would hold them liable for any loss they might sustain through the ship not having been delivered in terms of the charter-party, raised an action against J. W. Seater, Messrs Barr, Forrester, and Urquhart, and Messrs Ramage & Ferguson, and also against Messrs Hunter & Company and their sole partner William Hunter.

The summons was signeted upon 4th July 1887, and sought to have it found and declared "that the defender John White Seater is bound forthwith to deliver to the pursuers the iron screw-steamship or vessel called the 'Mula,' of which he is now the registered owner, in the state, for the purposes, and under the terms and conditions expressed in a charter-party entered into between the defenders William Hunter & Company and the pursuers, dated the 9th day of October 1886, and agreement endorsed thereon between the defenders William Hunter & Company and the pursuers, dated the 15th day of April 1887, together with the bunker coals, belonging to the pursuers, on board of the said steamship or vessel, amounting to 215 tons or thereby: And it being so found and declared, the defender John White Seater ought and should be decerned and ordained, by decree foresaid, forthwith to deliver to the pursuers the said steamship or vessel in the state, for the pur-

poses, and under the terms and conditions expressed in the said charter-party and agreement endorsed thereon, together with the said bunker coals belonging to the pursuers as aforesaid: Or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel, and coals therein, the whole defenders ought and should be decerned and ordained, by decree foresaid, conjunctly and severally, to make payment to the pursuers (1) of the sum of £1000 in name of damages; and (2) of the sum of £100 as the value of the said bunker coals, with interest on these two sums at the rate of five per centum per annum from the date of citation hereon until payment: Together with the sum of £100, or such other sum as our said Lords shall modify as the expenses of the process to follow hereon." . . .

Delivery of the "Mula" was afterwards given to the pursuers in August 1887, and in consequence thereof the pursuers upon 15th November 1887 lodged the following minute of restriction:—

"GUTHRIE, for the pursuers, stated that since the action was raised negotiations had been entered into and concluded between the defenders and them, whereby the steamship or vessel called the 'Mula,' and the coals on board thereof, both referred to on record, had now been delivered to the pursuers on the terms and conditions set forth in the correspondence between Messrs Beveridge, Sutherland, & Smith, S.S.C., Leith, and Mr David Turnbull, W.S., Edinburgh, agents for the defenders and pursuers respectively, a copy of which correspondence is herewith produced and referred to; and he accordingly restricted, as he hereby restricts, the conclusions of the summons to a conclusion against the whole defenders, conjunctly and severally, for the sum of £500, in name of damages sustained by the pursuers prior to the delivery of the said vessel, with interest thereon and expenses as concluded for."

The pursuers averred in condescendence 7 that "the said mortgagees at the date of their respective mortgages were fully aware of the existence of the said charter-party between the defenders William Hunter & Company and the pursuers, and when the terms of the said charter-party were altered by the said agreement endorsed thereon, they were also made fully aware of these alterations by the defender William Hunter and others." They also averred that they did not know of the proposed sale of the ship until it was advertised, and that they believed any sale of the ship would be made under burden of their charter-party. They further averred in condescendence 14 that they "had, for part of the period included in their charter-party, re-chartered the said steamship for a cargo of pitch, but through the unwarrantable delay in delivering the said ship they were unable to fulfil their contract, and the pursuers are informed that the re-charterers were obliged to charter the ship 'Greta' to perform the said pitch voyage at an increase of freight amounting to £124, 5s., of which the defenders are aware. Not only have the pursuers been deprived of reaping the benefits which would have accrued to them had their charter-party with the defenders William Hunter & Company been duly implemented, but they have been subjected to claims for damages at the instance of the re-charterers, which with brokerage and commissions will amount to £150, and which presently form the subject of an action in the English Courts at the instance of the re-charterers against the pursuers. The pursuers have been deprived of the services of the said vessel, and have made disbursements on the faith of the charter-party, and in connection therewith, which will amount in all to £500, which is the loss and damage which they have thus suffered through the breach of contract of the defenders."

The defenders denied the statements in Cond. 7 and 14, referred to the proceedings in the action of sale, and "explained that the pursuers got delivery of the vessel as soon as she was fit for sea. Till the pursuers got delivery of her she was unfit for sea and unfit to fulfil her charter. The mortgagees after they took possession of her had to expend large sums in repairing her in order to make her fit for sea, and though they were not bound to do so, they repaired the vessel, and as soon as the Board of Trade certificate was got, handed her over to pursuers." They also stated that "at the time when these mortgages were granted the defenders were not aware of the terms of the charter-party founded on by the pursuers. . . . In the month of April 1887 Messrs Barr and Forrester, who had never given up possession under their original mortgage, in conjunction with the defender Urquhart entered into possession of the ship in virtue of the said mortgage for £2650, and instituted an action of declarator and sale which is still depending in Court, and under which the vessel has been sold. . . . When formal possession was taken as aforesaid in 1887 on behalf of Barr, Forrester, and Urquhart, Messrs Ramage & Ferguson maintained that the ship was and had been in their possession and subject to their lien as shipwrights from December 1886, and that their claim was preferable to all others. The said ship from December 1886 till she was sold was uninterruptedly in the possession of the mortgagees or of Ramage & Ferguson, claiming under their lien." They further stated—(Stat. 6) "The said charter-party is not a fair charter-party, and the owner had no right to enter into such a contract. Said charter-party if carried out would very largely reduce the value of the defenders' securities under their mortgages, and it was entered into at a time when the pursuers knew that the owner Hunter was not in possession of the 'Mula' or entitled to charter her, and when he knew of said mortgages and that the defenders were in possession of the vessel. The defenders, however, with the view of avoiding all questions, ultimately resolved to tender the vessel to the pursuers whenever she was ready for sea, and accordingly the pursuers got delivery of her for the purposes of said charter whenever the repairs on her were completed. The defenders were no parties to the charter in question, and were in no way responsible for the disrepair of the ship."

The pursuers pleaded—"(1) The pursuers having suffered loss and damage to the extent sued for in consequence of the defenders' failure to deliver to them the said steamship 'Mula,' in terms of the charter-party and relative agreement founded on, decree should in the circumstances be pronounced against the whole defenders, in terms of the conclusions of the summons as amended, with expenses. (2) The defenders

Barr, Forrester, and Urquhart having wrongfully taken possession of the vessel, and having unwarrantably refused to deliver her to the pursuers, and the pursuers having thereby suffered loss and damage to the extent concluded for, the said defenders are liable in damages therefor. (3) The defenders Seater and Ramage & Ferguson having purchased the said vessel subject to the pursuers' rights, and having refused to deliver her to the pursuers for fulfilment of the said charter-party, are liable in damages for the loss which the pursuers have thereby sustained."

The defenders (other than Messrs William Hunter & Company and William Hunter, who did not appear in the action) pleaded—"(1) The pursuers' statements are irrelevant. (5) The pursuers having got delivery of the vessel from the defenders whenever she was ready for sea, the defenders are not liable for any loss or damage the pursuers may have suffered."

A proof was led upon 22nd May 1888, from which, and from the correspondence produced thereat, it appeared that after the agreement of 15th April 1888 Messrs Laming & Company immediately chartered the "Mula" with a Mr Dasnieres for a cargo of pitch to Port de Bouc, near Marseilles. Mr Dasnieres could still have taken the vessel up to the end of June, but eventually he could wait no longer and chartered another steamer called the "Greta," put his cargo of pitch into it, and recovered from Messrs Laming & Company £124, 5s. as damages, and £13, 11s. 3d, as costs because of increase of freight.

On 12th May 1887 pursuers wrote to Messrs Hunter & Company:—"The London merchant with whom we have fixed the 'Mula' outwards is now clamouring for her delivery, and writes holding us responsible for all losses and damages, &c., and we in our turn must therefore hold you responsible for all consequences that may arise through your failure to deliver the steamer as arranged. We consider we shall have a claim against your mortgagees, failing you, as they are cognisant of our charter and are bound to deliver her."

On 14th May 1887 they wrote to Barr:—"We understand from a letter from Mr Murray to our brokers that you have now entered into possession of the 'Mula,' and that you have no intention of carrying out the engagements of the steamer in accordance with the terms of the charter dated 9th October last, and the endorsement on same dated 15th April last. We shall be glad to know whether this information is correct, and whether you really intend not to carry out the charter of which you were cognisant. If such should be your intention, we must hold you responsible for all consequences for breach of charter-party, we having entered into engagements for the steamer, and being ourselves already threatened with damages." To which Barr's agents on 17th May replied:—"It is not correct to say that our clients have no intention of carrying out the arrangements of the ship in accordance with the terms of the charter. On the contrary, they have every intention of respecting your rights, and the sale will be carried out expressly under burden of the charter."

On 27th June the pursuers telegraphed to Seater:—"Charterers of 'Mula,' Dasnieres, pitch merchant, just given us notice we must tender 'Mula' at once or he will charter steamer 'Greta' at four shillings increased freight and claim difference, namely £160. Says must decide immediately. Telegraph you will deliver 'Mula,' and when."

On same date Seater's agents replied by letter:—"Our client is not in a position to take up the charter to which you refer, and the parties to whom you allude in your telegram must just take their own course." And also on same date pursuers' agents wrote to the agents of Seater, who were also the agents of Messrs Ramage & Ferguson:—"We have yours of Saturday. Since the sale we have since seen a print of the conditions. We applied for the conditions before the sale, but Messrs Mitchells, Cowan, & Johnston, whose names appeared in the advertisement, had not then got a copy. The eighth clause of the articles does not in our opinion touch the charter-party. It declares the ship to be free of all bonds, liens, rights of retention, and other incumbrances, but a charter-party is not an incumbrance, it is a contract of hire. We are not in error in supposing that the charter-party was referred to in the advertisement of the ship. We cut out the advertisement from the *Glasgow Herald* and sent it to our clients, who relied on the charter-party being carried out. We think the memorandum endorsed on the charter-party is easily understood. It contains not a proposed new arrangement but a completed contract of hire. Our clients in the face of your clients' refusal to implement the charter-party will now proceed with an action, and if need be will apply for reduction of the title to the ship."

The Board of Trade's restriction upon the "Mula's" sailing was removed upon 23rd April, but S. Jones, a witness for the pursuers, who was on board from May 1886 until August 1887, said—"At the time we were stopped we could have gone to sea, but there was one little defect in the pumps which we found out on starting the engines a second time, which it would have been necessary to put right. The vessel could have gone to sea, but it would have been judicious to have made the necessary alterations first." The valuator, who reported to the Court on 1st June 1887, said the ship was at that date apparently ready for sea.

Mr Ramage (of Messrs Ramage & Ferguson), a witness for the defence, said his firm had from the first asserted their right of lien over the ship, which was all along in their possession, and moved about subject to their orders. He also stated that the ship was not fit to go to sea until August, when she was given up to the pursuers.

Upon 20th April 1887 Barr telegraphed to Ramage & Ferguson—"Referring to interview yesterday as stamped policies not forthcoming, consulted Mitchells, Cowan, & Johnston (Barr's agents in Glasgow), who are making arrangements protect joint interests." And upon same date Ramage & Ferguson's agents wrote to Barr's agents—"With reference to our interview with Mr Kelly, we have just ascertained that this vessel is so situated that she cannot sail for a considerable time to come, and Ramage & Ferguson will do all in their power to prevent her getting away until the terms of the minute of agrement have been fulfilled. In these circumstances it appears to us to be scarcely necessary to resort to interdict."

Upon 27th April 1887 Hunter & Company wrote to Ramage & Ferguson—"The position of matters is this—the mortgagees demand that I hand over Lloyd's stamped policies to Messrs Mitchells, Cowan, & Johnston at once. I had the steamer covered and had arranged with the brokers as regards payment but the stamped policies could not be delivered immediately. The steamer is now ready for sea, but stopped on that account. I cannot possibly place the policy in the hands of the writers just now."

Upon 17th May 1887 Barr's agents wrote the agents of Ramage & Ferguson—"Referring to Mr Barr's telegram to you of to-day, we again send you the draft agreement for approval as now altered. As it is of the utmost importance that we should be able to inform the charterers whether the charter is likely to be carried out or not, please wire us on Monday whether you agree to the terms now proposed and that you will not defend the action." And again on 4th June—"We to-day obtained a warrant to sell, the exposure being fixed for Monday the 20th current. There is therefore very little time to advertise. We enclose herewith, for your approval, proof of the advertisement. You will observe that we have inserted in it that the purchaser is bound to carry out the charter. We understand your clients are strongly averse to the vessel being exposed subject to such a burden. We enclose copy of a letter we have from our Glasgow correspondents, from which you will see that their clients are willing that the exposure should take place free of the charter providing your clients undertake all responsibility of satisfying the charterer's claims. If you will write us on Monday, giving our clients such an undertaking, we shall delete from the advertisement all reference to the charter." To which the following reply was sent:—"Our clients quite understand that they have to settle the matter with Laming under their arrangement with Messrs Barr and Forrester, and in these circumstances we have deleted the reference in the advertisement to Laming & Co.'s charter."

Upon 17th July 1888 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"Finds that the mortgagees, Barr and others, when they entered into possession of the ship 'Mula' were not entitled to disaffirm the contract of affreightment into which the owners had entered while they were, with the mortgagees' consent, retaining the possession of the ship, such contract being of a usual and reasonable description: Finds also that the said mortgagees were entitled to insist on the fulfilment of conditions necessary for their protection, and in particular that they were entitled to prevent the 'Mula' from sailing until a policy of marine insurance had been effected available for their protection against sea risks: Finds that the owners were not able to effect such an insurance and that the detention of the ship by the mortgagees was justifiable: Finds further, that the defenders Ramage & Ferguson were entitled to detain the said ship under their right of lien until their account for repairs should be paid or satisfied: Therefore assoilzies all the defenders who are parties to the closed record from the conclusions of the action, and decerns: Finds these defenders entitled to expenses, &c.

"*Opinion.*—In this case the pursuers, the hirers, under a charter-party of the steamship 'Mula,' sue for damages for breach of charter-party, in respect that the vessel was not delivered to them as stipulated. The parties immediately interested as defenders are (1) Barr and others, mortgagees, and (2) Ramage & Ferguson, claiming on the customary shipbuilders' lien for repairs, by whose acts it is alleged the vessel was prevented from sailing. The question is as to the nature and limitations of the rights of a mortgagee and holder of a lien against a charterer or hirer. These are to be considered separately.

"1st. As to the right of a mortgagee. This is to be determined with reference to the quality of the subject of the mortgage. It is not the same as that of a pledgee of ordinary corporeal moveables, because actual possession is not necessary to the efficacy of the mortgage of a ship. The mortgagee has civil possession of a qualified kind by the registration of his mortgage, and if it be necessary that he should enter into actual possession to secure his rights, he must use his rights with a due regard to the interests of the owners. Neither is the right of a mortgagee in all respects the same as that of a heritable creditor. The latter on entering into possession may by known methods secure that the rents shall be payable to himself, and he has no power to interfere with the tenant's right under an existing lease. But the mortgagee of a ship holds a security over a floating subject which in the very act of use is liable to be withdrawn from the jurisdiction of the Courts of the country in which the right of mortgagee is constituted, and which also in the act of use is exposed to the perils of the sea.

"My general view of the mortgagee's rights may be stated under two heads—(1) As to the right of the mortgagee in a question with the owner—supposing he does not desire to bring the ship to sale, the mortgagee, if he finds the ship in a British port, may at once enter into actual possession, ousting the owner from the management. He may dismiss the master, and appoint another responsible to himself, or he may re-engage the master, making the master responsible to himself, and may thus acquire all the assurance which is possible in the nature of the case, that the ship will be returned to him on the completion of her voyage. (2) As to the mortgagee's rights in a question with the charterer or hirer of the ship, it is evident that if the mortgagee does not enter into possession at the time of making the advance, he does, as a matter of fact, assent to the owner exercising all ordinary powers for the joint benefit of owner and mortgagee. Accordingly if the owner enters into a reasonable charter-party for the purpose of enabling the ship to earn freight this must be held to be done with the mortgagee's consent. One of the conditions of a reasonable charter-party is that the ship shall be insured against sea risks for the voyage by one of the parties to the contract, usually by the owner. From the point of view of the mortgagees' interest it is not enough that there shall be an agreement to insure. A suitable insurance must be effected, failing which the mortgagee is, as I conceive, entitled to prevent the ship from sailing. He is also entitled to prevent the ship from putting to sea in an unseaworthy condition. Generalising, the mortgagee must recognise existing contracts of affreightment

subject to this, that he can insist on the preliminary fulfilment of all conditions which are necessary for the safety of the subject and for his own indemnification against sea risks. He is not bound to advance money for such purposes.

"According to these conditions, the case against Messrs Barr and others will in my judgment entirely fail, and that for two reasons—(1) The mortgagees were not in possession at the date of the original charter-party, but possession was finally taken on 22nd April, and the agreement was renewed on 27th May; (2) the ship was not in seaworthy condition at the time when the voyage ought to have commenced. She was in the hands of Messrs Ramage & Ferguson for repair, and the work of repairing had proceeded slowly because instalments of the cost were not forthcoming. Eventually certain of the mortgagees advanced a sum towards the completion of the repairs. They were not bound to do so, and if they had not made the advance the 'Mula' would probably have remained in the shipwrights' hands subject to their lien for repairs until she came to be sold under judicial authority in the action of sale referred to on record. When the 'Mula' was eventually got ready for a voyage the owners were not in a position to satisfy the mortgagees that the ship was covered by insurances. The owners had instructed their brokers to insure her, but the brokers would only insure subject to their own lien for a balance due to them on past transactions. Consequently any insurance that might be effected in this way would be valueless to the mortgagees as an indemnity to them against the loss of the ship. They accordingly took up the position that they would not allow the 'Mula' to proceed to sea until policies were delivered or assigned to them to the extent of their debt. This could not be done, and my opinion is that Barr and others were within their rights when they refused to allow the 'Mula' to commence her voyage.

"The case of Messrs Ramage & Ferguson is stronger. I consider that they had a lien for their repairs which was not lost by the ship going out of their yard to a pier or harbour where the work of repairing was continued, but which would have been lost if the ship had commenced her voyage. Their right then was to detain the ship until their account should be paid or provided for.

"It is true that through the exercise of the rights of the mortgagees and the builders the pursuers have lost money. But this is through the fault of the owners, and does not, as the case presents itself to me, render the parties who are responsible for the detention of the ship responsible in damages.

"It follows from this opinion that the defenders Barr and others, and the defenders Ramage & Ferguson, are entitled to be assoilzied from the action. If a different view were taken I think that damage has been proved (approximately) to the extent claimed in the proof."

The pursuers reclaimed.

They asked to be allowed to amend their summons under the provisions of the Court of Session Act 1868, sec. 29, which provides that "The Court . . . may at any time amend any error or defect in the record . . . in any action . . . in the Court of Session ; . . . and all such amendments as may be necessary for the purpose of determining in the existing action . . . the real question in controversy between the parties shall be made: Provided always, that it shall not be competent by amendment of the record . . . under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment" . . . They proposed to substitute for the words "or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel, and coals therein," the words "and in any event," so as to raise clearly their claim of damages for loss sustained before the raising of the action.

Argued for the reclaimers *upon the proposed amendment*—They were within the provisions of the section of the Act allowing amendments, as they were not altering "the real question in controversy." The best proof of this was that no alterations required to be made on the condescendence, and the whole evidence led related to loss sustained before the summons was signeted. They only desired to bring out more clearly what both parties intended.

Upon the merits—(1) As to lien—Ramage & Ferguson had no right of lien. The ship was never in any private dock of theirs, but in the open roadstead, and in such cases possession so as to found a lien was not presumed, but must be proved to have been given—*Cooper, &c.* v. *Barr & Shearer*, June 6, 1873, 11 Macph. 651, *reversed*, but the general principles laid down in Court of Session recognised February 26, 1875, 2 R. (H. of L.) 14. Even if they had a lien, it was renounced by the agreement of February 1887, under which they got a second mortgage. (2) As to mortgagees—The mortgagees were bound to respect the rights of the charterers, especially as there were no mortgagees in possession at the date of the renewal of the charter-party 15th April 1887, and the charter-party was not of an unusual description. The mortgagees had no right to cut off the ship from earning freight even while subject to their mortgages. The obligation undertaken by owner in February 1887 to insure was in favour of the mortgagees. The question of insurance did not affect the right of the charterers. It was not proved the ship was unseaworthy at the end of April. If it was, why were the mortgagees in such a hurry to stop its sailing by interdict? The correspondence showed that Ramage & Ferguson did their best to stop the ship's sailing. The other mortgagees were willing to let her go, and yet they were under an obligation to have her fit for sea within a month from February 1887. One of the partners of the firm admitted nothing was done to her between April and July, and in these circumstances it was not for them to plead unseaworthiness as a reason for not letting her go. The reclaimers had had a further action of damages raised against them for breach of contract with Dasnieres, and altogether, as the Lord Ordinary had found, the sum claimed in name of damages was not excessive—*Collins* v. *Lamport*, December 1864, 34 L.J. Chan. Div. 196 (Lord Chancellor Westbury); "*The Maxima*," June 18,

1878, 39 L.J. 112; "*The Fanchon*," April 21, 1880, L.R., 5 Prob. Div. 173; *Cory & Company* v. *Stewart*, April 7, 1886, Times' L.R., vol. 2, 508; "*The Innisfallen*," June 15, 1866, L.R., 1 Ad. and Eccle. 72; *Keith* v. *Burrows*, July 1877, L.R., 2 Ap. Ca. 636.

Argued for the respondents *upon the proposed amendment*—The amendment was incompetent. The summons as raised was to recover damages sustained after 4th July. By the very words of the summons it was implied that if delivery of the ship had been made upon 4th July there would have been no room for an action of damages. The proposed amendment violated both the conditions laid down in the 29th section of the Act, because it proposed "to subject to the adjudication of the Court" a "larger sum," and also an "other fund than such as are specified in the summons." Unless the proposed amendment of the record was allowed the reclaimers had no case. The ship had been delivered to them, and all the damages, if any, had been sustained before the raising of the action. Even if the amendment were allowed they had no claim against the respondents, who had acted within their legal rights. There was no privity of contract between them and the respondents. Their right of action, if any, was against the owner. The owner could not have obtained delivery, and the charterers had certainly no higher rights. The rule to be derived from the cases cited by the reclaimers was that mortgagees were not bound to respect any charter-party if by doing so their reasonable rights under their mortgages would be materially prejudiced. They would have been so prejudiced if the ship had been allowed to sail, as she was unseaworthy until August 1887, and uninsured. By getting the ship sold under the orders of Court the mortgagees had simply made their rights effectual in the only way recognised by law. Even if they had not entered into possession the ship would not have been allowed to sail, as there were other creditors who would have prevented her going.

At advising—

The Lord Justice-Clerk read the following opinion of Lord Rutherfurd Clark, with which he concurred:—

The pursuers entered into a charter-party with Messrs Hunter & Company, the owners of the steamship "Mula," dated 15th April 1887, and founding on that contract they have raised this action, which is directed against (1) John White Seater, who at the date of the action was the registered owner of the vessel; (2) Thomas Barr, John Forrester, and David Inglis Urquhart, who were mortgagees; (3) Ramage & Ferguson, who were mortgagees, and had also been employed to repair the "Mula;" and (lastly) William Hunter, the sole partner of William Hunter & Company, the owners. No appearance has been entered for Hunter, who is said to be insolvent, and it is admitted that Seater is no more than the nominee of the mortgagees, who are the real defenders in the case.

The pursuers seek declarator that the defender Seater is bound forthwith to deliver to the pursuers the steamship "Mula" in the state, for the purposes, and under the terms and conditions of the above-mentioned charter-party, and decree to enforce the declarator. And after that conclusion the summons proceeds—"Or alternatively, in the event of the defender John White Seater failing so to deliver to the pursuers the said steamship or vessel and coals therein, the whole defenders ought and should be decerned and ordained by decree foresaid, conjunctly and severally, to make payment to the pursuers (1) of the sum of £1000 in name of damages, and (2) of the sum of £100 as the value of the said bunker coals." I omit any reference to the coals which are mentioned, because they were delivered to the pursuers, and no question arises in regard to them.

The steamer was delivered to the pursuers in August 1887, and on 15th November 1887 the pursuers lodged a minute of restriction of their summons, which is No. 8 of process. It restricts the conclusions of the summons to a conclusion for damages sustained by the pursuers prior to the delivery of the vessel.

The first question which presents itself for consideration is, what damages can be recovered under that conclusion? The conclusion for damages being expressly dependent on the failure of the defender Seater to deliver the ship, the result seems to be that if Seater delivered the ship in terms of the pursuers' demand there is no conclusion for damages. In other words, the damages concluded for are the damages which will result from the failure to deliver, which of course can only be damages arising after the date of the action. The pursuers proposed an amendment of the summons so as to enable them to recover the damages incurred by them between the date of the charter-party and the date of the action. The motion was made under the 29th section of the Act of 1868; but in my opinion we cannot sustain that, for if we did we should, I think, be violating the express declaration of the statute to the effect that it shall not be competent by amendment "to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading." Under the summons as it now stands we can only in my opinion give a decree for such damages as arise after the date of the action. To allow the summons to be altered to the effect of enabling us to give a decree for damages which have arisen prior to the date of the action would be to enlarge the subject-matter of the action, and would in my opinion be contrary to the provision of the statute which I have just quoted. The pursuers urged that the proof was, *inter alia*, led with a view to seeing the damages which had arisen prior to the action, and that it was led without objection on the part of the defenders. That is true; but I do not think that by reason of the fact we are the less bound to act in conformity with the statute, for I cannot hold that the failure of the defenders to object is equivalent to that consent which the statute requires before we can enlarge the conclusions of the summons. The case as it stands could not be disposed of without an inquiry into the conduct of the parties prior to the date of the action. If evidence as to damage arising before that date had been introduced, all that can be said of it is that it was irrelevant. To admit irrelevant evidence is not the same thing as to consent that the Court shall adjudicate upon it. If I am right, so far

there is an end, or almost an end, to the case. I think the greater part of the damage, if not the whole of it, arose prior to the date of the action. But various questions of importance have been argued to us, and I think it right to consider these, all the more as another view may be taken of the summons than that which I have adopted.

As I have said, the pursuers' charter-party is dated 15th April 1887. They had a prior charter-party which they cancelled in terms of a power therein contained. It is not necessary to refer to the prior charter-party further. The "Mula" was mortgaged to the defenders Barr & Forrester for £1350, conform to mortgages dated September 1886. In October of that year she was placed in the hands of the defenders Ramage & Ferguson for extensive repairs which were proceeded with, but it became evident that Hunter & Company were unable to meet the cost. Ultimately an agreement was entered into between them and (1) Barr & Forrester and Urquhart, and (2) Ramage & Ferguson, dated February 1887, the effect of which was (1) that Barr & Forrester, in conjunction with Urquhart, advanced Hunter & Company £1300, and obtained a mortgage for £2650, which included the sum contained in the prior mortgage for £1350; and (2) that Ramage & Ferguson obtained £1300 towards payment of their account and a mortgage for £500. These mortgages were dated in February 1887. Ramage & Ferguson further bound themselves to have the vessel fit for sea by 9th March, and they renounced all claim for lien for the repairs which they had made. By the same agreement Hunter, the owner, undertook to have the vessel insured in the name of the other parties to the agreement. It is admitted that no such insurance was ever effected. On 22nd April 1887 Barr & Forrester and Urquhart entered into possession of the ship as mortgagees. On 28th April they raised a note of suspension and interdict to prevent its removal, and obtained interim interdict, which was declared perpetual on the 9th of May. Further, on 29th April they raised an action of declarator and sale, and under decree of the Court the ship was sold on 20th June to Seater, who, as I have already said, was the mere nominee of the mortgagees. The pursuers were not called to this action as the raisers of it were not aware of the charter-party. But when they came to be aware of it, it was at first proposed that the sale should be made under burden of the charter-party, but this proposal was not carried out. The pursuers did not intervene in the proceedings, for the reason that they expected the sale to proceed under the burden of the charter-party as it stood. The ship was detained till August, when, as I have said, she was delivered to the pursuers.

It is in these circumstances that the pursuers bring their action of damages. It is to be observed that they do not maintain that the defenders were bound by the charter-party, or that they could sue the defenders in virtue of any contract. Their case is that the defenders were bound to respect the rights of the charterers, and to deliver the vessel to them in implement of the charter-party, that they wrongfully failed to do so, and that they are therefore liable in damages. The pursuers referred to the case of *Collins* v. *Lamport* as determining the rights of mortgagees in a question with the charterers. The defenders admit its authority. The passage in the Lord Chancellor's judgment on which the pursuers rely is as follows:—"As long therefore as the dealings of the mortgagor with the ship are consistent with the mortgagee's security, so long as these dealings do not materially prejudice and detract from or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there Parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner, he has of necessity authority to enter into all these contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property." I accept that declaration of the law to its full extent. The limit of the owner's right to deal with the ship is to be found in the prejudice of the security of the mortgagee. So long as the mortgage is not materially prejudiced or detracted from the owner may deal with the ship as he pleases. When the security is prejudiced—or to keep to the language of the Lord Chancellor more closely, is materially prejudiced—he may not. It is, I think, obvious that the right of the charterer cannot be higher than the right of the owner. That right is to obtain delivery of the ship from the owners for implement of the charter-party. If the owner cannot in a question with the mortgagees legally give delivery, the charterers cannot claim it, and if the mortgagees have a right to withhold the use of the ship from the owner they have an equal right against the charterer.

We have thus to consider the position in which the mortgagees were placed in regard to the owners. It is plain enough that their mortgage was in jeopardy. The owners were in great pecuniary embarrassment, and could not meet the cost of repairing the ship. Further, the owners had become bound to effect an insurance over the ship in the name of the mortgagees, which they did not do, and which, so far as I judge from the evidence, they were never in a condition to do. The mortgagees thereupon took the ordinary steps for realising their security. They first prevented the removal of the ship by interdict, and thereafter proceeded with an action for a sale. In all this they were, I think, quite justified. But the pursuers demanded that the ship should be given to them in order to implement the charter-party. Could the owners have insisted on this? I do not think that they could. The conclusive answer of the mortgagees would be that their security would be thereby materially prejudiced. If the ship had been sent to sea without being insured, it is hardly necessary to say that the mortgagees would have been put into serious peril, and that a sale could only have been effected at great disadvantage. It is true that the charterer had nothing to do with the insurance of the ship, but that is in my opinion beside the question. The owners had undertaken to insure it in the name of the mortgagees, and they could not in a question with the mortgagees have insisted on sending the ship to sea while that obligation remained unfulfilled. The charterers are in the same position, and in my judgment they cannot have a higher right than the owners. For these reasons I am of opinion that the defenders did not act wrongfully in failing to deliver the ship to the pursuers.

But the defenders have a further defence. They say that the ship was not in a seaworthy condition up to the date of the action, and in my opinion that is proved. It is said that very little remained to be done, but I think it is proved that there were serious defects. The pursuers' witness, Jones, admits that it would not have been judicious to allow her to sail without the necessary alterations being made. I entirely agree with him, and I think that where it is judicious to have repairs made in port the mortgagees were not at all wrong in preventing the ship from going away till these repairs were made. It is true that Ramage & Ferguson undertook to have the repairs completed by the middle of March. I do not think that that is material. This contract was with the owners. The pursuers as charterers were not in right of it. The owners could not have insisted to the prejudice of the mortgagees in sending the ship to sea in an unseaworthy condition, and it follows from what I have said that the charterers were under the same disability.

It was urged that Ramage & Ferguson could not found on the breach of their obligation to complete the repairs; but as the charterers were not in right of their obligation they cannot, I think, found upon it, neither can the owners in this question. For beyond doubt Ramage & Ferguson have committed a breach of contract as shipwrights, but they could not compel them because of such a breach to surrender their rights as mortgagees. Besides, the other mortgagees were not affected by this breach, and they had an independent right to retain the ship. I do not think that Ramage & Ferguson had any lien for the repairs, and I cannot concur with the Lord Ordinary on that point.

The result is in my opinion that the defenders should be assoilzied.

Lord Lee—I have the misfortune to differ from the opinion which has been delivered, and from the Lord Ordinary; but I do not find it at all necessary to question the proposition in law upon which the Lord Ordinary proceeds, viz., that the first mortgagees were entitled to refuse to allow the ship to go without delivery of a policy of assurance. They did so in the month of April; but the ground upon which I arrive at the conclusion that there was a wrongful detention of the vessel, and that Ramage & Ferguson are responsible, is that the delay of the ship—the refusal to allow it to go when it was demanded ultimately—was not caused by Barr & Urquhart, the first mortgagees, I think, but was caused entirely by the conduct of Ramage & Ferguson. I think that they acted not only contrary to their legal rights, but contrary to their obligations in refusing to allow the ship to go, as I shall endeavour to explain.

The action was originally an action for delivery of the ship. It was raised upon the 4th of July 1887, but it had been intimated on the 27th of June. It was subsequently converted into an action of damages by an arrangement to which Ramage & Ferguson were parties, and which is contained in a minute of the 15th of November, as the ship had been given up, and the only question that was left was the question of damages. The conclusion for delivery was directed against Seater as the registered owner. He had been put forward by Ramage & Ferguson as the purchaser of the ship at a public sale, as a person quite independent of them, as a person who held the ship by his judicial title, and under conditions fixed by the Court, and which freed him from the charter-party. That appears from the joint print, where they meet the demand which was made upon them by the pursuers at that time for delivery of the ship. They had on the 25th June put forward Seater as a person with whom they had nothing to do, saying—"You are in error in supposing that the charter-party was referred to in the advertisement of the ship, or that she was sold subject to the fulfilment of any charter-party which her former owner had entered into," and so on. Now, Seater admittedly turns out not to have been an independent party at all. He was a mere agent or trustee for Ramage & Ferguson. But the conclusion for delivery was quite properly and sufficiently directed against him as the registered owner. And the question of damages which is now alone left in the case in my view depends upon this question, whether Ramage & Ferguson, and their nominee or agent Seater, were not bound to deliver the ship at the time when that action was raised.

I say my view is that the question of damages depends upon the question whether they were not bound to make delivery at that date for this reason, that I hold it to be clearly proved that the whole damage which was actually suffered arose after the 27th of June and ended with the 4th of July. Even down to the 4th of July, when the summons was signeted, no damage would have been suffered if delivery had been made upon that day according to the evidence. I say that is proved, in the first place, because I think the oral testimony is clear upon that point. In the proof Mr Laming says distinctly that Dasnieres, the person who had chartered the "Mula" for a cargo of pitch out to the Mediterranean, "could still have taken the vessel up to the end of June." And he says No. 69 of process is the charter-party which he entered into; and I think it was explained that the charter-party is subsequent in date to the end of June. Further, there is real evidence in the correspondence at the time that the whole damage arose after 27th June in the letter written by the pursuers to Seater, Ramage & Ferguson's nominee, and which is printed. For in that letter, or rather telegram, by the pursuers to Seater, they say—"Charterers of 'Mula,' Dasnieres, pitch merchant, just given us notice we must tender 'Mula' at once or he will charter steamer 'Greta' at four shillings increased freight, and claim difference, namely, £160. Says must decide immediately. Telegraph you will deliver 'Mula,' and when." So that on the 27th of June they had an opportunity to deliver the "Mula," and to avoid any damage. They refused to deliver the vessel in terms of their letter which follows, saying—"Our client Mr J. W. Seater has handed to us your telegram of date, and with reference thereto we beg to send annexed copy of a letter which we addressed to your representatives in Glasgow on Saturday on the same subject, and to which we beg to refer you. Our client is not in a position to take up the charter to which you refer, and the parties to whom you allude in your telegram must just take their own course." That is followed by a letter upon the same day, which ends by the agents of the

pursuers intimating that "our clients, in the face of your clients' refusal to implement the charter-party, will now proceed with an action," and so on. So that the whole damage was suffered after the 27th of June, the date when the action was instituted. If delivery had been made even on the 4th of July, when the summons was signeted, there is little reason to doubt, so far as I can see, that the damage might have been avoided. Therefore the question of damage comes to depend, as I said, upon the question whether there was or was not incumbent upon Ramage & Ferguson an obligation to deliver that ship? whether they were entitled to set at nought the charter-party altogether as they did?

Now, the position of the ship was this—The original charter-party was dated October 9, 1886. Under that charter-party it is unnecessary to notice the history of the delays which took place. I am disposed to think that these delays arose from the difficulties of Hunter, the owner of the ship. And I am clear that there is no claim in this action founded upon any delay under the original charter-party, nor indeed any claim under the amended charter-party of April 15th down to the 27th of June. No loss is alleged to have happened by the non-delivery of the ship prior to the 27th of June. But the delays which had arisen under the first charter-party are important in this respect as matter of history, for they resulted in an agreement in February 1887 between the owner Hunter and the first mortgagees Barr & Company, and Messrs Ramage & Ferguson, and Mr Urquhart, as an individual partner, who also had a share of Barr's interest, the object on the part of the owner, and on the part of all concerned, being obviously to enable this ship to begin earning freight. On the narrative that whereas the fourth party (that is Ramage & Ferguson) were engaged in certain repairs for which they claim a lien "preferable to the claim of the first and second parties under the said mortgages, but which lien the whole other parties hereto refuse to recognise;" and on the further narrative, that for the purpose of avoiding litigation, "and with the view of completing said repairs and making the said vessel ready for sea in every respect, the first and second and third parties have agreed to advance to the fifth party the further sum of £1300." Thereupon arrangements were made by which this advance is to be given and a mortgage is to be given to Messrs Ramage & Ferguson. By the third article of that agreement Messrs Ramage & Ferguson, "in consideration of said payment of £1300, and promissory-notes and mortgages to be granted by the fifth party as aforesaid, renounce and discharge any claim for a lien, present or future, over the said vessel in connection with or arising out of said repairs, and undertake and bind and oblige themselves fully to execute and complete all repairs on said vessel which may be required to make her fit and ready for sea in every respect." And they bind themselves when the repairs are executed that the vessel shall "pass the Board of Trade's Surveyor, and that all within the space of one month from the last date hereof." They renounce their lien, and they agree to the owner of the ship at that time that they shall make all repairs "which may be required to make her fit and ready for sea in every respect." Now, what happened under this? I do not go over the correspondence. I think it appears that at first there was a temporary delay caused by Barr & Company requiring that a policy of insurance should be delivered. That was in the month of April, but the result was undoubtedly that on the 15th of April a new or rather an amended charter-party was given to Messrs Laming & Company, and although Messrs Barr & Company caused some delay by their demanding a policy of insurance it is quite plain upon the correspondence that the delay caused by the demand for delivery of a policy of insurance passed off, and was not the ultimate cause of the detention of the vessel at the time the final demand was made.

That appears to me to be quite plain by two letters which are contained in the print. The first is a letter dated 17th May 1887, in which Barr & Company's agents, writing to the pursuers, say they find it necessary to sell the ship, and they go on to say—"It is not correct to say that our clients have no intention of carrying out the arrangements of the ship in accordance with the terms of the charter. On the contrary, they have every intention of respecting your rights, and the sale will be carried out expressly under burden of the charter." So that they were ready to go on selling the ship under her arrangements. Moreover, there is another letter, which shows that they made Ramage & Ferguson acquainted with their willingness that the ship should fulfil her engagements. On the 21st May they write to Ramage & Ferguson saying—"Referring to Mr Barr's telegram to you of to-day, we again send you the draft agreement for approval as now altered. As it is of the utmost importance that we should be able to inform the charterers whether the charter is likely to be carried out or not, please wire us on Monday whether you agree to the terms now proposed, and that you will not defend the action." Now, that was the position of Barr. It appears that the matter of the insurance had been arranged, and Barr was willing to sell the ship under her engagement. But Messrs Ramage & Ferguson's position from the correspondence—indeed from an early part of the correspondence, from the 20th of April—was that of insisting, contrary to their agreement of February, upon the right to take every step they could to detain the ship.

The letter of April 20th, I am afraid, it may be necessary to notice, because really in my mind it comes to be one of the links by which Ramage & Ferguson's liability is clearly demonstrated. They apparently began negotiations with Barr for the purpose of what they call "protecting the joint interests." Upon the 20th of April they write to Messrs Boyd, Jamieson, & Kelly, who, I think, are Barr's agents, as follows:—"With reference to our interview with Mr Kelly we have just ascertained that this vessel is so situated that she cannot sail for a considerable time to come, and Messrs Ramage & Ferguson will do all in their power to prevent her getting away until the terms of the minute of agreement have been fulfilled." Now, were Ramage & Ferguson fulfilling the minute of agreement? The minute of agreement bound them to make all necessary repairs in consideration of the £1300 and the mortgage which they got to fit her for sea. They go on writing, making it still more plain that they are determined to make a

stand against the ship being allowed to go. I do not need to read these letters, but Hunter & Company write on the 27th April—"The steamer is now ready for sea, but stopped on that account." That is the question about the policy of insurance which went off. But all through the correspondence it will be found that from the 20th of April Ramage & Ferguson's position was that of taking every step they could to have the vessel detained.

Now, I pointed out that Barr & Company's proposed sale was under the burden of the ship's engagements. Barr & Company's agents write to Ramage & Ferguson's agents on 4th June 1887 as follows—"We to-day obtained a warrant to sell, the exposure being fixed for Monday the 20th current; there is therefore very little time to advertise. We enclose herewith for your approval proof of the advertisement." That is an advertisement which contained a clause bearing that the sale was under the burden of the charter-party. Then they go on to say—"You will observe that we have inserted in it that the purchaser is bound to carry out the charter. We understand your clients are strongly averse to the vessel being exposed subject to such a burden. We enclose copy of a letter we have from our Glasgow correspondents, from which you will see that their clients are willing that the exposure should take place free of the charter provided your clients undertake all responsibility of satisfying the charterers' claims." That letter showed that Barr & Company were willing, indeed desirous, to act upon their undertaking to the owner Hunter that the sale should be subject to the charter. But the answer by the agents of Ramage & Ferguson is this—"We have your favour of Saturday. Our clients quite understand that they have to settle the matter with Laming under their arrangement with Messrs Barr & Forrester, and in these circumstances we have deleted the reference in the advertisement to Laming & Co.'s charter." And accordingly the result is that by the action of Ramage & Ferguson upon their own sole responsibility the sale was effected, and effected by them without any reference to the charter-party. It set at nought the engagement of the ship. It was in substance a sale by Ramage & Ferguson to themselves, or to a person who is their mere nominee, for the purpose of ignoring and putting aside the charter-party which I have referred to.

Now, that is done by persons who in a question with the owner had undertaken within a month of the end of February to do everything that was necessary to make the vessel ready for sea in consideration of a sum of £1300. Now, were they entitled to do that? or were they not bound to allow Hunter to fulfil his engagement? It is perfectly clear that Hunter was bound to the charterers. It is equally clear that Ramage & Ferguson were bound to Hunter to do what was necessary to enable the ship to fulfil her charter. I fail to see how Ramage & Ferguson can justify what they did. I have not thought it necessary to notice the fact that their position as regards responsibility is made abundantly clear by the formal agreement between themselves and Barr & Company. I think it is dated in June, and by it they undertake all responsibility to the charterers. But apart from that altogether, being bound to Hunter, who was bound to the charterers—bound to Hunter in the way that I have mentioned—I entirely fail to see how they were entitled to take these steps for the purpose of defeating the charter. Therefore I am of opinion that at the 27th of June, when the action was intimated, before the damage had begun to arise, at the time when it was telegraphed to them from their agents that the charterer of the "Mula," Mr Dasnieres, was still willing to take the vessel, they were under an obligation to make their nominee Seater give up the vessel, and they were altogether wrong in going on to hold out Seater as being a person entirely independent of them, holding under a decree of sale which had itself set aside the charter. But it now appears that the setting aside of the charter-party in the proceedings of sale was entirely the work of Ramage & Ferguson. I say therefore that they were bound to deliver on 27th June. I say further that if they had delivered on 27th June no damage would have arisen, because the vessel would have earned her freight under the pitch contract, and would have earned her coal freight, and no damage would have arisen. That being so, I think that under the agreement, after what had taken place, they must be held as responsible for the damage so arising. I think, in my view of the claim for damage, that no amendment is necessary. It is perfectly rightly concluded for as a substitute for a claim to the ship. That is to say, the claim of damages arising out of the refusal to deliver the ship at the date when the action was intimated on 27th June.

I do not know that it is necessary to say more. Some importance has been thought to attach to the fact that Messrs Ramage & Ferguson had a lien for repairs. I concur entirely in the opinion of Lord Rutherfurd Clark that they had no such lien. Something has also been said about the ship being unseaworthy and unfit to go to sea down to the 27th of June. Well, let it be supposed for a moment that it was so, who is responsible for that? I say most clearly Ramage & Ferguson, for it was Ramage & Ferguson's breach of their engagement to the owner that prevented the ship being made ready for sea. Therefore on the whole I am sorry to say that I am obliged to differ from the proposed judgment.

The Court adhered.

Counsel for the Pursuers—Lord Advocate, Q.C.—Graham Murray. Agent—David Turnbull, W.S.

Counsel for the Defenders—Dickson—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

SUMMER SESSION, 1889.

COURT OF SESSION.

Tuesday, May 14.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

DICKSON *v.* BRYAN.

Sheriff—Appeal—Competency—Value under £25—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 22.

A Sheriff Court petition craved warrant to commit the defender to prison, therein to remain until he restored certain poinded effects, or paid to the pursuer the sum of £9, 8s. 8d., being double the appraised value of the said articles. *Held* that as the prayer of the petition showed that the value of the cause did not exceed £25, it was not competent to appeal the case to the Court of Session.

Adam Dickson, horse dealer, Edinburgh, on 8th August 1888 obtained a decree in the Small Debt Court, Edinburgh, against William Bryan then residing at 4 Lauriston Place for £4, 10s. By said decree execution was ordained to pass thereon by poinding and sale after a lapse of ten days.

On 27th August Bryan's effects were duly poinded in virtue of the decree

By the Personal Diligence (Scotland) Act 1838 (1 and 2 Vict. cap. 114), sec. 30, it is enacted, that "If any person shall unlawfully intromit with or carry off the poinded effects, he shall be liable, on summary complaint to the Sheriff of the county where the effects were poinded, or where he is domiciled, to be imprisoned until he restore the effects, or pay double the appraised value."

In January 1889 Dickson presented a petition in the Sheriff Court at Edinburgh praying that Bryan might be committed to prison and detained there until he restored the effects poinded in August 1888, or made payment of £9, 8s. 8d., being double their appraised value.

He averred that the defender had carried off the poinded effects out of the jurisdiction of the Court to Melrose where he alleged they now were.

The defender averred that his whole effects were on 28th September 1888 sequestrated for rent, that the *nexus* of sequestration was preferable to the pursuer's diligence of poinding, and that the pursuer was not entitled to sell the poinded effects without finding caution for the said rent.

The defender pleaded, *inter alia*, that the action was incompetent.

On 18th February 1889 the Sheriff-Substitute (Rutherfurd) sustained the defender's first plea-in-law, and dismissed the action, and on 4th March 1889 the Sheriff (Crichton) on appeal adhered to the Sheriff-Substitute's interlocutor.

The following note was appended to the Sheriff's interlocutor:—"The Sheriff is of opinion that this petition against the defender (which is brought under 1 and 2 Vict. c. 114) for carrying off the effects poinded by the pursuer in virtue of the decree obtained against the defender under the Small Debt Act is incompetent. Proceedings should have been taken against the defender under the Summary Procedure Act of 1864 and 1881."

The Sheriff Court (Scotland) Act 1853 (16 and 17 Vict. cap. 80), sec. 22, provides—"It shall not be competent . . . to remove from a Sheriff Court, or to bring under review of the Court of Session . . . any cause not exceeding the value of £25." . . .

The pursuer appealed to the Court of Session.

On the motion that the case be sent to the roll the defender objected (1) to the competency of the appeal upon the ground that the value of the cause as shown by the prayer of the petition was under £25, and that by sec. 22 of the Sheriff Court (Scotland) Act 1853 (16 and 17 Vict. cap. 80), an appeal in such cases was incompetent—*Singer Manufacturing Company* v. *Jessiman*, May 14, 1881, 8 R. 695; (2) that under sec. 30 of the Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), no provision was made for a review of the Sheriff's determination by this Court.

Argued for the appellant—The question was not a pecuniary one, but really came to be, how a creditor could work out his remedy—*Jeffrey* v. *Duncan*, February 5, 1852, 14 D. 442. The present appeal was not on the merits, but involved a question of procedure—*Purves* v. *Brock*, July 9, 1867, 5 Macph. 1003; *Wilson* v. *Aberdeen*, July 16, 1872, 10 Macph. 971; *Henry* v. *Morrison*, March 19, 1881, 8 R. 692. What the pursuer asked here was truly a decree *ad factum præstandum*, and in such cases the mere money value of the action was of no account—*Thomson* v. *Barclay*, February 27, 1883, 10 R. 694.

At advising—

Lord President—This is an application under the Personal Diligence Act of 1838, and what the prayer of the petition asks is "to grant warrant to officers of Court to commit to prison the person of the defender, therein to remain until he restore the following effects poinded on 27th August 1888, at 4 Lauriston Street, Edinburgh, in virtue of a Small Debt decree, dated the 8th day of August in the same year at the pursuer's instance," and then follows the list of articles poinded, after enumerating which the prayer proceeds "or until he pays to the pursuer the sum of £9, 8s. 8d. sterling, being double the appraised value of the said articles, all as provided for in the Act 1 and 2 Vict. cap. 114, sec. 30."

Now, it is clear from the terms of this application that if the defender pays the £9, 8s. 8d. he will be free from imprisonment, and will fully implement the prayer of the petition. That being so, the case does not at all resemble alternative conclusions in a summons when there is a demand for specific implement or damages. In such a case as that the option is in the pursuer who claims the specific article or a sum instead which he deems equivalent. Here the option is with the defender, who, if he does not restore the articles poinded, is liable in double their appraised value.

The objection which has been taken to the competency of the present application is that the value of the cause is shown by the prayer of the petition to be under £25, seeing that double the appraised value of the articles poinded is only £9, 8s. 8d., and it is clear that if the defender makes payment to the pursuer of that sum he completely fulfils the prayer of the petition.

It is very difficult to dispute that a cause like the present, the value of which is so distinctly shown in the prayer of the petition, falls under section 22 of 16 and 17 Vict. cap. 80, which by very express negative words excludes the jurisdiction of this Court in every case where value does not exceed £25.

In the case of *Henry* v. *Morrison*, to which reference was made and which related to the giving up to the pursuer by the defender of certain I O U's (the total value of which was under £25), the action really was one *ad factum præstandum*, as it was clear that the vouchers might be of much more value to the parties than the mere pecuniary sum which they represented, and the competency of the action was accordingly sustained. On the other hand, in the case of *Singer* v. *Jessiman* what was demanded was the delivery of a certain machine, or alternatively, the payment of a sum much under £25. In that case the Court decided that an appeal to the Court of Session was incompetent. A comparison of these two cases helps us I think to come to a very clear decision as to what we ought to do in the present case, and I am therefore for sustaining the objection to the competency of this appeal.

Lord Shand and Lord Adam concurred.

Lord Mure was absent.

The Court refused the appeal.

Counsel for the Pursuer—M'Lennan. Agent—R. Broatch, L.A.

Counsel for the Defender—Crole. Agent—E. Nish, Solicitor.

Tuesday, May 14.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DUFF *v.* THE NATIONAL TELEPHONE COMPANY (LIMITED).

Reparation—Negligence—Barrow Left in Public Place—Injury to Infant—Relevancy.

A two-wheeled barrow, which on account of its size could not be received into its owner's workshop, was left by his servants in an adjoining lane, and secured to the wall by a chain. Some children who were playing in the lane, mounted the barrow, and were swinging on it, when they slid to the back of it, and brought it suddenly down on the head of a child aged three years, who died shortly after in consequence of the injuries which he then sustained.

In an action of damages by the father—*held* that as a two-wheeled barrow was not a dangerous article no blame was to be attached to the owner for leaving it chained in the lane, and that no relevant averment of fault had been made by the pursuer to entitle him to an issue.

John Duff, house painter, Edinburgh, raised an action against the National Telephone Company (Limited) concluding for payment of £250 as damages and *solatium* for the injury and subsequent death of his son William Henry Duff, who, he alleged, was fatally injured through the fault of the defenders.

The pursuer averred—"On Sunday the 26th August 1888, about twelve o'clock noon, a child of the pursuer named William Henry Duff, three years of age, was playing with some other children in a lane leading from Gayfield Street to Broughton Court. Some of the said children were playing with a two-wheeled hurley belonging to the defenders, which had been left in the lane by the defenders' workmen. The hurley was entirely unprotected, and two of the children had got on to it, and were swinging on it, when they slid to the back of it, and brought it suddenly and violently down on the head of the said William Henry Duff. It struck the said William Henry Duff, causing a deep wound on the front part of

the head." The wound was dressed immediately after the accident, and an operation was performed on the 1st September, but the child got worse and died that evening. The pursuer further averred—"The defenders have a small enclosure or other place in the said lane into which the hurley could have been put, and had this been done the accident would not have occurred. The said hurley was left in the open lane, where it ought not to have been left, and where the defenders had no right to leave it. Neither of its wheels was locked, and no precaution whatever was taken against such an accident as has occurred."

The defenders averred—"The said barrow was chained to the wall. The lane is a private lane, and the defenders were accustomed to leave their barrow there, as it was too wide across the wheels to be taken into their workshop, which adjoins the lane. The barrow was of the usual construction, and was not a dangerous article. The reason for the defenders chaining it was to prevent its being interfered with by unauthorised persons. The defenders believe and aver that the accident was due to the fault or carelessness of the child himself, or of the other children with whom he was playing. They further aver that it was the direct consequence of the fault or negligence of the pursuer, or those for whom he is responsible, in allowing a child of such tender years to go about without the care or superintendence of some person fit to take proper charge of him. The pursuer knew quite well that the barrow used to be left in the said lane, but he never made any complaint to the defenders regarding the same."

The defenders pleaded, *inter alia*—"(2) The defenders are entitled to absolvitor, with expenses, in respect that the death of the pursuer's child (1st) was not caused by fault on their part; (2d) that it was caused by the fault of the said child, or his companions; or (3d) that such last-mentioned fault materially contributed to the said accident."

The pursuer proposed the following issue for the trial of the cause—"Whether on or about 26th August 1888 William Henry Duff, son of the pursuer, was, while in a lane leading to Broughton Court, Edinburgh, struck by a hurley and injured in his person, and soon thereafter died of said injuries, through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages claimed, £250."

By interlocutor of 27th February 1889 the Lord Ordinary (Fraser) disallowed the proposed issue, found that the pursuer had made no relevant averments in support of the conclusions of the summons, and dismissed the action.

The pursuer reclaimed, and argued that the defenders on their own admission had been in fault in leaving the hurley in an exposed place unprotected. It ought to have been so placed that the children could not have got at it, and the defenders' failure so to deal with it rendered them liable for the consequences—*Campbell* v. *Ord*, November 5, 1873, 1 R. 149. It became a dangerous article from the locality in which it was left—*Findlay* v. *Angus*, January 14, 1887, 14 R. 312.

Argued for the respondents—There was no relevant averment of fault on the defenders' part. The accident was entirely caused by the pursuer allowing so young a child to go about unattended. A hurley was not a dangerous article which required fencing or protection like machinery, or which required a person in attendance like a horse in a public thoroughfare. The proposed issue was properly disallowed—*M'Gregor* v. *Ross & Marshall*, March 2, 1883, 10 R. 725.

The case was heard by the Lord Probationer, who delivered the following judgment:—

* The Lord Probationer—I agree in the view taken by the Lord Ordinary that no relevant averment of fault has been made on the part of the defender, and that no purpose can be served by sending the case to a jury. A hurley cannot in any sense be termed a dangerous thing in itself, nor can blame be attached to the defenders for leaving it unprotected in the lane in question. No doubt it was the means of causing injury to this child, but the defenders are not responsible because so young a child was allowed to play about unattended. The true cause of the accident was not fault on the part of the defenders, but neglect on the part of the pursuers.

I think therefore that the interlocutor of the Lord Ordinary should be affirmed and the defenders assoilzied.

Their Lordships thereafter delivered the following opinions:—

Lord President—I concur in the opinion expressed by the Lord Probationer. The pursuer alleges that his child was playing with some other children in a lane in which a two-wheeled hurley belonging to the defenders had been left. "The hurley was entirely unprotected and two of the children had got on to it and were swinging on it when they slid to the back of it and brought it suddenly and violently down on the head of the said William Henry Duff." It is then alleged that the death of the child was caused by the injuries which he on this occasion received, and that the accident was caused by the fault of the defenders in leaving the hurley in an open lane where the defenders had no right to leave it.

Now this averment appears to me to be quite irrelevant. If it were necessary to speculate as to the real cause of the accident I should say that it occurred in consequence of the parents allowing their child of three years old to play in this lane without anyone to look after it. I think that is the whole case, and I am for adhering to the Lord Ordinary's interlocutor.

Lord Shand—It was remarked in the course of the discussion that if the relevancy of this action was sustained it would be impossible to say where responsibility in such matters would end, and I agree with that observation.

What is usually averred in cases of this kind is that an article dangerous in itself has been left unguarded in an exposed position. What the word "dangerous" may mean in such cases cannot perhaps definitely be determined, but in the cases to which we were referred the meaning sufficiently appears. In *Macgregor* v. *Ross* what were left exposed were machines which were dangerous if set in motion, and the setting of them in

* William Mackintosh, Esq., Q.C., Dean of Faculty, took his seat with the title of Lord Kyllachy.

motion was a simple matter. In *Findlay's* case the article was a heavy shutter which if let alone was harmless, but was so placed that with a very slight movement it would come down. No doubt if a horse were left unattended in a public street, most serious consequences might follow, but I cannot adopt the view that an ordinary hurley is in any sense a dangerous article, nor do I think that in leaving it where they did the defenders rendered themselves liable to an action of damages on the ground of fault.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—Comrie Thomson—Burnet. Agent—T. Carmichael, S.S.C.

Counsel for the Defender—Jameson—W. Campbell. Agent—Fraser, Stodart, & Ballingall, W.S.

Tuesday, May 14.

SECOND DIVISION.

WRIGHT'S TRUSTEES *v.* WRIGHTS.

Succession—Double Legacy.

A testator by trust-disposition and settlement left a legacy of £1000 to both A and B. By a codicil he recalled A's legacy of £1000, and gave "said sum" to B. By a subsequent codicil he renewed the legacy of £1000 to A, and made no reference to B.

Held that the additional legacy of £1000 to B had not been revoked.

The late John Wright, W.S., Edinburgh, died on 2nd November 1888, leaving personal estate to the amount of £57,579. By holograph trust-disposition and settlement he directed his trustees to pay a legacy of £1000 to each of his nephews and nieces, and, *inter alios*, to the Rev. Maxwell James Wright and Charles William Ferney Tod.

He left several holograph codicils to the said trust-disposition, of which the last two were in the following terms:—

"I, John Wright, Writer to the Signet, recal the legacy of £1000 to my nephew Charles Ferney Tod, and I give said sum to my nephew the Revd. Maxwell J. Wright, now minister of Dornock in the Presbytery of Annan, to be paid to him at the same time with the like legacy of One thousand pounds already given to him: Written and signed by me at Edinburgh this 19th day of May 1888.—(Signed) JOHN WRIGHT, W.S."

"I, John Wright, Writer to the Signet, renew the legacy of One thousand pounds to my nephew Charles Ferney Tod, to be paid to him as at the time of the original legacy; and may God have mercy upon his soul: Written and signed by me at Edinburgh this 21st day of May Eighteen hundred and eighty-eight.—(Signed) JOHN WRIGHT, W.S."

A special case was presented by the trustees of the late John Wright of the first part, the Rev. Maxwell James Wright of the second part, and the residuary legatees of the fourth part, to have the following question of law determined by the Court—"Is the second party entitled to the legacy of £1000 bequeathed to him by the codicil of 19th May 1888, in addition to the legacy of £1000 left to him by the settlement?"

Argued for the first and fourth parties—The second codicil restored the will to its original state. The testator dealt with the £1000 to Charles Ferney Tod as a specific legacy. He moved it about as if it had been an article of furniture. He gave it, he took it away, he renewed it. It was the same gift, not £1000, but the "said sum," and when it had been restored to Charles Tod, Maxwell Wright ceased to have any interest in it. The question ought to be answered in the negative.

Argued for the second party—The question ought to answered in the affirmative. This was not the legacy of a specific article, but of £1000. There was nothing to show that because the testator had repented of taking away the legacy from Charles he had also repented of giving an additional £1000 to Maxwell. The said codicil was a renewal of Charles' legacy, but not a revocation of Maxwell's legacy.

At advising—

LORD JUSTICE-CLERK—By his trust-disposition and settlement dated 25th August 1883 the late Mr John Wright left certain legacies, and among them a legacy of £1000 to his nephew Maxwell James Wright, and another of the same amount to his nephew Charles Ferney Tod. On 19th May 1858, for some reason which we do not know, he wrote a codicil, which runs as follows—"I recal the legacy of £1000 to my nephew Charles Ferney Tod, and I give said sum to my nephew the Rev. Maxwell J. Tod." . . . Two days afterwards, on 21st May, having repented of the recal of the legacy to Charles Ferney Tod, the testator executed another codicil, in which he says—"I renew the legacy of £1000 to my nephew Charles Ferney Tod." . . .

The question for decision is, whether the renewal of the legacy to Tod implies, and necessarily implies, that the gift of the second thousand pounds to Maxwell Wright was recalled? for unless that is necessarily implied I think the gift to Mr Wright must stand. Now, it is not easy to decide this question, but there are, I think, two grounds for holding that that implication is not necessary, and if it be not necessary it cannot be implied. In the first place, as Lord Lee suggested during the debate, if the object of the codicil of 21st May 1888 was to restore matters to the condition in which they had been two days previously, there was no necessity for giving it the form of a new codicil at all. All the testator had to do was to revoke the codicil of 19th May. In the second place, it by no means follows from the testator's repenting of the act by which he deprived Charles of £1000 that he repented also of giving to Maxwell £2000. He had, for reasons satisfactory to himself, given £2000 to Maxwell (instead of £1000) on 19th May, and there is nothing to indicate that in the following two days he had repented of that. The giving to Charles again his legacy of £1000 was quite consistent with the legacy to Maxwell of the £2000 remaining valid.

Therefore I think that the codicil of 19th May must receive effect in so far as it gives to Mr Maxwell Wright £2000.

Lord Young, Lord Rutherfurd Clark, and Lord Lee concurred.

The Court answered the question in the affirmative.

Counsel for the First and Fourth Parties—Wallace—Sym. Agents—Traquair, Dickson, & Maclaren, W.S.

Counsel for the Second Party—Sir C. Pearson—Guy. Agent—David Turnbull, W.S.

Thursday, January 3.

OUTER HOUSE.

[Lord Wellwood.

POLLOK, PETITIONER.

Entail—Mansion-house—Insurance—Fire Insurance—Obligation to Re-build.

The mansion-house on an entailed estate was partly destroyed by fire, and the heir in possession, who had insured it against the risk, received a sum of money in respect of the damage done. He died without having rebuilt. The next heir having done so, presented a petition under the Entail Acts of 1875 and 1882 for authority to charge the entailed estate with the amount expended. It was objected on behalf of subsequent heirs that the sum recovered by the late heir, in so far as it exceeded his life interest in the subjects destroyed, was received by him as trustee for the subsequent heirs, and ought to be recovered by the petitioner from his executor, and applied *pro tanto* to repay the expense of rebuilding, and that the amount with which the petitioner was entitled to charge the estate was the amount expended under deduction of that sum.

Held that the sum received by the late heir was his own absolute property, that he was not bound to rebuild, and that his executor was not liable to the next heir for any part of the sum recovered from the insurance company.

On 17th October 1888 Mrs Jean Johnstone Fergusson Pollok of Pollok, heiress of entail in possession of the entailed lands and estate of Over Pollok and others in the county of Renfrew, presented a petition to the Court for authority to charge said estate with various sums which she had expended in improvements thereon and on the mansion-house, offices, and policies. The next heirs, who were all in minority, were called as respondents, and curators *ad litem* were appointed to them. After the usual preliminary procedure the cause was remitted to Mr H. B. Dewar, S.S.C., to make the necessary inquiries and to report.

He reported, *inter alia*, as follows, viz.—"It is explained to the reporter that a fire took place at Pollok Castle on 1st August 1882, and that while Sir Hew recovered a sum of £2800 from the Caledonian Insurance Company as the estimated amount of the damage done by the fire, he never expended any part of that sum towards rebuilding or restoring the Castle, but, on the contrary, he retained the money and applied it to his own purposes, and that his executor maintained, when applied to by the petitioner on the subject shortly after her accession to the estate, that he was not bound to account for any part of the £2800 to the next heirs of entail, but that as Sir Hew had paid out of his own money the premiums on the fire policy he was entitled to receive and to retain the whole amount."

The reporter expressed an opinion "that in a question with the next heirs of entail Sir Hew was bound to apply the £2800 in reinstating *pro tanto* the mansion-house; or otherwise, that his executor may be bound to pay the £2800 to the petitioner under deduction of the fire premiums paid by Sir Hew between the commencement of the fire policy, 31st March 1869, and the date of the fire, but without interest, Sir Hew being entitled to the liferent of the £2800 as the *surrogatum* for what was burned between that date, 1st August 1882, and the date of his death, 14th December 1885. If the petitioner were to get the £2800 from Sir Hew's executor she would be entitled, in the reporter's humble opinion, to retain the same, but that only in respect that she has already, out of her own funds, applied more than an equal amount towards reinstating the buildings, but that in that event she would be bound to give credit in a question with the next heir for the £2800 in the account of expenditure which is the basis of the present application.

"The grounds upon which the reporter has humbly come to this conclusion are, that while it may be quite true that an heir of entail in possession is under no legal obligation to insure the mansion-house against fire he is undoubtedly entitled to do so, and that if he exercise his option by effecting an insurance, not merely for the value of his life interest in the building, but for the whole value of the building itself, just as if he had been a fee-simple proprietor, the true construction of his act in doing so is, that he effected the insurance in the interest of the whole corporation of heirs of entail. He thereby insured property in which he personally had only a partial interest, and in so far as the insurance was to an extent beyond the value of his partial interest he insured property belonging to other people, namely, the heirs next succeeding to him. So far as they themselves and their rights of property in the mansion-house were concerned, Sir Hew, in effecting the insurance in question, in the reporter's opinion, acted in a fiduciary character and in their interests, so that in the fund which forms the *surrogatum* for the entailed buildings burned down there is, after Sir Hew is repaid therefrom, the premiums abovementioned, and after he enjoys the liferent of the money, a resulting trust for the next heirs.

"So far as the reporter has been able to ascertain, the facts in regard to the fire insurance in question are as follows—1st. The policy was effected in 1869 by the late Sir Hew Crawfurd Pollok with the Caledonian Insurance Company over the mansion-house of Pollok Castle, with stables and other offices attached thereto, and over numerous farm-houses forming part of the entailed estate, for £11,800 in all, but as regards the mansion-house, for £3200. The policy is in Sir Hew's individual name, and there is nothing in it to indicate that the estate was entailed. 2nd. That Sir Hew recovered as the

amount of damage done by the fire of 1st August 1882 not the whole £3,200, but £2800 thereof, and in doing so he received the full amount of the value of the damage done to the mansion-house by the fire. 3rd. That the petitioner in rebuilding the mansion-house made use of old walls not destroyed by the fire, which her architect considers were worth from £2000 to £2500, from which it would appear that the house had been insured for about half its value. 4th. That the petitioner, besides being the heir of entail of her late brother, is also his sole next-of-kin, and that as such she participates in the succession to his moveable estate, and in her character of next-of-kin has an adverse interest to some extent to the corporation of heirs of entail in regard to the question whether this insurance money should be applied towards the rebuilding of the mansion-house.

"The petitioner maintains that it is a fixed principle in the law of fire insurance that if an heir of entail effects a fire policy in his own name, and pays the premiums with his own money, he is entitled in the event of a fire to receive and apply to his own purposes the sum insured, and her agents refer the reporter to Rankine on Landownership (1st ed.), p. 553, and cases there cited. More particularly, they refer to and rely upon Mr Justice Chitty's judgment in *Warwicker* v. *Bretnall*, L.R., 23 Chan. Div. 188.

"The reporter, however, is humbly of opinion that since that judgment of Mr Justice Chitty in 1882 the law of insurance has matured, and that it is now quite settled that fire insurance is a contract of indemnity, and no more; that this is a 'fundamental principle of insurance, and if ever a proposition is brought forward which either will prevent the assured from obtaining a full indemnity, or which will give the assured more than a full indemnity, that proposition must certainly be wrong.' Those are the words of Lord Justice Brett, quoted and approved by the Lord President, and Lords Shand, Adam, Lee, and Kinnear, in the recent case of *The Glasgow Provident Investment Society* v. *The Westminster Fire Office*, July 16, 1887, 14 R. 947—*aff.* August 10, 1888, 15 R. (H. of L.)

"The reporter humbly thinks that the petitioner's contention in the present case clearly involves the proposition that Sir Hew was entitled to 'more than a full indemnity.' He was only entitled to a life interest in the house damaged by the fire. He claimed and obtained the full money value of what was so destroyed.

"The most recent works on fire insurance law, it is believed, are Bunyon (3rd ed.), 1885, in which he treats of this subject at pp. 250–255, and Porter on Insurance (2nd ed.), 1887, pp. 267–269. They both quote Mr Justice Chitty's judgment in *Warwicker* v. *Bretnall*, but the more recent writer of the two (Porter) thinks that that case was inconsistent with the principles established by the case of *Castellain* v. *Preston*, March 12, 1883, L.R., 112 B.D. 386, from which the above quotation from Lord Justice Brett's opinion is taken. . . . . .

"Reference may also be made to *Rook* v. *Worth*, 1752, 1 Vesey (sen.) (Lord Chancellor Hardwicke), p. 459, and also to *Parry* v. *Ashley*, 1829, 3 Simon's Rep. (Vice-Chancellor Sir Lancelot Shadwell), p. 97, the import of which can be gathered from the following quotation from the Vice-Chancellor's judgment:—'The inclination of my opinion is that the proceeds of the policy cannot be considered as part of the testator's general personal estate, but that they are affected with a trust for the benefit of the parties interested in the real estate. And *prima facie* that is so much ground for holding that the proceeds of the policy are a substitution for the property.' He charged that the order might be made according to the notice of motion, which was that the money be paid into Court. See also *Collinridge* v. *The Royal Exchange Company*, 1877, 3 Q.B.D. 176 (*per* Lord Justices Mellor and Lush)." . . . . .

The petitioner was heard before the Lord Ordinary upon her objections to the report.

Argued for the petitioner—She was entitled to charge the whole sum expended by her without making any deduction on account of the sum recovered by the late heir from the insurance company. The late heir in possession was not bound to insure, neither was he bound to rebuild if he had insured. The policy being in his own name, and the premiums paid out of his own funds, he was entitled to any resulting benefit. It was said that only a share of the sum recovered represented Sir Hew's life interest, but a share of that sum would not reinstate. It was only a sum which would reinstate the whole damage done which represented his interest. He had therefore not got more than he was entitled to, and it had not been shown that he insured for more than his interest. Besides, the petitioner only shared in the late Sir Hew's personal estate, which had been divided long ago. The cases cited by the reporter were not relevant to the present circumstances—Rankine on Landownership (1st ed.), p. 553, and cases there cited; Sandford on Entails, p. 281; *Seymour* v. *Vernon*, 21 L.J., Ch. 433, and 16 Jur. 189; *Warwicker* v. *Bretnall*, L.R., 23 C.D. 288; Bunyon on Insurance (3rd ed.), p. 250–255.

Argued for the minor respondents—The late Sir Hew had clearly got more than his interest when he received the whole sum recovered from the insurance company. Part of that belonged to the next heirs, and Sir Hew should either have expended it in reinstating, or consigned it and uplifted the interest only—*Castellain* v. *Preston*, March 12, 1883, L.R., 112 B.D. 386; Porter on Insurance, p. 268, and the cases cited in Mr Dewar's report.

The Junior Lord Ordinary (Wellwood) on 3rd January 1889 pronounced the following interlocutor:—"Finds that the sum of £2800, recovered by the late Sir Hew Crawfurd Pollok in respect of damage done by fire to the mansion-house, does not fall to be deducted from the sum expended by the petitioner on improvements on the entailed estate, and to that effect sustains the objections stated by the petitioner to the said report; *quoad ultra* approves of the said report."

"*Note.*—In 1869 the petitioner's brother and immediate predecessor Sir Hew Crawfurd Pollok effected in his individual name and kept up at his own expense a fire insurance with the Caledonian Insurance Company over the mansion-house and offices of Pollok Castle and other houses on the estate, the amount insured on the mansion-house being £3200. In 1882 the mansion-house was seriously damaged by fire, and Sir Hew received payment of £2800, which repre-

sented the full amount of the damage done to the mansion-house. He did not, however, apply this money in repairing the mansion-house, but retained it and applied it to his own purposes.

"The mansion-house has now been repaired at the expense of the petitioner, and the reporter, while of opinion that the money has been properly expended, indicates a doubt whether there should not be deducted from the sum which would otherwise be held to represent the improvement expenditure, the capital sum of £2800 received by Sir Hew Pollok. The ground of the reporter's opinion or doubt seems to be this—that Sir Hew must be held to have insured not merely for his own interest, but also for that of the substitute heirs of entail, and that *quoad* the capital of the sum recovered, he must be held to have received it as trustee for them.

"The question must therefore be considered just as if the petitioner were now suing the executors of Sir Hew Pollok for payment of the £2800, and if she would have had no title to sue, and could not have recovered from them, there is no other reason why the sum in question should be deducted.

"I am of opinion that the reporter's doubts are not well founded. In the first place, it is begging the question to say that Sir Hew Pollok insured for more than his own interest. His interest was to have the mansion-house entire and habitable, and he was entitled to insure for and receive the full sum necessary to make it so. No doubt the insurance company if they chose could have elected to reinstate, in which case the succeeding heirs of entail would have got the benefit of the insurance. But if they did not choose to do so they could not refuse to pay the money representing the full amount of the damage; and once paid they could not have insisted on Sir Hew applying it in rebuilding the mansion-house.

"But further, Sir Hew was under no obligation to rebuild in a question with the substitute heirs of entail. Except in so far as expressly fettered by the deed of entail, an heir of entail is in all respects fiar of the estate. He is not a trustee for the subsequent heirs of entail, and he does not come under any implied obligations to them in respect of his acts. He is not bound to keep the mansion-house in repair; he is not bound to rebuild it if it is burned down. Nay, he may even pull the mansion-house down himself, if he does so with the *bona fida* intention of rebuilding it, and if he dies before doing so no claim will lie against his personal representatives—*Earl of Breadalbane* v. *Jamieson*, 4 R. 667. I think it necessarily follows that if he chooses to insure it at his own expense no claim will lie against him or against his personal representatives in respect of an implied obligation to apply the money recovered in rebuilding. On this matter I need only refer to the instructive opinion of Lord Shand in the case just quoted—4 R. 681-684—and I think it is unnecessary to discuss more fully some of the subtle questions raised by the reporter."

Counsel for the Petitioner—Ure — Graham Campbell. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for the Respondents—W. Campbell. Agent—John Galletly, S.S.C.

Thursday, January 3.

OUTER HOUSE.

[Lord Wellwood.

DUNBAR *v.* PRESBYTERY OF ABERNETHY AND OTHERS.

Church—Church Patronage Act 1874 (37 *and* 38 *Vict. cap.* 82), *sec.* 7, *sub-sec.* 1—*Appointment of Minister—Right of Congregation where Delay caused by Presbytery.*

The Church Patronage (Scotland) Act 1874 provides by section 7 (1)—"If on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam jure devoluto*."

A congregation were, through the action of the presbytery and of the moderator appointed by them, deprived of a portion of the six months allowed them for the election of a minister. They elected a minister, not within six months if the period within which they were prevented from electing were computed as part thereof, but within six months if it was not so computed.

Held that the currency of the six months was interrupted during the period in which election had been prevented by the presbytery, and that the election was valid.

Church—Church Patronage Act 1874 (37 *and* 38 *Vict. cap.* 82), *sec.* 3—*Appointment of Minister—Jurisdiction of Court of Session.*

The Church Patronage (Scotland) Act 1874 provides by section 3 that the courts of the church are to have "right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof."

Held that the Court of Session had jurisdiction to decide, in a question relating to the validity of an appointment, whether the right of appointment to the parish had devolved upon a presbytery under sec. 7 (1) of the Act.

This was a process of suspension and interdict at the instance of William Dunbar, farmer, Bynatalloch, and others, communicants and adherents of the congregation of the church and parish of Cromdale, against the reverend the Presbytery of Abernethy, and also against the Rev. John M'Cowan, minister of the parish of Duncansburgh, in which the complainers sought to interdict the Presbytery of Abernethy from acting or following out an alleged election and appointment of the Rev. John M'Cowan as minister of the parish of Cromdale, and to interdict the Rev. John M'Cowan from presenting himself to the Presbytery to be inducted.

The complainers pleaded—"(1) The congregation of Cromdale not having made an election and appointment of a minister to that church and parish within six months after the date of the vacancy, the right of appointment accrued and be-

longed, on the expiry of the said period, to the presbytery of the bounds *tanquam jure devoluto*, and the prayer of the note should be granted as craved, with expenses.

The respondent the Rev. Mr M'Cowan pleaded —"(2) The congregation having, by reason of the action of the Presbytery and of the moderator appointed by them, been deprived of a portion of the six months from the date of the vacancy allowed to them for the election of a minister, the currency of the six months was interrupted, and the right of the appointment did not devolve to the Presbytery. (3) The congregation having duly elected Mr M'Cowan within six months after the date of the vacancy, if the period during which they were prevented from electing by the action of the Presbytery and their moderator is deducted, the said election is valid and effectual."

The facts of the case are fully narrated in the Lord Ordinary's opinion, *infra*.

On the 3rd January 1889 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor and opinion:—"Sustains the second and third pleas-in-law stated for the respondent the Rev. John M'Cowan, and in respect thereof, repels the reasons of suspension, and refuses the interdict craved: Finds the respondent the Rev. John M'Cowan entitled to expenses

"*Opinion.*—The church and parish of Cromdale were duly declared vacant on the resignation of the Rev. Duncan M'Innes as from 15th October 1886. The respondent the Rev. John M'Cowan was elected to be minister by the congregation on 10th May 1888, upwards of eighteen months after the date of the vacancy. The question raised in this process is, whether Mr M'Cowan can be held to have been legally elected having regard to the provisions of the Church Patronage (Scotland) Act 1874, which provides, *inter alia*, sec. 7 (1)—'If on occasion of a vacancy in any parish no appointment of a minister shall be made by the congregation within the space of six months after the vacancy has occurred, the right of appointment shall accrue and belong for that time to the presbytery of the bounds where such parish is, who may proceed to appoint a minister to the said parish *tanquam jure devoluto*?'

"Before considering the various questions of law which were argued to me it will be convenient to state the precise course of procedure which was followed. No proof was asked, and I understand that all the parties desire a judgment on the whole case as disclosed on the record, read in connection with the various minutes and deliverances referred to, copies of which are lodged in process, and admitted to be correct.

"Shortly after the church and parish of Cromdale were declared vacant the Rev. Mr Forsyth was appointed by the Presbytery of Abernethy to be moderator of the kirk-session in terms of the first regulation of the regulations framed by the General Assembly (1883) under the power conferred by the Act. A congregational committee was thereafter appointed, but there seems to have been a great division of opinion, and the 29th of March 1887 arrived without any decision having been come to. On that day a deputation from the committee waited upon the Presbytery of Abernethy, and craved extension of time for the election of a minister. This application, however, was opposed by a minority of the committee. After hearing parties the Presbytery decided that the extension of three months craved in the petition be granted.

"On 12th April 1887 the Rev. Mr Forsyth, the moderator, appeared at a meeting of the Presbytery, and asked for instructions, pointing out that only three days remained before the date (15th April) when the six months would expire, and the *jus devolutum* take effect. The Presbytery adjourned consideration of the matter till 15th April—that is, the day on which the six months actually expired—when they gave Mr Forsyth the following instructions—'They continue Mr Forsyth's appointment as moderator of the kirk session of Cromdale, and they direct their clerk to furnish him with an extract of their minute of 29th March last containing their resolution granting an extension of three months to the congregation of Cromdale for the election of a minister. Further, they authorise Mr Forsyth to preside at such congregational meetings at Cromdale, called after due notice, for the election of a minister, and instruct him to bring up a certified minute of the meeting at which the election takes place.'

"On 14th June 1887 a meeting of the congregation of Cromdale parish was held, presided over by Mr Forsyth. It appears from the minute that the moderator made the following statement to the congregation—'The moderator stated that the six months granted to the congregation for the election and appointment of a minister had expired on the 15th April, and that the right of appointment had devolved upon the Presbytery, but that the Presbytery had been pleased, on application being made to them, to grant to the congregation a further period of three months from the said date to enable them to take steps for the election of a minister. The moderator further stated that the Presbytery had continued him as moderator, and had given him authority to call and to preside at all meetings of the congregation that might be held, and also that they would accept a certified extract of the minutes of the meeting of the congregation at which an election of a minister might be made as sufficient evidence of the mind of the congregation in the matter.'

"The congregation then proceeded to vote upon three names proposed, with the result that the Rev. Mr M'Cowan had a distinct majority of the total votes. The moderator then put the question, 'Shall the Rev. John M'Cowan be elected, yes or no?'; but in the end, 'after deliberation and conference of parties, the movers and seconders of the several motions asked leave to withdraw their motions, which was allowed, and it was then unanimously agreed to refer the matter as it now stands to the Presbytery for settlement, and the moderator was requested to lay this minute before the Presbytery at their first meeting.'

"This resolution was submitted to the Presbytery on 21st June 1887, when the Presbytery instructed Mr Forsyth to call another meeting of the congregation and to take a vote, 'Shall the Rev. Mr M'Cowan of Duncansburgh be now recommended to the Presbytery for appointment, yes or no?'

"Accordingly on 5th July 1887 a congregational meeting was held, at which 112 communicants and 7 adherents voted for recommending Mr M'Cowan, and 91 communicants and 2 ad-

herents voted against doing so. This vote was reported to the Presbytery on 12th July 1887, when they refused to sustain the appointment; and further found that the six months allowed to the congregation had expired, and that it fell to the Presbytery to exercise the right of presentation *tanquam jure devoluto*. The reason assigned by the Presbytery was that an extension of time was granted to the congregation, solely in the hopes that a harmonious settlement might be secured. As this had not been attained they resolved to exercise their *jus devolutum*.

"This resolution was brought by petition and appeal before the Synod of Moray on 27th September 1887, who pronounced the following deliverance:—'Dismiss the appeals and petition, and inasmuch as the Presbytery granted an extension of time to the Cromdale congregation before the right of election and appointment *tanquam jure devoluto* had accrued to them, the Synod instruct the Presbytery to cause the congregation to resume their privilege and statutory power as they were vested in them as at 29th March, and subsisting for nineteen days from that time, and in those days, and thereafter, to proceed according to the laws of the church—the said nineteen days to date from the intimation of this finding in the church of Cromdale.'

"In pursuance of this deliverance the congregational committee met on 25th October 1887, when a report was drawn up recommending the Rev. Mr Sinton to the congregation, and making no mention of any other names as having been proposed and voted on. A meeting of the congregation was held on 8th December 1887 to receive this report, at which the moderator was asked to read also the report of the minority of the committee, which was said to contain the name of the respondent the Rev. Mr M'Cowan as having been proposed and seconded, and voted on in committee. The moderator, however, refused the motion, and in the end the Rev. Mr Sinton's name alone was put to the meeting, when 98 voted Yes, and 117 voted No. The moderator declared accordingly that there was no election, and a protest was handed in against the moderator's ruling as to reading the report of the minority of the committee, and an appeal was taken.

"In the end the matter came again before the Synod of Moray on 24th April 1888, when they pronounced the following deliverance:—'That the Synod sustain the protest and appeal to the extent of finding that the report given in by the convener of the congregational committee of the parish of Cromdale to the moderator was not a report in conformity with the regulations of the General Assembly, in respect that it did not contain the name of the Rev. Mr M'Cowan, which had been proposed, seconded, and voted on in the committee, although this was demanded by a member of the committee. That in consequence of these irregularities of the committee the congregation were unjustly deprived of their rights of electing a minister, and that therefore the congregation have still seventeen days in which to exercise that right. The Synod directed that the report of the committee be corrected by the moderator of the kirk-session by the report given in by the minority of the congregational committee being added to that given in by the convener of that committee, and that the report so corrected and completed be read to the congregation, and a meeting to elect a minister intimated on Sunday first, and that they instruct the Presbytery of Abernethy to meet to-morrow and adopt measures which will ensure that this finding shall be faithfully carried out, and that the whole case may, if appealed, be ripe for decision at the General Assembly when they meet next month.'

"The end of the whole matter was that on 10th May 1888 the Rev. Mr M'Cowan was elected to be minister by the congregation, and a call to him was signed, and on 26th June 1888 the appointment was finally sustained by the Presbytery.

"This record of the proceedings discloses a series of mistakes which it is to be hoped does not often occur in the working of the Patronage Act. It cannot be said that the congregation and their committee were free from blame. Not to mention mistakes made at later stages, there is little excuse for their wasting upwards of five months between the date of the vacancy and the 29th March 1887 in useless disputes. But the peculiarity of the case is that the cardinal error of allowing the six months to expire was mainly due to the action of the Presbytery, who not only were in a manner entrusted, through the moderator appointed by them with the supervision of the congregation's proceedings, but were themselves the body on whom the right of election would devolve failing an appointment by the congregation.

"Now, on 29th March 1887, when there was still time for the congregation to elect a minister, the Presbytery, disregarding the remonstrances of the minority of the congregational committee, granted an extension of three months. If by this they intended and professed to grant an extension of the statutory period, they undoubtedly acted *ultra vires*. The only other construction which their deliverance will bear is, that they thereby consented practically to waive their right to exercise the *jus devolutum* for a period of three months, and agreed to accept and give effect to any nomination made by the congregation during the extended period as if it had been made within the statutory six months. By so doing they paralysed the action of the congregation, and led them to believe that there was no necessity for proceeding to election within the six months. Even when the moderator Mr Forsyth very properly asked the Presbytery for instructions immediately before the expiry of the six months, they directed him to proceed with the election exactly in the same way as if it were to take place in terms of the statute within the six months. In their deliverance they call it an election.

"Accordingly, at the congregational meeting held on the 14th of June, the proceedings up to a certain point were precisely those which would have taken place at a statutory election; and the question put by the moderator, after the vote had been taken, was—'Shall the Rev. John M'Cowan be now elected, Yes or No?

"It seems to have occurred to the congregation at this point that the proceedings were not quite in shape, as there could not, strictly speaking, be an 'election' at that stage. I take it that when they agreed to 'refer the matter as it now stands to the Presbytery for settlement,' they in substance simply meant that instead of their professing to elect Mr M'Cowan, the state of the vote should be reported to the Presbytery, that the

latter should fulfil their implied undertaking, and accept him as being the candidate who had the highest number of votes.

"I think that in refusing to accept Mr M'Cowan when subsequently by their own directions expressly recommended to them by the congregation the Presbytery clearly acted in breach of the undertaking impliedly involved in their deliverance of 29th March 1887.

"I am therefore of opinion that the congregation having been thus mislead by the Presbytery, and deprived of the opportunity of electing a minister within the six months fixed by the statute, were entitled—unless there is anything in the statute to prevent it (which I will consider presently)—to be reponed against their failure to elect in time.

"The case of *The Presbytery of Inverness* v. *Fraser*, 2 S. 384, decided under the former law, is in point. The judgment proceeded on the ground that the Presbytery had acted in such a manner as to induce the Officers of State to believe that the presentation made by the patron was valid, and that right of presentation had not developed on the Crown; and that consequently the Presbytery could not avail itself of the delay thus arising. I do not think that the opinions of some of the Judges in the case of *Duff* v. *The Officers of State*, 2 Macph. 478, to which I was referred, when examined, really throw doubt upon the sufficiency of this ground of judgment; because, while opinions were there expressed to the effect that a presbytery cannot decline to exercise the *jus devolutum* when it has once passed to them, it was not said that they would be entitled to exercise the right if by their actings they had misled the patron or other party having the right of presentation, and thus themselves caused the delay. Lord Deas says, p. 480—'The case of *Inverness* was not in point at all. The substance of the decision in that case is just this, that the Presbytery having been the cause of the delay, were not entitled to take advantage of their own delay by taking the right into their own hands.' The actings of the Presbytery of Abernethy, which in my opinion constitute a bar in the present case, are stronger than those of the Presbytery in the case of *Fraser*.

"But then it is said by the complainers that by the 7th section of the Act of 1874 the time within which an appointment must be made by the congregation is so strictly limited that no interruption, however caused, can be regarded as an excuse for delay, and that on the expiry of six months devolution must take place. It was argued that the right of election conferred on the congregation, not being a right of patronage, it was not intended that the indulgence previously shown to patrons in respect of their patrimonial interests should be extended to congregations. In support of this view, it was pointed out that the words 'neglect or refuse,' which occur in the 3rd section of the repealed Act 10 Anne c. 12, are not repeated in section 7 (1) of the Act of 1874.

"An examination of the various statutes shows, I think, that it would not be safe to attach much importance to the insertion or omission of these words. For instance, in the Act 1857, cap. 7, the patron is simply bound to present within six months of the decease of the incumbent coming to his knowledge. In the Act 1592, cap. 117, the words are 'gif he failzie to do the same, the said patrone shall tine the right of presentation for that time allenarly.' In the Act 1690, cap. 23, no such words as 'neglect or refuse' or 'fail' occur. The words 'neglect or refuse' do occur in the 3rd section of the Act of Queen Anne, but in the 6th section, by which the right of presentation passes to the Crown on the refusal or neglect of the patron to take the oaths, the provision is simply that the Crown 'may present a qualified person to such church or benefice at any time within the space of six months after such neglect or refusal.' It is to be noted that the decision in the case of *Fraser* turned upon the 6th section of the Act of Queen Anne, and not upon the 3rd.

"I am therefore not prepared to hold, on the wording of section 7 (1) of the Act of 1874, that a congregation is not entitled to put forward the plea which was sustained in the case of *Fraser*.

"I have hitherto assumed that the Court has jurisdiction to entertain the question raised in this process. It was not disputed by the respondents—and they could not successfully have done so looking to the cases of *Stuart* v. *Presbytery of Paisley*, 6 R. 178, and *Cassie* v. *General Assembly of the Church of Scotland*, 6 R. 221—that the Court has jurisdiction to decide as to the construction and effect of the statute. But it was maintained that in respect of the powers conferred upon them by the 3rd section of the Act of 1874, the church courts had power to decide finally and conclusively upon all questions of fact and law, or mixed fact and law, concerning the appointment, admission, and settlement of a minister, and that this right included the right to decide finally as to what does or does not constitute a legal interruption of the six months allowed for election to the congregation. While I feel that there may be some difficulty in deciding the precise limits of the power thus conferred, I am unable to accept the proposition thus broadly stated by the respondents. I think that while the Church Courts are intended to be final as to all matters properly connected with the mode of election, this Court must have jurisdiction to decide as to the right of election. For instance, in the present case the Synod decided on 24th April 1888 that the moderator Mr Forsyth acted irregularly in refusing to allow the report of the minority of the congregational committee to be read at the meeting of the congregation on 8th November 1887, and added to the report of the majority. Now, I am disposed to think that the decision of the Church Courts on this matter, which was one connected with procedure and the mode of election, may properly be held to be conclusive, in so far as it decides that the moderator acted irregularly, and that the committee's report should have been corrected. On the other hand, I think that it is for this Court to decide what is the effect of the moderator having thus failed to do his duty. It was urged by the complainers, and there was some force in their argument, that the Presbytery should not be prejudiced by the actings of the moderator, who though nominated by them was acting simply as president of the kirk-session. But on consideration, I think it would be unfair to deprive the congregation of their right of election in consequence of the erroneous rulings of a moderator selected by the Presbytery from their

own number, and whose rulings and instructions the congregation were bound to accept and obey.

"On the whole matter, though not without some doubt, I have come to the conclusion that the right of appointment did not devolve on the Presbytery, and that the respondent Mr M'Cowan was validly elected on 10th May 1888.

Counsel for the Complainers—Kennedy. Agents—Gordon, Pringle, Dallas, and Company, W.S.

Counsel for the Rev. Mr M'Cowan—D.-F. Mackintosh, Q.C.—Low. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Presbytery of Abernethy—Dickson. Agents—Menzies, Coventry & Black, W.S.

Friday, February 15.

OUTER HOUSE.

[Lord Wellwood.

LOGAN, PETITIONER.

Process—Expenses—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *sec.* 79 *—Entail—Petition for Investment of Sum Awarded to Heir of Entail.*

The Lands Clauses Consolidation (Scotland) Act 1845 provides by section 79 that where money has been deposited in bank under the Act "it shall be lawful for the Court of Session to order the expenses of the following matters . . . to be paid by the promoters of the undertaking; (that is to say) . . . the expense of the investment of such monies in Government or real securities, . . . and also the expense of obtaining the proper orders for any of the purposes aforesaid."

A sum of money awarded to an heiress of entail in possession, under the Lands Clauses Consolidation (Scotland) Act 1845, for land taken by a railway company, and deposited in bank under the Act, was, under the authority of the Court, in part applied in payment of permanent improvements, and the balance invested on heritable security. The railway company paid the expenses of the application. Some years thereafter the heiress of entail obtained authority from the Court to uplift part of the money so invested and apply it in payment of further improvement expenditure. The expense of this application was also paid by the railway company. Subsequently the debtor in the bond paid up the amount remaining so invested, and the then heir of entail in possession having expended a like sum in improvement expenditure presented a petition to have the money applied in repayment thereof, and prayed that the railway company should be found liable in the expense of the application. The date of this application was more than nineteen years after the date of the award.

Held that the railway company were not liable.

This was a petition by Robert John Logan of Loganlee and Newmains, residing at Newmains Lodge, Carnwath, with consent of his curator.

The petition set forth, *inter alia*—"In pursuance of the provisions contained in the Caledonian Railway (Cleland and Midcalder Railway and Branches) Act 1865, certain portions of the said entailed estate of Loganlee were taken by the Caledonian Railway Company for the formation of the Cleland and Midcalder line of railway and branches. For the ground so taken and the damage thereby occasioned to the remainder of the said entailed estate the sum of £1654, 5s. was awarded to Miss Eliza Helen Logan, then heiress of entail in possession of the said entailed lands and estates, by arbiters appointed in terms of the Lands Clauses Consolidation (Scotland) Act 1845, conform to decree-arbitral pronounced by them dated 2nd and 4th December 1868. This sum of £1654, 5s. was on 14th May 1869 consigned in the Commercial Bank of Scotland, Edinburgh, to be applied under the authority of the Court of Session in terms of the said last-mentioned Act.

"Of this date (July 20, 1870) the said Eliza Helen Logan presented a petition to the Court for authority to uplift and apply part of the said consigned sum of £1654, 5s., and to invest the balance on heritable security. Of this other date (February 11, 1871) your Lordships granted warrant for payment to the said Eliza Helen Logan of £293, 0s. 10d. out of the said consigned money, in repayment of permanent improvement expenditure on the said entailed estates of Loganlee and Newmains, and authorised a further expenditure of £290 in improvements then proposed to be made by the said Eliza Helen Logan on the farms of Netherlongford and Newhouse, and also authorised the investment on heritable security of the sum of £1071, 4s. 2d., being the balance of the said consigned money. The said sum of £1071, 4s. 2d. was accordingly, at the sight of the Court, invested in a bond and disposition in security over the lands and estate of Catpair or Cathpair in the county of Edinburgh, granted by Richard Somner Frier, Esq., the proprietor thereof, dated, the said bond and disposition in security, 30th January, and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh 6th February 1872. By interlocutor of this date (March 5, 1872) your Lordships approved of said bond and disposition in security, and by interlocutor of this other date (November 19, 1872) your Lordships approved of the expenditure by that time made of the sum of £290 previously authorised, and of the payment thereof to the said Eliza Helen Logan.

"Of this date (January 20, 1876) the said Eliza Helen Logan presented a petition to the Court for authority to uplift and apply part of said sum of £1071, 4s. 2d., invested as aforesaid, and to invest the balance on heritable security. Of this other date (May 7, 1876) your Lordships granted warrant to and ordained the said Richard Somner Frier to pay over to the said Eliza Helen Logan the sum of £516, 15s. 7d. out of the said £1071, 4s. 2d., invested as aforesaid, in repayment of permanent improvement expenditure on the said entailed estates of Loganlee and Newmains. The said Richard Somner Frier having died on 7th June 1876, his widow Christian Swan or Frier, then proprietrix of Cathpair, paid over the said sum of £716, 15s. 7d. to the said Eliza Helen

Logan out of the said sum of £1071, 4s. 2d., invested as aforesaid, and the said bond and disposition in security was duly discharged to that extent, conform to discharge by the said Eliza Helen Logan in favour of the said Christian Swan or Frier, dated 12th and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh 15th July 1878.

"The balance of the said £1071, 4s. 2d., viz., £354, 8s. 7d., was subsequently, at the request of the said Christian Swan or Frier, paid up, and the said bond and disposition in security fully discharged, conform to discharge by the said Mrs Agnes Watt Logan, then heiress of entail in possession of said entailed estates in favour of the said Christian Swan or Frier, dated 5th and recorded in the Division of the General Register of Sasines applicable to the county of Edinburgh 31st May 1880. The said sum of £354, 8s. 7d. was thereafter on 26th May 1880, under deduction of £5, 6s. 8d., the expense incurred by the said Mrs Watt Logan in making up her title to the said bond as nearest and lawful heir of tailzie and provision in special of the said Eliza Helen Logan, consigned in the National Bank of Scotland, Edinburgh, to be applied on behalf of the heirs of entail of the said entailed estates of Loganlee and Newmains. The said balance, amounting to £349, 1s. 11d., still remains in bank.

"The petitioner has between 22d March 1884, when he succeeded to the said entailed estates, and October 1888, expended a sum of £349, 5s. 9d., conform to statement of expenditure herewith produced, in permanent improvements on the said entailed estates of Loganlee and Newmains.

"The petitioner is now desirous of having the foresaid sum of £349, 1s. 11d., consigned as aforesaid, uplifted and applied in repayment *pro tanto* of the foresaid sum of £349, 5s. 9d. expended by him upon permanent improvements on the said entailed estates, or such other sum as may be found to have been so expended; and if any balance less than £200 shall remain after repayment of the sum so found to have been expended, the petitioner is desirous of acquiring the same for his own use and behoof.

"The present application is made under the Lands Clauses Consolidation (Scotland) Act 1845, the Entail Amendment (Scotland) Act 1848, section 26, and subsequent statutes and relative Acts of Sederunt."

The petition prayed for payment to the petitioner of the said sum of £349, 1s. 11d., and for the expenses of the application against the Caledonian Railway Company.

The Caledonian Railway Company opposed the prayer for expenses.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), sec. 79, provides—"In all cases of monies deposited in bank under the provisions of this or the special Act, or any Act incorporated therewith, . . . it shall be lawful for the Court of Session to order the expenses of the following matters . . . to be paid by the promoters of the undertaking; (that is say) . . . the expense of the investment of such monies in Government or real securities, . . . and also the expense of obtaining the proper orders for any of the purposes aforesaid: . . . Provided always, that the expense of one application only for reinvestment in land shall be allowed unless it shall appear to the Court of Session that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the expenses of any such investment to be paid by the promoters of the undertaking."

Authority cited—*Grant* v. *The Edinburgh, Perth, and Dundee Railway Company*, 1850, 13 D. 1015.

The Lord Ordinary (WELLWOOD) on 15th January 1889 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the petitioner's motion to find the Caledonian Railway Company liable in the expenses of the application, and considered the process, Refuses the said motion: Finds the said railway company entitled to the expenses of the discussion, modifies the same at the sum of Two pounds two shillings, for which decerns against the petitioner.

"*Note.*—I do not think that the expenses of this application should be charged against the railway company. The land was taken so long ago as 1869, and the whole sum consigned was only £1654, 5s. The railway company have already paid the expenses of two applications for the investment and re-investment of the consigned fund. I think it would be unreasonable to hold a railway company indefinitely liable for the expenses connected with the re-investment of consigned money on all occasions when the heir of entail for the time thought fit to change the investment, or the debtor in a bond thought fit to pay up his debt. There may be circumstances in which the heir of entail cannot at once find a suitable investment for the whole of the consigned sum, or in which, owing to the amount of the sum or other reasons, a suitable permanent investment cannot be obtained. In such cases it may be reasonable that the expenses of more than one application should be allowed. The case of *Grant* v. *The Edinburgh, Perth, and Dundee Railway Company* is an instance in point. The compensation amounted to £7100. The heir of entail proposed to invest £5930 of this sum in the purchase of lands, and presented an application for that purpose, and while inquiries were being made in the petition he obtained decree for the expenses of improvements on the entailed estates, and was thus in a position to apply for payment of £1700, the balance of the consigned sum, in part payment of the sum expended in improvements. In that case the expenses of both applications were allowed, but there, it would appear, the heir of entail was not able at once to find an investment for the whole of the consigned sum, and moreover, the second application was made within a reasonable time. Here, after the lapse of nearly twenty years, it is proposed to subject the railway company in the expenses of a third application connected with the disposal of the small balance which has been lying in bank for eight years. I am of opinion that the application should be refused."

Counsel for the Petitioner—Wallace. Agent—David Turnbull, W.S.

Counsel for the Caledonian Railway Company R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Thursday, March 14.

OUTER HOUSE.

[Lord Fraser.

BOOTH *v.* NAPIER AND ANOTHER.

Public-House—Home Drummond Act (9 *Geo. IV. cap.* 58), *sec.* 14—*Publicans Certificates (Scotland) Act* 1876 (39 *and* 40 *Vict. cap.* 26), *sec.* 6—*New Certificate—Appeal to Quarter Sessions.*

Section 14 of the Home Drummond Act, which provides for appeal to Quarter Sessions against the grant of a new certificate, has been superseded by sec. 6 of the Publicans Certificates (Scotland) Act 1876, which provides for the same being confirmed by the County Licensing Committee.

A new public-house certificate having been granted, an appeal thereagainst by a justice of the peace to the Quarter Sessions of the county was sustained, and the licence was refused. *Held* that the application should have been to the standing committee of the justices of the peace, whose decision is now in place of the former right of appeal, and the appeal and decrees thereon *reduced*.

This was an action of reduction at the instance of Arthur Booth, wine and spirit merchant, Partick, against Robert Twentyman Napier, one of Her Majesty's Justices of the Peace for the county of Dumbarton, and William Craig, Clerk of the Peace for the county, in which the pursuer sought to reduce (1) an appeal taken by the defender Napier to the Quarter Sessions of the Peace for the county against the grant of a public-house certificate to the pursuer, and (2) the deliverance upon the appeal recalling the certificate and refusing the licence.

The pursuer's certificate was granted at the statutory half-yearly general meeting of the Justices of the Peace for the county on the 30th October 1888. The pursuer within ten days thereafter lodged the same in the hands of the defender Craig for confirmation by the County Licensing Committee in terms of the Publicans Certificates (Scotland) Act 1876. Within the same period the defender Napier lodged with the defender Craig an appeal by him to the Quarter Sessions of the county against the decision of the Justices of the Peace granting the certificate, craving to have the grant recalled and the licence refused.

At an adjoined meeting of the Quarter Sessions on 13th November 1888 the appeal was heard and sustained and the licence refused.

In consequence thereof the pursuer was prevented from having his certificate confirmed by the County Licensing Committee, and brought this action for reduction of the appeal and deliverance thereon.

He pleaded—"(1) The appeal by the defender Napier, and the deliverances of the Quarter Sessions thereon, being incompetent and irregular, the pursuer is entitled to have the same set aside and reduced. (2) The actings of the defenders and of the Quarter Sessions complained of having been contrary to the Publicans Certificates (Scotland) Act 1876, the pursuer is entitled to decree in terms of the conclusions of his summons. (3) In any event, the said appeal not having been taken, and not having been considered by the 'next Quarter Sessions' after the grant of the certificate, the pursuer is entitled to decree as concluded for. (4) The pursuer having complied in all respects with the requirements of the statutes, he is entitled to have his application for confirmation laid before the County Licensing Committee."

The defender Napier pleaded—"(1) The action is incompetent in respect of section 26 of the Act 9 Geo. IV. c. 58. (2) The action is irrelevant. (3) The averments, so far as relevant, being untrue, the defender should be assoilzied. (4) The appeal having been regularly taken, and the deliverance thereon competently pronounced, the defender should be assoilzied. (5) The said appeal to Quarter Sessions having been heard and disposed of at the 'next Quarter Sessions' within the meaning of the Justice of the Peace and Licensing Acts, the action should be dismissed.

The Act 9 Geo. IV. cap 58, sec. 14, provides—"That if any justice of the peace . . . shall be dissatisfied with any proceeding of any justices or magistrates assembled for granting certificates as aforesaid . . . it shall be lawful to such justice of the peace . . . to appeal therefrom to the next Quarter Sessions of the Peace for the county."

The Publicans Certificates (Scotland) Act 1876 (39 and 40 Vict. cap. 26), provides by section 6—"A grant of a new certificate in any county in Scotland . . . shall not be valid unless it be confirmed by a standing committee of the justices of the peace for the county (hereafter called the County Licensing Committee)."

The pursuer argued—The appeal and deliverance under reduction were incompetent, the right of appeal in cases where new licences had been granted having been taken away by implication by the Publicans Certificates (Scotland) Act 1876 (39 and 40 Vict. cap. 26), known as Dr Cameron's Act. By the Home Drummond Act (9 Geo. IV. cap. 58), which still regulated appeals in licence cases, except so far as altered by the Act of 1876, appeal was provided for by 'any justice of the peace or proprietor or occupier of any house in respect whereof any such certificate shall be applied for' 'to the next Quarter Sessions of the Peace for the county,' ten days being the period within which appeals required to be lodged. The Act of 1876 provided (sec. 5) that there is to be no appeal against any proceeding of justices in refusing any application for a new certificate; (sec. 16) that "subject to the provisions of this Act certificates shall be renewed and transferred, and the powers and discretions of justices or magistrates, and the rights of appeal relative to such renewal and transfer, shall be exercised as heretofore"; and (sec. 6) that "a grant of a new certificate in any county in Scotland, except the city of Edinburgh, shall not be valid unless it shall be confirmed by a standing committee of the justices of the peace for the county (hereinafter in this Act called the County Licensing Committee)." The four cases of granting new certificates, refusing new certificates, and renewing or transferring old certificates, being thus provided for, the right of appeal which formerly existed in cases of the granting of new certificates was now abolished by implication and confirmation by the County Licensing Committee

in its place. The time within which the application for confirmation required to be made was (sec. 10, sub-sec. 1) ten days, the same period as that which under the older statute an appeal required to be taken. The Act of 1876 is entituled "An Act to assimilate the law of Scotland relating to the granting of licences to sell intoxicating liquors to the law of England." By the law of England the appeal and deliverance under reduction would have been clearly incompetent—35 and 36 Vict. c. 94, sec. 52; 37 and 38 Vict. c. 49, sec. 27; Whitely & Lowe on the Licensing Acts, pp. 41–42, and pp. 165–166. In a similar case (*Mackean* v. *Bartlemore*, February 8, 1878, unreported) Lord Young in the Outer House had granted reduction.

The defender argued—The appeal to Quarter Sessions had not been removed by 39 and 40 Vict. cap. 26, and therefore the action (of reduction) was incompetent. By Act 9 Geo. IV. cap. 58, sec. 14, any justice of the peace dissatisfied was to appeal therefrom to the next Quarter Sessions of the peace. This law continued in force until 39 and 40 Vict. cap. 26, was passed. When therefore 39 and 40 Vict. cap. 26, was passed the Legislature in appointing the confirming committee (*i.e.*, the County Licensing Committee) had before it the question of whether the old rights of appeal to Quarter Sessions should be abolished or not. In result it adopted a middle course, viz., it abolished the appeal of the owner and occupier. It effected this by section 5, which abolished the appeal to Quarter Sessions when a licence was refused, and as it would be the owner or occupier who were interested in securing a licence their right of appeal was thus taken away. Nothing, however, was said regarding the right of a justice of the peace to appeal to Quarter Sessions, and unless it was taken away by necessary implication it remains. It had not been taken away by necessary implication, for no right was given to a justice of the peace in lieu of it. In fact a justice of the peace, as such, could not appear before the confirming committee at all—*vide* sec. 12, "Any person who appears before the justices of the peace . . . and opposes the grant of a new certificate, and no other person excepting the Procurator-Fiscal for the public interest may appear and oppose the confirmation of such grant." . . . The Legislature had thus not intended that the rights of appeal by a justice of the peace should be taken away. The argument founded on section 16 was not sound, for it would be most anomalous that Quarter Sessions should supervise "renewals" and "transfers," and yet have no jurisdiction over "grants" of new certificates. This section was introduced to prevent any doubts as to the position of renewed or transferred certificates. The argument founded on the title also failed—(1) The title was not part of the Act; (2) the right of appeal to Quarter Sessions was expressly repealed by 35 and 36 Vict. c. 94, sec. 75, and though this section had itself been repealed, still the old right of appeal had not been revived. Therefore the law of Scotland had not been assimilated to the law of England.

At advising—

Lord Fraser—The pursuer seeks reduction of (first) an appeal taken by the defender Robert Twentyman Napier to the Quarter Sessions of the Peace for the county of Dumbarton, and (second) the decrees, judgments, or deliverances pronounced by the Quarter Sessions thereon. The pursuer applied to the Justices of the Peace in October 1888 for a public-house certificate for premises occupied by him in the parish of West Kilpatrick, and at the statutory half-yearly meeting of the Justices this certificate—being a new certificate — was granted to him on the 30th October 1888. The defender Napier was dissatisfied with this judgment, and he lodged an appeal to the Quarter Sessions of the county against the decision of the Justices, and at an adjourned meeting of the Quarter Sessions on 15th November 1888 the appeal was sustained, and the licence was refused.

These proceedings were irregular and outwith the statute. It is true that under the Statute of 9 Geo. IV. cap. 58, sec. 14, called the Home Drummond Act, an appeal could be taken by any justice of the peace or proprietor or occupier of any house against any proceeding of any justices or magistrates for granting certificates to publicans, "whether in granting or refusing or otherwise disposing of any such application." The appeal was to be "to the next Quarter Sessions of the Peace for the county." Recent legislation has taken away this right of appeal. The Act 39 and 40 Vict. cap. 26, which is entituled "An Act to assimilate the law of Scotland relating to the granting of licences to sell intoxicating liquors to the law of England," contains various provisions which are quite inconsistent with any such right of appeal. This Act calls into existence a new body called a standing committee of the justices of the peace, consisting of not less than three nor more than twelve members, and the 6th section of the statute expressly provides that a grant of a new certificate in any county in Scotland shall not be valid unless it shall be confirmed by this standing committee. The confirmation of the certificate must be applied for by the publican, and his application must be lodged with the clerk of the peace of the county within ten days after the grant of the certificate. There is no appeal allowed from the decision of the confirming committee. The statute regards the decision of such committee as final.

Now, this was the only tribunal to afford redress to any person dissatisfied with the decision of the justices granting the certificate. Clearly it was never intended that there should be two courts of appeal, one this standing committee, and the other the next meeting of Quarter Sessions. Further, the subject of the right of appeal is dealt with very specially in two places of the Act of 1876. By the 5th section it is enacted that notwithstanding the 14th section of the Act of 9 Geo. IV. cap. 58, no appeal shall lie against a refusal by the magistrates to grant a new certificate, "but every such proceeding and refusal shall be final." Then, again, the 16th section deals with the case of renewals and transfers of certificates in the following terms—"Subject to the provisions of this Act, certificates shall be renewed and transferred, and the powers and discretion of justices or magistrates, and the rights of appeal relative to such renewal and transfer, shall be exercised as heretofore." The omission here to save the right of appeal with reference to the granting of a new certificate indicates quite clearly that no such appeal

as under the old statute was intended to be reserved, and that the standing committee's decision was to come in place of the former right of appeal.

The Court reduced the proceedings complained of.

Counsel for the Pursuer — Jameson — Guy. Agents—Nisbet & Mathison, S.S.C.

Counsel for the Defenders—Graham Murray—Napier. Agents—Fodd, Simpson, & Marwick, W.S.

Friday, May 24.

FIRST DIVISION.

YOUNG AND OTHERS (EARL OF DALHOUSIE'S TRUSTEES) *v.* MACDONALD AND OTHERS.

Succession — Vesting — Destination-Over — Vesting Subject to Defeasance.

A testator directed his trustees to realise the residue of his estate and to pay the free annual proceeds thereof to his sister during her life, and at her death to divide the residue among his nephews and nieces *nominatim* in certain proportions. The deed further provided that "if any of my said nephews or nieces die before my sister, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay or my said niece Patricia Ramsay, die without issue, the share of such deceaser or deceasers shall fall to their surviving brothers and sisters equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister, and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one."

Held that the surviving brothers and sisters of one of the nephews who had predeceased both the testator and the liferentrix were entitled to take his share of residue as conditional institutes, and that the share of Edward Bannerman Ramsay, who had predeceased the liferentrix, had vested *a morte testatoris* subject to defeasance in the event of the beneficiary leaving children, but as he had died without issue, it fell to the executor under his settlement.

The Right Honourable Fox, Earl of Dalhousie, died on 6th July 1874. He left a trust-disposition and settlement by which he conveyed to trustees his whole estates heritable and moveable. By the last purpose of the deed the trustees were directed to realise the residue of his estate, and pay the free annual interest thereof to his sister, Lady Christian Maule, during her life, and at her decease to divide the residue among his nine nephews and seven nieces specified in the deed, to the effect of giving each nephew £6000, and each niece £4000. The purpose contained, *inter alia*, the following provisions:—"Provided always and declaring that if any of my said nephews or nieces die before my sister, the said Lady Christian, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay or my said niece Patricia Ramsay, die without issue, the share of such deceaser or deceasers shall fall to their surviving brothers and sisters equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one. And with regard to the £6000 herein before directed to be apportioned to my said nephew Edward Bannerman Ramsay, I desire that in the event of his predeceasing me without issue the same shall go, one-half to the said Christina Ramsay or Elliot, whom failing to her issue, equally among them, and the other half to the said Georgina Harvey Ramsay or Hay, whom failing her issue, equally among them." The truster left means and estate sufficient to pay all the bequests above mentioned. He was predeceased by one of the nine nephews, Captain Henry Macdonald, who died in March 1873 without issue.

In December 1883 another nephew, Major-General Edward Bannerman Ramsay died, testate, but without issue.

Lady Christian Maule died on 21st March 1888. In her settlement, dated August 1887, she directed her trustees how they were to deal with the legacy of £6000 bequeathed by the Earl of Dalhousie to the said Edward Bannerman Ramsay in the event of its being found to have lapsed by his predecease of her, the liferentrix.

After the death of Lady Christian Maule, questions arose as to the sums of £6000 bequeathed respectively to Captain Henry Macdonald, and to Major-General Edward Bannerman Ramsay under the trust-disposition of the Earl of Dalhousie.

This special case was accordingly presented by (1) Earl of Dalhousie's trustees; (2) Lady Christian Maule's trustees; (3) George Dalhousie Ramsay and others, certain of the nephews and nieces of the Earl of Dalhousie; (4) the surviving brothers of the said Captain Henry Macdonald; (5) the executor of the deceased Major-General Edward Ramsay, and another.

It was maintained by the fourth parties that they were, as conditional institutes, entitled to the £6000 bequeathed to their brother Captain Henry Macdonald, in virtue of the survivorship clause above quoted, contained in the trust-disposition of the Earl.

The parties of the second part maintained that the bequest lapsed in consequence of his having predeceased the testator; that it fell to Lady Christian Maule as residuary legatee, and was now payable to her trustees and executors.

A further question arose with regard to the

sum of £6000 bequeathed to Major-General Edward Bannerman Ramsay under the same trust-disposition and settlement. The parties of the fifth part maintained that the bequest vested in Major-General Edward Bannerman Ramsay on the death of the testator, or at all events vested in him at said date, subject to defeasance only in the event of his predeceasing Lady Christian Maule and leaving issue, and that it thus fell to be paid to Colonel Elliot, an executor under Major-General Edward Bannerman Ramsay's will. The parties of the third part, on the other hand, maintained that in consequence of Major-General Edward Bannerman Ramsay having predeceased Lady Christian Maule he never took any vested interest in the bequest of £6000; that it accordingly lapsed and fell to Lady Christian Maule, as residuary legatee under the Earl's trust-disposition and settlement, and was now payable to her trustees and executors.

The following questions were submitted to the Court—"(1) Whether the bequest of £6000 by the Earl of Dalhousie to Captain Henry Macdonald falls to the fourth parties, equally among them, in virtue of the survivorship clause contained in the trust-disposition and settlement; or whether the said bequest lapsed in consequence of Captain Macdonald predeceasing the testator? (2) Whether the bequest of £6000 by the Earl of Dalhousie to Major-General Edward Bannerman Ramsay, vested in him *a morte testatoris;* or whether the said bequest lapsed in consequence of his predeceasing the liferentrix?"

Argued for the fourth parties—The fact that Captain Henry Macdonald predeceased the testator did not in any way prevent the fourth parties taking the benefit of this legacy as they took as conditional institutes. The testator provided that they were to take failing issue of the beneficiary, and in preference to his own residuary legatee. The circumstances contemplated and provided for had occurred—*Denholm*, January 1726, M. 6346; *Dunlop*, June 2, 1812, F.C.; *Moray*, December 15, 1782, M. 8103; *Hallibur-ton* v. *Halliburton*, June 26, 1884, 11 R. 979; *Martin* v. *Holgate*, L.R., 1 Eng. and Ir. App. 175.

Argued for the second parties—As Captain Macdonald did not survive the testator, the bequest in his favour lapsed—little benefit could be got from authorities, as the case really depended upon facts. There was no natural obligation here which fell to be implemented, the testator was not *in loco parentis* to the beneficiary.

Argued for the fifth parties — As Edward Ramsay survived the testator, his legacy vested *a morte testatoris* subject to defeasance if he had issue; as he died childless it fell to be disposed of by his settlement—*Maxwell* v. *Wylie*, May 25, 1837, 15 S. 1005; *Taylor* v. *Gilbert's Trustees*, July 12, 1878, 5 R. (H. of L.) 217; *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697; *Fraser* v. *Fraser's Trustees*, November 28, 1883, 11 R. 196; *Ross' Trustees* v. *Ross*, December 18, 1884, 12 R. 378; *Finlay's Trustees* v. *Finlay*, July 6, 1886, 13 R. 1052; *Byar's Trustees* v. *Hay*, July 19, 1887, 14 R. 1034.

Argued for the third parties—The term of distribution was the death of the liferentrix, till which time no vesting could take place. Edward Ramsay predeceased the liferentrix, so his share lapsed and fell into residue to be disposed of by Lady Christian Maule's settlement—*Young* v. *Robertson*, 4 Macq. 314; *Laing* v. *Barclay*, July 20, 1865, 3 Macph. 1143; *Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709; *Wannop* (*Haldane's Trustee*) v. *Murphy*, December 15, 1881, 9 R. 269; *Water's Trustees* v. *Waters*, December 6, 1884, 12 R. 253.

At advising—

LORD PRESIDENT—[*After narrating the circumstances above mentioned.*]—The first question therefore which we have to determine is, whether seeing that Captain Henry Macdonald predeceased not only the lifrentrix but also the testator, his share of the residue did not lapse? or whether, on the other hand, there is anything in the destination here which will entitle the fourth parties to take under it? What the testator desired was that each of his nine nephews should receive out of the residue of his estate a sum of £6000, and each of his seven nieces a sum of £4000, and after so directing his trustees the testator inserted the following provisos:—"Provided always and declaring that if any of my said nephews or nieces die before my sister, the said Lady Christian, leaving a child or children, such child or children shall be entitled to their parent's share, and if any of my said nephews or nieces, other than my said nephew Edward Bannerman Ramsay, or my said niece Patricia Ramsay, die without issue, the share of such deceaser or deceasers shall fall to their surviving brothers and sisters equally among them if more than one, the issue of any deceased brother or sister taking the share which would have fallen to their parent if in life, or if there be no surviving brother or sister, and no issue of a deceased brother or sister of such deceasing nephew or niece, then the share of such deceasing and childless nephew or niece shall on such decease go to such of my said nephews and nieces above named as may be then living, equally among them if more than one."

It is to be observed that in these two provisos there is a variation in the expression—thus it is provided in the first, that if a nephew or niece dies before the testator's sister, leaving issue, such issue is to take the parent's share; while in the second proviso the words "before my sister" are omitted, and it is provided that if any of the said nephews or nieces die without issue, the share of the deceaser is to go to their surviving brothers and sisters equally among them if more than one.

Now, though the words "before my sister" are not expressed in this latter proviso, it appears to me that they may fairly be implied; and if that be so, then the fourth parties here are entitled to prevail in respect that they are the brothers of a nephew who died before the testator's sister and left no issue.

But it was urged on the other hand that we should read into this clause the words "die after me but before my sister" and that what the testator really meant was, that before the brothers or sisters of any nephew could take, such nephew must have survived the testator and died before the liferentrix. I cannot see any ground for reading in such words, nor do I think that they are in any way implied.

Again, it was urged that the death of the

liferentrix was the time at which the parties among whom the residue was to be divided were to be sought for; and that as Captain Henry Macdonald had predeceased the liferentrix, his share had lapsed. I am not however prepared to adopt so constrained a construction of this clause of residue. I prefer to give to the words their literal interpretation, and I think that there is here a conditional institution of the brothers and sisters of a nephew dying without issue, and that the fourth parties are accordingly entitled to take their brother's share.

The second question in this case relates to the share of another nephew Edward Bannerman Ramsay, but it stands in a different position. He left no children, so the first proviso does not apply to his case; nor does the second, because he is expressly excluded by its terms. He died without leaving issue, surviving the testator, but predeceasing the liferentrix. The question accordingly which we have to determine is, whether this bequest of £6000 vested in the beneficiary *a morte testatoris*, or whether it lapsed by his predeceaser of the liferentrix?

It was urged against the legacy vesting *a morte* that there is here a provision that if the beneficiary died leaving children they were to take their parent's share; and it was argued that such a provision suspended vesting. I cannot adopt such an argument; on the contrary, I think that this is a case of vesting subject to defeasance in the event of children coming into existence. In such a case they would take their parent's share and vesting would be defeated.

I am therefore for answering the second question by holding that this bequest vested in the beneficiary *a morte testatoris*, subject, however, to defeasance in the event of his having issue, which it appears he had not.

Lord Shand—I agree with your Lordship on both points, and cannot say that to my mind this case is attended with the slightest difficulty. With regard to the £6000 bequeathed to Captain Henry Macdonald, we must hold that the fourth parties are entitled to it as conditional institutes under the will. I think we cannot resist the view that the testator meant the fund to go to the legatee himself if he survived him, but that if he predeceased that date it should go to his issue if he had any, and that if he had none it should go to his brothers and sisters. The provision is quite distinct, and I agree with your Lordship that no reason whatever has been shown for reading in any words which would deprive the fourth parties of the benefit which the testator clearly intended them to take, merely because the beneficiary predeceased the testator. There is here a *predilectio* in favour of the children of the beneficiary, whom failing of his brothers and sisters, in preference to the residuary legatee of the testator.

I think, therefore, that the fourth parties are entitled to take in virtue of the destination-over contained in this last purpose of the trust-deed.

As regards the bequest to Edward Bannerman Ramsay, it is in a somewhat different position. He survived the testator but predeceased the liferentrix leaving no issue. I am of opinion that his legacy of £6000 does not fall into residue and go to Lady Christian Maule or her representatives, but goes according to the directions of his will. The legacy vested in him *a morte testatoris* but subject to defeasance in the event of his leaving issue, which he did not do. The case is, I think, indistinguishable from that of *Snell's Trustees*, March 20, 1877, 4 R. 709, and from the recent and most authoritative judgment of the House of Lords in the case of *Gregory's Trustees* (*Hood* v. *Murray*, January 21, 1887, 14 R. 368) in which the decision of this Court has been reversed. In that case the House of Lords dealt with the case of *Wannop* (*Haldane's Trustees*) v. *Murphy*, December 15, 1881, 9 R. 269, and though their Lordships were not dealing with the case by way of appeal, they practically reversed the decision of this Court. The result of the reversal of the decision in *Gregory's Trustees* is that the House have upheld the doctrine of vesting subject to defeasance, so here the vesting in General Ramsay was subject to defeasance by an event which, as matter of fact, never occurred.

Lord Adam concurred.

Lord Mure was absent.

The Court answered the first alternative of both questions in the affirmative.

Counsel for the First Parties—C. K. Mackenzie.

Counsel for the Second Parties—C. J. Guthrie. Agents for First and Second Parties—John Clerk Brodie & Sons, W.S.

Counsel for the Third Parties—Gillespie. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Fourth Parties—Sir C. Pearson—Stuart. Agents—Alexander Campbell, S.S.C.

Counsel for the Fifth Parties—Begg. Agents—John Clerk Brodie & Sons, W.S.

VALUATION APPEAL COURT.

Saturday, February 2.

(Before Lord Fraser and Lord Trayner).

THE CRAIGTON CEMETERY CO. (LIMITED) *v.* ASSESSOR OF THE LOWER WARD OF THE COUNTY OF LANARK.

Valuation Roll—Lands Valuation Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Cemetery—Yearly Value.*

Land belonging to a cemetery company, laid out as a cemetery, from which the company derived an annual income by allotting the land in portions for burial purposes, was entered in the valuation roll at a yearly value based upon the rent at which in its actual state as a cemetery it might be expected to let to a tenant to be used by him in the same manner as it was used by the company. The company appealed against the valuation, and contended that the land ought to be entered upon the roll at its agricultural value. *Held* that the valuation was *right*.

At a meeting of the Valuation Committee of the Commissioners of Supply for the Lower Ward of the county of Lanark held at Glasgow on the 12th day of September 1888, for hearing and disposing of appeals against valuations made by the Assessor for the year from Whitsunday 1888 to Whitsunday 1889, under the Lands Valuation Acts 17 and 18 Vict. cap. 91, and 20 and 21 Vict. cap. 58, and Amending Acts, the Craigton Cemetery Company, Limited, appealed against the entry made by the Assessor in the valuation roll of £500 as the yearly value of the lands belonging to the company, situated in the parish of Govan.

The appellants stated that in the year 1873 they acquired 29½ acres of land, and partly enclosed the same with a wall, and built an entrance lodge, and laid off part of the ground for burial purposes. When that had been done the appellants' property was entered in the valuation roll at £100. Since the appellants acquired the ground they disposed of 9 acres or thereby for burial purposes, and the whole of these 9 acres have practically been used for interments. The remaining portion of 21 acres has been laid off with carriage drives and footpaths, and made suitable for burial purposes. Of recent years the appellants have had a considerable surplus of revenue over expenditure, and they have divided the same amongst their shareholders. This revenue is principally derived from the sale of the land to lairholders, and the Assessor contends that the said sums so realised from the sale of the lands should form the basis of the yearly value thereof. In other words, the Assessor considers the said revenue from sales of ground as profits of a business, and argues that a business yielding such a profit to the proprietor would let to a tenant at a rental of £500.

The appellants objected to this method of arriving at the yearly value, and contended—*First.* That the revenue made by them arose from the sale of the *corpus* of their property, and was not rent or yearly value of the lands; *Second.* The principle adopted by the Assessor of ascertaining the annual value from a comparison of income and expenditure was an erroneous one. It led to the anomaly that, if strictly applied, only such lands and heritages as yielded a surplus of income over expenditure would be treated as having an annual value. There were cemeteries in Glasgow which did not yield a surplus of revenue over expenditure, and which consequently did not yield any return to the proprietors, and in these cases the subjects were entered in the valuation roll at the agricultural value. In these circumstances the appellants maintained that if a valuation was to be placed upon burial grounds it must be the value at which the ground would in its actual state let from year to year, and that that value could only be the agricultural value. The amount of revenue derived from the disposal of land to lairholders could not affect in any way the question of the yearly value of the lands in the sense of the Valuation Acts—*Falkirk Gas Company (Limited)*, 20 S.L.R. (*per* Lord Lee). *Third.* That ground disposed of or set apart for the burial of the dead was not a rent-producing subject. It was never utilized for any other purpose, and it had therefore no annual value. In point of fact, the appellants' ground was not used in any other way than as a burial place for the dead, and it yielded no annual value to them. *Fourth.* By 37 and 38 Vict. cap. 20, ground exclusively appropriated as burial ground was exempted from assessment for any county, burgh, parochial, or other local purpose whatsoever, and there was therefore no object to be gained by the Assessor increasing the valuation of the appellants' ground to £500. The appellants stated that £100 was a full estimate of the yearly value of their land.

The Assessor did not admit the assumptions said to be made by him by the appellants, and stated that in the year 1878–79 the annual value of the cemetery was entered in the lands valuation roll at £100, and in the year 1882–83, and since then, at £250. For the current year, 1888–89, he had increased the annual value to £500, which he considered a most moderate valuation. In support of that he produced the last balance-sheet of the company dated 31st December 1887, which showed less profits than the balance sheets of preceding years, and which also showed that the cost of making the cemetery was £12,178, that £357, 17s. 11d. of feu-duty was paid annually by the company for the ground of the cemetery, and that a profit was made of almost £1500. In the face of that balance-sheet he contended that neither the company, in seeking to find out at what rent they could afford to let the cemetery at, nor a tenant in seeking to find out what rent he could afford to pay for it, would put the question to themselves—What is the agricultural value of its land? Instead, the one (owner) would seek a reasonable return in the shape of interest on the money expended in making the cemetery, and the other (tenant), looking at the balance-sheet, would try to ascertain what remuneration he would get to himself after working expenses had been defrayed and a rent paid to the owner. In fixing the fair annual value for the year at £500 the Assessor maintained that an owner would ask £500 at least of rent, and that a tenant would readily give at the least that amount of rent, and that he had purposely entered that amount in the roll as a low valuation because of the somewhat exceptional nature of the subject. Though there was no immediate object to be gained in increasing the valuation, as the company though possessing heritage, and earning and dividing dividends, did not, rightly or wrongly, pay local rates, the incidence of these rates might be changed any day, and the company, like other limited companies possessing heritage, might be made to pay its share. The company in prosecuting their appeal evidently thought that some object was to be gained in getting the valuation fixed at £100.

The Assessor also stated that the cemetery was assessed under the Property Tax Acts, though parish churchyards were not assessed.

The committee sustained the appeal to the extent of £100, and fixed the valuation at £400.

The appellants being dissatisfied with this decision, craved a case for the opinion of Her Majesty's Judges, from which the foregoing narrative is taken.

At advising—

Lord Fraser—The appellants in this case are a joint-stock company who carry on a perfectly legitimate business. They have become owners

of 29½ acres of land, which they have devoted to the purpose of a cemetery for the interment of the dead. Nine acres of this land have been already given off for burial purposes, and the remaining 21 acres have been laid off with carriage drives and footpaths, and made suitable for the same purpose. The income of the company is derived from the grant of burial stances and other fees; and the income for the year at 31st December 1887 showed a profit of £1395, 16s. 6d. No information is given in the case as to the conditions on which lairs have been granted to the persons whose relatives are buried therein. The grants to these persons are called "sales." But this term is clearly inapplicable, for there can be no sale of heritage in Scotland except by disposition, which it is not said any of the grantees of the lairs ever received. Nor is there any information given as to what are the obligations of the company in reference to keeping in good order the plots of ground, nor as to any right of access to or control over the lairs allocated. I suppose it must be taken for granted that the cemetery is to be kept in order by the company, and that the nature of the transaction is a grant of perpetual use for the purpose of interment to the allottee, without any transferance of the right of property from the company to the allottee. As explained to us at the debate this was the nature of the right which the allottee claimed.

Now, what rent would a hypothetical tenant give for such a subject? If the joint-stock company let the cemetery to a tenant, the latter would have all the powers which they possessed of utilising the cemetery for the purpose for which it was created, viz., a place for interment. The only way in which he could so utilise it would be simply by giving off lairs and receiving the price therefor from the allottees. The tenant could not be restrained from the use of the cemetery by the landlords, because such use was that to which it was devoted. The appellants contend as follows—"That if a valuation is to be placed upon burial grounds, it must be the value at which the ground would in its actual state let from year to year, and that that value can only be the agricultural value." Why should it be an agricultural value when the land has been laid out as a burial ground, enclosed with a wall, and with the carriage drives and footpaths suitable for a burial ground. It must be dealt with as in its actual state as such burial ground, and not as agricultural land.

In the next place, what is the income derivable from this cemetery? The only income which it yields is the sums paid for the lairs that are given off. The income will no doubt cease in time when the whole area of this cemetery has been allocated, but in the meantime that must be treated as income; and according to the balance-sheet annexed to the case the profit on the year ending 31st December 1887 is £1395, 16s. 6d. Surely a tenant of the subject, whose expenditure would be very little—only that of keeping the cemetery in good order—could upon receiving £1395 afford to pay a rent of £400, at which sum the valuation committee have fixed it. I observe that the case has been made the matter of decision by the Queen's Bench in England in the case of *The Queen* v. *Abney Park Cemetery Company*, L.R., 8 Q.B. 515, where the Court determined that the sums received for lairs was just income that must be taken into account. I am therefore of opinion that the determination of the valuation committee in this case was right.

Lord Trayner concurred.

The Court sustained the valuation.

Counsel for the Appellants—W. Campbell. Agent—James Drummond, W.S.

Wednesday, January 30.

(Before Lord Fraser and Lord Trayner.)

THE ASSESSOR OF THE COUNTY OF ARGYLL *v.* MARQUESS OF BREADALBANE.

Valuation Roll—Valuation of Lands (Scotland) Amendment Act 1878 (42 *and* 43 *Vict. cap.* 42), *sec.* 9—*Remit to Obtain further Information.*

The appellant in a valuation appeal moved the Court to remit the case to the Valuation Committee to take further evidence. Information of the facts which the appellant desired to prove was in his possession when the case was before the committee, but he failed to lead evidence thereof, or to move for an adjournment to enable him to do so. The motion was *refused.*

At a meeting of the Valuation Committee of the county of Argyll, held at Oban on the 13th day of September 1888, to dispose of appeals against the valuations of lands and heritages by the County Assessor for the year ending Whitsunday 1889, under the Valuation of Lands (Scotland) Acts 17 and 18 Vict. cap. 91, 20 and 21 Vict. cap. 58, 42 and 43 Vict. cap. 42, and 49 Vict. cap. 15, the Marquess of Breadalbane appealed against the following entries in the valuation roll of the county of Argyll for said year:—

No.	Description of Subject.	Proprietor.	Occupier.	Yearly Rent or Value.
		Parish of Ardchattan and Muckairn.		
9,678	Blackmount Deer Forest and Lodge. Shooting and Grazing.	The Marquess of Breadalbane.	Proprietor.	£720
		Parish of Glenorchy and Innishael.		
10,132	Do.	The Marquess of Breadalbane.	Do.	£1860

The Assessor produced the statutory return made on behalf of the proprietor, which instructed that the valuation entered in the roll agreed with the amount returned by the proprietor, viz., £720 and £1860 respectively.

The Assessor referred to the case of *Dalness* (No. 84) of last year, where the Valuation Committee fixed the value of that forest at £255, or £15 per stag, for 17 stags, being less than the grazing value of the lands. Her Majesty's Judges on appeal differed in opinion, and the valuation by the Valuation Committee stood.

That valuation was arrived at on the evidence of Mr N. B. Mackenzie, solicitor, Fort-William,

as to what had been done in the counties of Inverness, Ross, and Sutherland in arriving at value of deer forests in these counties, where he stated that £15 per stag had been adopted as the annual value. The Assessor then proposed to read and put in letters he had received from the Assessors of Inverness, Ross, and Sutherland shires. Counsel for the appellant objected, on the ground that the writers could have been obtained as witnesses. The Committee sustained the objection to the reading of the letters, but agreed to admit the statement of the Assessor as a witness as to material facts which he had ascertained. The Assessor then stated that he had made very careful inquiry as to the valuations of deer forests in Inverness, Ross, and Sutherland shires, and found that no such rule had been adopted in either of the counties named, and that as a matter of fact in no case was there a forest valued at less than £20 per stag, while he quoted the following cases of forests actually let at much higher rates, viz.—Balmacan, Glen Urquhart, rent £3000, after all deductions £2049, or £30 per stag; Dell, Abernethy, net rent £1762, equal to £25 per stag; Glenmore, Abernethy, £1300, equal to £25 per stag; Rothiemurchus, equal to £25 per stag; Applecross, equal to £22 per stag; Jura, Argyllshire, equal to £22, 10s. per stag. The Assessor further stated that he had ascertained that Mr Mackenzie was in error in stating that the Commissioners of Supply of Inverness-shire had appointed a committee to assist the Assessor in finding out a basis upon which to value unlet shootings and deer forests. No such committee had been appointed, and no communication in regard thereto had been made to the Assessor of Inverness-shire, and in no case had the rate of £15 per stag been adopted.

As stated in the *Dalness* appeal (No. 84), the Blackmount Forest was leased by Earl Dudley at £4500, and he was limited to 120 stags, or £37, 10s. per stag net. It was sub-let, with the proprietor's consent, in 1880 at £3250; in 1881 at £3500; in 1882, 1883, 1884, and 1885 at £3000, the tenant providing servants, ghillies, &c., the limit of stags was 100, or at the rate of £32, 10s., £35, and £30 per stag net. The forest is admitted to be one of the finest in Scotland.

The Assessor further stated that when settling the valuation of the forest last year, Mr Young, the agent for the proprietor, admitted that Lord Breadalbane refused an offer of £3000 for the forest by a former sub-tenant.

No other evidence was adduced by the Assessor in support of his statement, and the material facts relied on by him were denied by the appellant.

The appellant contended that the case of *Dalness* referred to by the Assessor ruled the present case, and that accordingly £15 for each stag which might be killed should be adopted as the basis of the value of the forest. When this case was before the Committee last year an exhaustive inquiry was entered into as to the rents of deer forests in the other counties of Scotland, and evidence was led. It was proved to the satisfaction of the Committee, "that the Commissioners of Supply for Inverness-shire, in the spring of 1887, appointed a committee to assist the assessor in finding out a basis upon which to value unlet shootings and deer forests. They took information from every possible source, and the result was that they came to the conclusion that the net value should be £15 per stag for deer forests. Acting upon this information Inverness had adopted this rate, and Ross-shire and Sutherlandshire had followed their example." The Committee accordingly fixed the value at the rate of £15 per stag. The judgment of the Committee on this point was confirmed by the Judges on appeal (though they differed in opinion regarding another point in the case), Lord Fraser expressing himself as perfectly satisfied with the judgment of the Committee. The Assessor had adduced no evidence in support of his statement other than the statement of facts which he had ascertained, which the Committee admitted as such, and therefore it must be taken as a fact, in view of the evidence in the *Dalness* case, that the counties of Inverness, Ross, and Sutherland had adopted the valuation of £15 per stag.

The appellant adduced the evidence of the ground officer—who, however, could not speak from personal knowledge as to the number of stags killed—to show that the number of stags which could be killed in each year was 83; that the forest had deteriorated in value as a lettable subject on account of some of the adjoining ground having been let with right to kill deer, and some having been cleared to make a forest; and that, since Lord Dudley was tenant of the forest, the two grazings of Glenkitland and Clashgour were let as sheep farms, and were separately valued in the valuation roll, the annual value of Glenkitland being £120, and Clashgour £150.

The Assessor contended that the *Dalness* case could not establish, and was not intended to establish, any general rule. It proceeded entirely upon the evidence of Mr Mackenzie, which he had proved to be incorrect. The Blackmount Forest was capable of yielding 100 stags per annum, although, being in the proprietor's hands, it had not recently been shot to its full capacity. Looking to the valuations of other deer forests which he had given, and to the fact that Lord Breadalbane had refused a rent of £3000 for Blackmount, it was moderately valued at £2580, the sum entered in the roll.

The Court found the number of stags the forest is capable of producing, one year with another, to be 100, and fixed the valuation at £15 per stag for 100 stags = £1500, with £2 per head for 40 cattle grazed in the forest. They therefore directed the valuation of £720 in the parish of Ardchattan and Muckairn to be reduced to £440, and the valuation of £1860 in the parish of Glenorchy and Innishael to be reduced to £1140.

The Assessor expressed himself dissatisfied with the decision, and took a case for the opinion of Her Majesty's Judges.

At the hearing of the appeal, counsel for the appellant moved the Court to remit the case to the Valuation Committee to hear the evidence of the parties upon whose information the Assessor's statements before the Committee were founded.

At advising—

LORD FRASER—In this case, which has to deal with the valuation of the Blackmount Deer Forest and Lodge, and the shooting and the grazing belonging to the Marquess of Breadalbane, the parties are at issue in regard to simply the amount at

which each should be stated in the valuation roll.

In the case of *Dalness (Assessor for Argyllshire)* v. *Stuart*, March 15, 1888, 15 R. 588, the Valuation Committee held that the value of that forest must be estimated at £15 per stag for 17 stags, making in all £255. This value proceeded upon a report submitted to the Committee, of the values put upon deer forests in Inverness, Ross, and Sutherland shires. The Committee adopted this valuation, and although the Judges in this Court were divided in opinion, there was no division between them as to £15 being the proper valuation for a stag. We have now been told that the Valuation Committee in the case of *Dalness* were misled, and that instead of £15 being the rate per stag in the neighbouring counties, there was no case where a forest was let at less than £20 per stag. Now, it is relevant to attack the *Dalness* decision as an authority, that it proceeded upon imperfect information, and if the appellant, the Assessor, had gone rightly about it he might, if he succeeded in his attack, increase the valuation of each stag. But instead of this, what he proposed to do was to read and put in letters which he had received from the Assessors of Inverness, Ross, and Sutherland shires, to which the objection was taken that these letters could not be read, the writers of them being available as witnesses, and the Committee very properly rejected the evidence. Then the whole ground of challenge of the *Dalness* decision rested upon the Assessor's own statement, which the Committee agreed to receive, which certainly was very meagre proof, and it is mentioned that "no other evidence was adduced by the Assessor in support of his statement, and the material facts relied on by him were denied by the appellant."

The Committee rejected the contention of the appellant. He had an opportunity, if his witnesses were not present, of getting the case delayed to another diet, but this he objected to. It was moved on behalf of the Marquess to adjourn the case if further evidence was to be adduced, but this not being agreed to the Valuation Committee could only pronounce judgment on the evidence before them. We were then moved by the counsel for the appellant to remit the case back to the Valuation Committee to hear the evidence that had not been forthcoming at the first meeting. I am clearly of opinion that we ought not to do so. The power of making a remit granted by statute to this Court in order to obtain further information must be limited in its character to such matters as a mistake committed in the statement of the case; the setting forth specific details of matters which are stated quite generally; or to correct a judgment of the Committee refusing to allow competent or admitting incompetent proof, and matters of a similar character. But it was never intended that when the remit is asked for the purpose of beginning to make out a case *ab ovo*, and to lead the evidence which could have been properly led before, that a similar indulgence should be allowed. In all probability this case will come up again next year if the information which the Assessor says he has got is in his possession.

Lord Trayner—I take quite the same view. The appellant should have been ready with his proof before the Committee to show that the decision in the *Dalness* case had proceeded upon information which was erroneous. He now wants a remit to enable him to make a better case than he presented to the Committee. I think that is not one of the purposes for which we are authorised by the statute to send a case back to the Committee.

The Court sustained the valuation.

Counsel for the Appellant—Low. Agent—Party.

Counsel for the Respondent—Asher—Crole. Agent—Davidson & Syme, W.S.

Thursday, January 31.

(Before Lord Fraser and Lord Trayner.)

MARTIN *v.* ASSESSOR OF THE BURGH OF LEITH.

Valuation Roll—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Consideration other than Rent—Provision to Erect Wooden Building Removable at End of Lease.*

A plot of ground was let to a circus proprietor for a period of five years at a rent of £115 per annum. The tenant was taken bound within two months of his entry to erect a circus upon the ground. It was further provided that the tenant should be entitled to remove his buildings at the termination of the lease. *Held* that the provision in the lease for the erection of a circus, was not a consideration other than the rent, which must accordingly be taken to be the yearly value of the land.

At the Valuation Court for the burgh of Leith, held on the 11th day of September 1888 to dispose of appeals against the valuations by the Assessor of the burgh for the year commencing at Whitsunday 1888, under the Valuation of Lands (Scotland) Acts, an appeal was made by William Martin, No. 5 Tennant Street, Leith, factor for and on behalf of George Stewart of Thornhill, Lasswade, against the following entry in the valuation roll:—

Nature of Subjects.	Situation.	Proprietor.	Occupier or Tenant.	Value.
Circus.	G. Junction Street.	G. Stewart, Lasswade.	A. E. Cooke.	£300.

The appellant objected to the said entry, and craved that it be altered to the extent and effect of describing the subjects as ground and not a circus, and of stating the value thereof at £115. Or otherwise, if the basis adopted by the Assessor were sustained, that the value be altered and stated at £215; and that on the grounds that the appellant was proprietor of the ground alone, and not of the circus erected thereon, and that under the lease produced the only rent or consideration received by the said George Stewart for said ground is £115. And if the basis of valuation adopted by the Assessor were sustained the value of the erections had been over-estimated by him, or the percentage on the cost overstated.

The parties were agreed as to the facts which were stated to be as follows, viz.—That the missive offer, dated 12th October 1887, quoted below, with the acceptance thereof, constituted the contract of lease between the parties, and

contained the whole stipulations, and that buildings had been erected by the tenant on the ground in terms of the lease.

It was pleaded for the appellant on the first ground of appeal—"(1) That the lease produced being a *bona fide* lease, and the rent payable thereunder conditioned as the fair annual value of the subjects thereby let, such rent must in terms of the statute be deemed and taken to be the yearly rent or value thereof. (2) That the stipulations contained in the lease were only matter of regulation as to the use of the property, and did not amount to *grassum* or consideration other than rent. (3) That in any event the lease being for less than twenty-one years, and the erections put on the ground by the tenant being of a temporary nature, and removable by the tenant, were not of the nature of heritage within the meaning of the Valuation Act, and that the value of these erections consequently fell to be deducted from the valuation on the roll; or otherwise, that the appellant should, as the fact was, be entered as proprietor of the ground only, and the tenant under the lease as proprietor of the buildings or erections."

The Assessor, however, maintained—(1) That under the lease the ground referred to therein was not let as a piece of ground pure and simple to be occupied as a yard, but was let on the condition and under an obligation by the tenant to erect and complete a substantial wooden circus building, in terms of certain plans submitted by the tenant to and approved of by the landlord, and that within two months from the date of entry; (2) that the obligation upon the tenant to build the circus was as much a consideration and condition of granting the lease as the promise of payment of the money rent; (3) that the circus having been erected, the nature of the subject was entirely changed, and the lands and heritages at Great Junction Street, which fell to be entered in the valuation roll, were not a mere piece of ground, but a house or building known as a circus, and must be valued as such accordingly.

The Assessor referred to the case of *Arnott* v. *The North British Railway*, 9th February 1884, 11 R. 538.

The Magistrates and Council adopted the Assessor's view, that the subjects should not be valued at the mere ground rent of £115, but that the building also should be valued, and fixed the value at the sum of £215, as craved by the appellant in the alternative branch of this appeal.

The agent for the appellant expressed his dissatisfaction with the decision, in respect that it did not value the subject as craved in the first alternative of his appeal, and took a case from which the foregoing narrative is taken.

The missive offer addressed by the proprietor's agent to the tenant's agent contained, *inter alia*, the following conditions:—

"1. The rent to be £115 sterling per annum, payable half-yearly in advance, at the usual terms, and in equal portions, and you will personally guarantee payment of the first half-year's rent at Martinmas first.

"2. The lease to be for five years from Martinmas first 1887, but after or on the expiry of the first two years thereof, the proprietor of the ground to have the right to resume possession of the ground for building purposes upon giving twelve months' notice in writing to the tenant.

"3. Mr Cooke shall be bound, within two months from the date of his entry, to erect and complete a substantial wooden circus building in terms of the plans which he has submitted to me, and which I approve of, and the said building to be completed to my reasonable satisfaction.

"6. Mr Cooke shall be entitled to remove his buildings at the natural or earlier termination of the lease, and shall be bound to leave the site clear and free from all rubbish or debris, and fenced in as at present towards the public street and east lane."

At advising—

Lord Fraser—This case presents a question for decision which comes up at every sittings of this Appeal Court. The 6th section of the Valuation Act enacts that where the lands to be valued "are *bona fide* let for a yearly rent, conditioned as the fair annual value thereof without *grassum* or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act." The clause for construction is "consideration other than the rent." It has presented itself in a variety of forms, as is illustrated by many decisions since the statute was passed. I adhere to all that I have said in the case of *The Trustees of the Dundee Harbour, &c.* v. *Assessor for Dundee*, March 19, 1886, 13 R. 831, viz., that the consideration must be valuable, and not a mere matter of regulation as to how a tenant shall use the property; that the stipulation in favour of the landlord shall not be such as the common law implies apart from the conditions in the lease; and that the tenant shall be bound to do something which redounds to the advantage of the landlord.

The present case presents a point of difference from all the cases which have hitherto been decided. It is stipulated by the lease that the tenant "shall be bound within two months from the date of his entry to erect and complete a substantial wooden circus building in terms of the plans which he has submitted to me, and which I approve of, and the said building to be completed to my reasonable satisfaction." Now, if the lease had gone on further to stipulate that the building so to be erected should belong to the landlord at the termination of the lease, there would clearly have been a consideration other than the rent of £115, and that rent in consequence could not have been taken as the annual value of the subjects. But the contrary has been stipulated, for it is agreed that the tenant "shall be entitled to remove his buildings at the natural or earlier termination of the lease, and shall be bound to leave the site clear and free from all rubbish or debris, and fenced in as at present towards the public street and east lane"—that is to say, the tenant has right to leave the circus which he has built, or take it away, at his pleasure; but if he does take it away, he must remove all debris. The landlord thus receives no advantage whatever from the erection of the circus except to this extent, that during the subsistence of the lease it is a security to him to the extent of its value for payment of the rent, and the question then comes to be, whether this security is a consideration other than the rent.

Now let us test this by the ordinary security

of caution. In the present case the landlord does get a cautionary obligation for the tenant, because it is a condition of the lease that the tenant's agent "will personally guarantee payment of the first half-year's rent at Martinmas first." Is this any consideration other than the rent? It clearly is not. It simply is a precaution taken by the landlord that the rent shall be paid, but this is not a consideration other than the rent. It makes the payment more secure, but that is all. Now, is the security afforded by the existence of the wooden circus in anyway different? It appears to me that it is not. I am therefore of opinion that the determination of the Magistrates in this case was wrong, and that the value in the roll should be reduced to £115.

LORD TRAYNER—I agree with the opinion which your Lordship has delivered. The 6th section of the Act requires the assessor (speaking in general terms) to take as the yearly rent or value of a subject actually let, the rent expressed in the lease, but it adds that the rent expressed in the lease shall not be taken to be the yearly rent or value of the subject where the lease confers upon the landlord a *grassum* or consideration other than rent, that being an enhancement of the advantage which the landlord receives.

In this case the landlord gets a rent fixed by the lease, and he gets no advantage or consideration whatever for the land beyond the stipulated rent. It is true that there is an obligation to build a circus within two months, and, as your Lordship pointed out, that may afford a security to the landlord for payment of his rent beyond what he would have had if the circus had not been built. But that is not a consideration which enhances the value of the subject to the landlord. Then, tested by the case of a cautionary obligation as your Lordship has tested it, the argument of the respondent fails—the existence of the cautioner makes the landlord's chance of recovery greater, but after all, whether he recovers from the cautioner or the debtor, he only gets the amount of rent stipulated. And so, in this case, whatever the landlord's security may be, he gets no more than the rent stipulated in the lease. It seems to me plain therefore that there is here no *grassum* or consideration other than the rent, and that under section 6 of the Act the rent fixed by the lease must be entered in the roll as the yearly rent or value of the subjects.

The Court sustained the appeal.

Counsel for the Appellant—C. K. Mackenzie. Agent—D. H. Murray, S.S.C.

Counsel for the Respondent—Guthrie Smith—Salvesen. Agent—J. C. Irons, S.S.C.

Thursday, January 31.

(Before Lord Fraser and Lord Trayner.)

THE FORTH BRIDGE RAILWAY COMPANY *v.* THE ASSESSOR OF THE BURGH OF QUEENSFERRY.

Valuation Roll—Lands Valuation Act 1854 (17 *and* 18 *Vict. cap.* 91), *secs.* 3 *and* 21—*The Forth Bridge Railway Act* 1882 (45 *and* 46 *Vict. cap.* 114), *sec.* 16—*Land forming Part of Undertaking.*

By sec. 16 of the Forth Bridge Railway Act 1882 it is provided that land acquired under that Act shall, for all "purposes whatsoever, be the undertaking, railway works, and property of the company."

By sec. 3 of the Lands Valuation Act it is provided that county and burgh assessors shall value the lands within the county or burgh other than the lands and heritages of railway and canal companies, the assessment of which is provided for by sec. 21, which provides that the Assessor of Railways and Canals shall value *in cumulo* "all lands and heritages in Scotland belonging to or leased by each railway and canal company and forming part of its undertaking."

A plot of ground lying within a burgh which had been acquired by the Forth Bridge Railway Company under their Act of 1882, and which was occupied by a portion of railway in course of construction, was entered in the valuation roll by the assessor of the burgh at its agricultural value.

On an appeal, *held* that the land in question formed part of the undertaking of the company, and fell to be valued as such by the Assessor of Railways and Canals, and ought not to have been put upon the roll by the assessor of the burgh.

At the Lands Valuation Court of the royal burgh of Queensferry, held by the Magistrates and Town Council within the Council Chambers there upon Monday the 10th day of September 1888 for the purpose of hearing and disposing of appeals against valuations made by the Assessor of the said burgh for the year from Whitsunday 1888 to Whitsunday 1889, the Forth Bridge Railway Company appealed against the following entry in the valuation roll, the ground valued in that entry being situated in the parish of Dalmeny and county of Linlithgow, but within the parliamentary boundaries of the burgh of Queensferry, and so included in the area falling to be valued by the Burgh Assessor, who is an officer of Inland Revenue:—

No.	Description.	Situation.	Proprietor.	Occupant.	Yearly Rent or Value.
404	Ground (acre).	Queensferry.	Forth Bridge Railway Company, per G. B. Wieland, Secretary, 4 Princes St., Edinburgh.	Proprietors.	£4

The appellants stated that the ground in question extended to 1 acre, and formed part of the lands of Bankhead, near South Queensferry, acquired by the railway company from the Earl

of Rosebery, and which land was required for the purposes and under the powers of the Forth Bridge Railway Act 1882. By section 16 of that Act it is provided that "subject to the provisions of this Act, the lands and property from time to time acquired by the company under this Act, and the railway and works by this Act authorised, shall, for all purposes of tolls, rates, and charges, and for all other purposes whatsoever, be the undertaking, railway works, and property of the company, as if the company had by the Act of 1873 been authorised to acquire, make, and maintain the same."

By section 3 of the Lands Valuation Act (17 and 18 Vict. cap. 91) it is provided that it shall be the duty of the various county and burgh assessors annually to ascertain and assess the real rent or value of the several lands or heritages within the county or burgh respectively, other than the lands and heritages of railway and canal companies which are thereinafter specially provided for; and by sec. 20 of that Act power is given to appoint a fit and proper person to be Assessor for Railways and Canals.

By sec. 21 of the said last-mentioned Act it is provided, *inter alia*, that "the Assessor of Railways and Canals under this Act shall, on or before the 15th day of August of every subsequent year, inquire into and fix *in cumulo* the yearly rent or value, in terms of this Act, of all lands and heritages in Scotland belonging to or leased by each railway and canal company, and forming part of its undertaking." The portion of land in question formed part of the undertaking of the Forth Bridge Railway Company, whose railway thereon had been for some time in course of construction, and was now approaching completion, the area in dispute being wholly occupied by the railway and works.

The land in question did not fall to be included in the local valuation roll of the burgh of South Queensferry.

It was further contended, however, that even supposing the land was property entered in the local valuation roll, it had no value in the sense of the Valuation Act of 1854, section 6 of which provides, *inter alia*—"In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year." The land in question being wholly occupied by a portion of an unfinished railway, having as yet no connection with any other portion of railway by means of which it could be in any way whatever utilised, is incapable of being let or yielding rent. If the land is to appear in the valuation roll at all it should be entered at *nil*.

The Assessor admitted that the land in question was acquired by the appellants the Forth Bridge Railway Company, who were the occupiers as well as the owners of it. He stated that prior to its being acquired by the company it had formed part of the arable farm of Bankhead, and was then valued at £4, and he maintained that its value had not diminished, but rather increased, on account of its convenient proximity to the Forth Bridge. He denied that the land in question was "wholly occupied by the railway and works," and stated that in point of fact about one-fourth of it was used in the construction of a railway embankment, and the remaining three-fourths or thereby were littered over with loose material which could be readily removed. He also denied that at present at any rate it formed a part of the railway company's undertaking, as was contended by the appellants, it being only as stated by them, "a portion of an unfinished railway, having as yet no connection with any other portion of railway by means of which it could be in any way whatever utilised," and he accordingly maintained that in terms of the Lands Valuation Act (17 and 18 Vict. cap. 91), sec. 21, the land in question was not and could not competently be valued by the Assessor of Railways and Canals, as was contended by the appellants, and that in the discharge of his duty, he was bound in terms of sec. 3 of the said Act, to enter it in the valuation roll for the burgh of South Queensferry, within the Parliamentary boundaries of which burgh it is situated. On this point he referred to the judgment of Lord Lee in *Forth Bridge Railway Company* v. *Assessor of the County of Linlithgow*, February 10, 1888, 11 R. 595. In conclusion, he denied that the land, if entered in the valuation roll at all, should be entered at *nil*, as was suggested by the appellants, £4 being its fair undiminished annual value.

At the hearing neither party craved nor adduced any proof, and the Court considered that there was sufficient in the statements of parties to enable it to dispose of the appeal.

The Magistrates dismissed the appeal.

The appellants being dissatisfied with this decision took a case, from which the foregoing narrative is taken.

The following authorities were cited at the hearing of the appeal — *Edinburgh, Perth, and Dundee Railway* v. *Arthur*, December 22, 1854, 17 D. 252; *North British Railway Company* v. *Greig*, March 20, 1866, 4 Macph. 645; *Dundee and Arbroath Joint Line Committee, Appellants*, December 21, 1883, 11 R. 396.

At advising—

Lord Trayner—The Assessor of the burgh of Queensferry has placed the land in question on the valuation roll of the burgh, on the ground that it "was not and could not competently be valued by" the Railway Assessor, and that he was bound, in the discharge of his duty, under section 3 of the Valuation Act, to enter it on the valuation roll of the burgh within which it is situated. I think the Assessor has taken an erroneous view of his duty under the section he refers to. By that section he is required to ascertain and assess the yearly rent or value of the several lands and heritages within the burgh "other than the lands and heritages of railway and canal companies, which are hereinafter specially provided for." He is not required to see whether the lands and heritages of railway companies have been valued or placed on any valuation roll; with that he has no concern. His only duty in reference to such properties is to see that they are not entered in the burgh roll. But before he excludes them from the burgh roll, he must be satisfied that the lands and heritages so excluded are (as described in section 20 of the Valuation Act) "belonging to or leased by railway or canal companies, and forming part of the undertakings of such companies." If the lands

are of this description the Burgh Assessor has no duty with regard to their valuation whatever.

The question now to be determined is, whether the land concerning which this appeal has been brought falls within the description of section 20? and I am of opinion that it does. That land was acquired by the appellants for the purposes of their railway under the powers conferred by their Act of 1882, which provides that land acquired under that Act shall, for all "purposes whatsoever, be the undertaking, railway works, and property of the company." But in addition to that, it is the fact, admitted by the Assessor, that part of the land in question has been already applied to the purposes of the railway, and been embodied in the appellants' undertaking by being used in the construction of a railway embankment. The remainder of it is covered with the debris and loose material which necessarily accompany the formation of such an embankment. The whole ground therefore, in my opinion, is at present occupied by the railway works, and forms part of the appellants' undertaking. If it is the view of the Assessor that nothing can form part of an undertaking until the undertaking is completed, and in such a state that it may competently be valued, that is a view in which I cannot concur.

Lord Fraser concurred.

The Court were of opinion that the determination of the Magistrates and Town Council was wrong.

Counsel for the Appellants—Asher—Comrie Thomson. Agents—Millar, Robson, & Innes, W.S.

Counsel for the Respondent—Wilson. Agent—Party.

COURT OF SESSION.

Monday, March 25.

OUTER HOUSE.

[Lord Wellwood.

GARDNER *v.* SCOTT'S TRUSTEES AND ANOTHER.

Trust for Behoof of Creditors—Powers of Trustee—Disposition ex facie *Absolute—Sale by Consent—Title.*

A trust-deed for behoof of creditors granted in 1879 conferred power upon the trustee to sell the estates thereby conveyed, but provided that the power of sale "may be exercised by him with the advice and concurrence of" a committee of creditors to be appointed by the trust-deed. No committee of creditors was appointed. Prior to the date of the trust-deed the granter had conveyed a property to a creditor *ex facie* absolutely, but really in security of advances. In 1888 the successors of this creditor having obtained the consent of the trustee agreed to sell the property, and in implement of their agreement offered the purchaser a disposition by them with the consent of the trustee. The purchaser refused to accept a disposition without the consent of the granter of the trust-deed.

Held that the disposition offered by the sellers was valid, and that the purchaser was bound to accept it.

The late James Scott, merchant in Glasgow, acquired a property from Thomas Lucas Paterson of Dowanhill, merchant in Glasgow, by *ex facie* absolute disposition, dated 31st December 1878, and recorded in the General Register of Sasines 2nd January 1879. By back-letter, unrecorded, dated 13th January 1879, Mr Scott declared that although the disposition by Mr Paterson in his favour was *ex facie* absolute, it was in reality granted in security for repayment of advances. Mr Paterson's affairs subsequently became embarrassed, and on 31st December 1879 he granted a trust-disposition in favour of William Mackinnon, chartered accountant, Glasgow, as trustee for behoof of his creditors, whereby he conveyed to him his estates. The trust-deed also granted to Mackinnon power to sell the estates, and provided that the power of sale conferred on the trustee "may be exercised by him with the advice and concurrence of" a committee of creditors therein referred to. The original appointment of this committee lay with the truster, the power of the creditors being limited to appointing persons in room of the parties originally appointed. No committee of creditors was ever appointed, the trust-deed being blank as to this committee.

By missive letters dated the 20th January 1888 Messrs Nicolson, MacWilliam, & Company, writers, Glasgow, acting on behalf of John Gardner of Muirpark, Partick, near Glasgow, offered a sum of £2500 for this property, over and above feu-duty. By missive letter of the same date Messrs Moncrieff, Barr, Paterson, & Company, writers, Glasgow, on behalf of Scott's trustees, and with the consent and concurrence of Mackinnon, accepted this offer.

Thereafter Scott's trustees tendered to Gardner a disposition of the property granted by them, with consent of Mackinnon, but he refused to accept a disposition unless granted with the consent of Paterson as well as of Mackinnon, and brought this action against Scott's trustees and Mackinnon, concluding for declarator that they were bound to implement the contract contained in the missives by delivering to him a valid disposition of the property, for decree ordaining them to do so, and alternatively for damages.

The Lord Ordinary (Wellwood) on 25th March 1889 pronounced the following interlocutor:—"Finds that the disposition tendered by the defenders Scott's trustees is valid and sufficient; to that effect sustains the second plea-in-law for the defenders, and dismisses the action: Finds no expenses due to or by either party, and decerns.

"*Opinion.*—The pursuer the purchaser maintains that the disposition offered by the defenders Scott's trustees is insufficient in respect that it bears to be granted with the consent of Mackinnon, Paterson's trustee, alone, and he refuses to accept a disposition unless Paterson's consent is also obtained.

"Now, the formal title to the lands is and has

been since 1879 in James Scott, and subsequently in the defenders. The back-letter granted to Paterson has never been recorded. Therefore, so far as the form of the title is concerned, Paterson's assistance and concurrence is not required. The only question is, whether the defender Mackinnon, Paterson's trustee, has power to bind Paterson to the effect practically of renouncing the personal right evidenced by the back-letter to demand a reconveyance of the lands on payment of the debt due to Scott's trustees.

"The main ground on which it is maintained that Mackinnon has not full power to assent to this sale is that although he is given full powers of sale under the trust-disposition from Paterson, he can, it is said, only exercise those powers with the advice and concurrence of a committee of creditors. The defenders' answer to this is that no committee of creditors was ever appointed. Now, the appointment of the original committee lay with the truster, the power of the creditors in this matter being confined to appointing persons in room of the parties originally appointed. It appears to me that by failing to appoint a committee, and by allowing the trust to be acted on for ten years, Paterson is barred from objecting to the actings of his trustee in this matter. Under the trust-deed the advice and concurrence of the committee of creditors would seem to be required by the trustee in the exercise of all or any of the powers conferred upon him, and therefore the trust has been from the first incomplete and invalid if the view of the trustee's powers presented by the pursuer is correct.

"I am therefore of opinion that the pursuer is in safety, and is bound to accept the disposition offered, although I think he was justified in presenting the point for the decision of the Court."

Counsel for the Pursuer—Ure. Agent—John Pairman, S.S.C.

Counsel for the Defenders—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, May 28.

SECOND DIVISION.

WILLIAMS *v.* WATT & WILSON.

Process—Appeal—Competency—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 40—*Act of Sederunt, 11th July* 1828, *sec.* 5.

Held (following the cases of *Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386, and *Duff* v. *Steuart*, October 20, 1881, 9 R. 17) that an appeal to the Court of Session for jury trial, which was not taken within fifteen days of the interlocutor allowing proof, was incompetent.

Question—Whether to prevent hardship the Court could have admitted the appeal notwithstanding the terms of the Act of Sederunt.

Case of *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, *commented upon and distinguished.*

Mrs Margaret Cuthbertson or Williams, widow, 38 Dempster Street, Greenock, brought a petition in the Sheriff Court there against Messrs Watt & Wilson, railway contractors, Chapel Street, Greenock, to recover damages for the loss of her son who was killed while in their employment.

On 8th February 1889 the Sheriff-Substitute (NICOLSON) repelled a preliminary plea for the defenders, and ordered a proof, to be taken on 26th February.

The defenders appealed to the Sheriff (PEARSON), who on 5th April dismissed the appeal and remitted the cause to the Sheriff-Substitute of new, to fix a diet of proof.

On 17th April 1889 the Sheriff-Substitute, on the pursuer's motion, assigned the 9th May as a new diet of proof.

On 24th April the pursuer appealed to the Court of Session for jury trial.

When the case came before the Court for the adjustment of issues it was objected for the defenders that the appeal was incompetent as it had not been taken within the fifteen days specified in the Act of Sederunt of 11th July 1828.

The said Act of Sederunt by section 5 provides, "Whereas it is enacted by sec. 40" (of the Judicature Act) "that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, . . . and it is further enacted and declared that if neither party, within fifteen days in the ordinary case, and in causes before the courts of Orkney and Shetland within thirty days, after the date of such interlocutor allowing a proof, shall intimate in the inferior court the passing of a bill of advocation, such proof may immediately thereafter effectually proceed in the inferior court, . . . and if, within these periods respectively, no intimation shall be made of any such bill of advocation the proofs shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented."

Argued for respondent—The appeal was incompetent because it was too late of being taken. The fifteen days must be counted from the date of the interlocutor allowing proof, which in this case was that pronounced by the Sheriff on 5th April—*Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386; *Duff* v. *Steuart*, October 20, 1881, 9 R. 17.

Argued for appellant—Admittedly the appeal was not taken within fifteen days of April 5th, but (1) the date from which the fifteen days were to be reckoned was the 17th April when the diet of proof was fixed, and (2) it was within the discretion of the Court to allow the appeal to proceed. It would be hard to deprive the pursuer of the benefit of a jury trial, and where such a hardship would arise the Court had it in their discretion to dispense with a strict adherence to the rules of an Act of Sederunt, which was intended to guide and not to fetter them—*Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104.

At advising—

Lord Justice-Clerk—In any case under an Act of Sederunt in which omission to comply with its provisions without doing prejudice to anybody would shut out a party from carrying on his case altogether, we always show our sympathy with such party by looking narrowly to see if we must enforce the Act of Sederunt. In a recent case where prints were through inadvertence lodged after the time specified in an Act of Sederunt, and there was no interest in anyone to have them lodged early, we held with difficulty, but after consulting the Judges of the other Division, that we were not bound to enforce the Act of Sederunt. In that case had we sustained the objection to the competency of the appeal the Sheriff-Substitute's judgment would have became final, but here the pursuer does not lose the power of prosecuting her case by the appeal being held incompetent. The only difference will be that she will lose her right to come here and get a jury trial, but she may proceed in the Court in which she raised her action. She will suffer no real prejudice. She may prefer a trial by jury, but she can still proceed, and after trial before the Sheriff-Substitute may appeal to the Sheriff, and eventually to this Court. She will therefore get her case fairly heard and disposed of, and I do not look with any favour on this case as one of hardship.

The Sheriff-Substitute pronounced an interlocutor allowing a proof, which was appealed to the Sheriff, who dismissed the appeal. Thereby the Sheriff-Substitute's interlocutor allowing proof became final, and from that date the pursuer had fifteen days to intimate an appeal to this Court. She did not during the fifteen days lodge such an appeal, but went to the Sheriff-Substitute and asked him to fix a diet for proof. He by interlocutor fixed a day, but that was not an interlocutor disposing of any question between the parties. It was merely an interlocutor as to when the proof should be taken.

I should have held, apart from the authorities, that the date of the interlocutor allowing proof is the date from which the fifteen days must run, because after that it is fixed there is to be a proof, and the mere question of when is of no material interest to the parties. If I had had any hesitation in the matter I could have had none after the cases of *Kinnes* and of *Duff*, which are on all fours with the present one. They have fixed that the fifteen days are to be counted from the date of the interlocutor allowing proof, or from the date of such interlocutor becoming final by an appeal from it being refused. I am therefore for holding the appeal incompetent.

Lord Young—This is an interesting matter, and that must be my excuse for saying what I am about to say. The meaning of this Act of Sederunt has been determined, and we cannot go back upon that. The date from which the fifteen days run is the date of the interlocutor allowing proof, but I am and have always been of opinion that wherever considerations of good sense and of justice require that we should give relief from the terms of an Act of Sederunt, and wherever such relief may be given to one party without hardship to the other we may give it, and that is quite settled by the case of *Boyd, Gilmour & Company*. In that case there was a miscalculation as to the proper date for lodging prints, and if the appeal had been refused as incompetent the Sheriff-Substitute's judgment would have became final in a specimen case brought to try important questions, and which it was intended to take to the House of Lords. To have held in such a case that this Court could not give the relief sought for would have been to hold an Act of Sederunt the most ridiculously powerful of all things, and that rules which we have made for our own guidance bind us even to refrain from doing what we may think good sense and justice require us to do.

I am therefore of opinion that we may give relief here if there are grounds for doing so, but I think that there are no grounds here for it, and that the Act of Sederunt should be enforced except where there are strong grounds for not doing so.

It is a great indulgence to give a pursuer the right to come here for jury trial, to remove a case he has brought in the Sheriff Court, and therefore a limited time is set within which he must avail himself of the privilege or the case will go on in the Court of his own selection. Here the pursuer had an opportunity given to her of appealing for jury trial on the 8th February last, but she allowed the case to go on by her adversary's appeal to the Sheriff, and even when that was disposed of on the 5th April she did not think of removing the cause, but went to the Sheriff-Substitute to get a diet of proof fixed. There is no case here for departing from the rule laid down by the Act of Sederunt, for there are clearly no circumstances to demand or even to warrant it.

Lord Rutherfurd Clark—I think the appeal is incompetent under the Act of Sederunt, and that we are bound to follow the decisions referred to. Into the question whether we could give relief I do not wish to enter. I would only like to say I think it very doubtful if we could.

Lord Lee—I concur with Lord Rutherfurd Clark, and I would only like to add that the case of *Boyd* in which the dispensing power was sustained was different. This is a case of appealing. That was a case of lodging prints.

The Court refused the appeal as incompetent.

Counsel for the Appellant—Younger. Agent—J. Murray Lawson, S.S.C.

Counsel for the Respondent—A. S. D. Thomson. Agent—

Tuesday, May 28.

SECOND DIVISION.

JAMIESON AND OTHERS *v.* LESSLIE'S TRUSTEES.

Succession—Trust—Direction to Divide and to See to the Investment of the Residue.

A testatrix by her settlement directed her trustees to divide the residue of her estate equally between her two daughters, "and to their respective heirs and assignees, but declaring that the provision hereby made . . . is an alimentary provision for their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their husbands, . . . but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions."

Held that the daughters were fiars, and were entitled to have the residue paid over to them upon their own receipts, but, following the case of *Allan* v. *Allan's Trustees*, December 12, 1872, 11 Macph. 216, that the receipts should bear exclusion of the *jus mariti* and right of administration.

Mrs Jane Lesslie, widow of the late James Lesslie, shipowner, North Shields, died at Bonnytoun, Linlithgow, on 9th January 1881, leaving a trust-disposition and settlement, and codicil thereto, whereby she assigned to certain trustees her whole estate.

The third purpose of the settlement was as follows—"I direct my trustees, at the first term of Whitsunday or Martinmas six months after my death, or as soon after such term as my trustees shall be able to realise my estate, to divide the whole rest and residue of my said estates and effects equally between my two daughters Mrs Agnes Lesslie or Jamieson, wife of William Henry Jamieson, farmer, residing at Mayshade aforesaid, and Mrs Jane Lesslie or Dawson, wife of Adam Dawson, residing at Bonnytoun, Linlithgow, share and share alike, and to their respective heirs and assignees; but declaring that the provision hereby made to my said two daughters is an alimentary provision for their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their present husbands, or any future husbands they may marry, nor shall the same be assignable by them or by their said husbands, nor be liable to the deeds or subject to the legal diligence of the creditors, either of themselves or of their said husbands, for payment or in security of debts contracted by them; but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions, *with power to my trustees, notwithstanding what is hereinbefore written, and provided they be required so to do by my said daughters, or either of them, to pay to my said daughters, or either of them, the whole or such part of their respective provisions foresaid as they may request so to be paid to them, leaving my said daughters themselves to see to the application, use, or investment thereof, and without my trustees incurring any responsibility therefor;* and I declare that the receipts and all other writings with reference to the said provision, or to the interest or produce thereof, to be granted by my said daughters, shall be granted by themselves alone, and shall be good, valid, and sufficient to the receivers thereof, though the consent of their husband be not given thereto." By codicil Jane Lesslie revoked that part of the third purpose of the settlement which is printed above in italics.

The trust-estate was realised by the trustees, and the primary purposes of the trust implemented. Mrs Agnes Lesslie or Jamieson and Mrs Jane Lesslie or Dawson, the residuary legatees under the settlement, both had children, who were all in minority.

Questions having arisen as to the rights and interest of the residuary legatees in the residue under the third purpose of the trust-disposition and codicil, a special case was presented by (1) Mrs Jamieson and Mrs Dawson, and (2) the trustees of the late Mrs Lesslie, submitting the following questions of law—"(1) Whether the fee of the residue of the said estate is vested in the said Mrs Agnes Lesslie or Jamieson and Mrs Jane Lesslie or Dawson? (2) Whether they are entitled to have the capital of the said residue conveyed and made over to them, or any, and if so, what part thereof? Or (3) whether the trustees are bound to retain the capital invested in their own names during the lifetime of the said legatees?"

Argued for the first parties—A right in the fee of the residue vested in them as at the date of the death of the testatrix, and they were now entitled to have the same conveyed and made over to them in such a way as to give effect to the declaration and condition of its being for separate use and behoof. They were willing to grant a receipt to the trustees in similar terms to that suggested by the Court in the case of *Allan's Trustees* v. *Allan and Others*, December 12, 1872, 11 Macph. 216, which ruled the present case.

Argued for the second parties—They were willing to pay over the residue to the first parties, who probably had the fee, if they could do so with safety, but there was here no direction to pay as in *Allan's* case, and the conditional power "to pay" had been cancelled by the codicil. In order "to divide" and "to see to the investment" of the residue, so as to protect it for the first parties as the testatrix desired it to be protected, it was necessary to keep up the trust during their lifetime, and only pay to "their respective heirs and assignees"—*Balderston* v. *Fulton*, January 23, 1857, 19 D. 293; *Lady Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173; *Whyte's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786.

At advising—

LORD JUSTICE-CLERK—The testatrix in this case, Mrs Jane Lesslie, by her will left the residue of her estate to her two daughters by a destination in these terms—"I direct my trustees, at the first term of Whitsunday or Martinmas six months after my death, or as soon after such term as my trustees shall be able to realise my estate, to divide the whole rest and residue of my said estates and effects equally between my two

daughters Mrs Agnes Lesslie or Jamieson, wife of William Henry Jamieson, farmer, residing at Mayshade aforesaid, and Mrs Jane Lesslie or Dawson, wife of Adam Dawson,. residing at Bonnytoun, Linlithgow, share and share alike, and to their respective heirs and assignees." But she qualified these general words by a clause of declaration to the effect that what she thus gave to her daughters was an alimentary provision, and that the *jus mariti* and right of administration of their husbands were to be excluded, and that they should not be liable for the deeds or subject to the legal diligence of their own or their husband's creditors, and the trustees were directed "to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions" so as to carry out these intentions of the testatrix. I think there can be no doubt that by the first provision which I have quoted the daughters of the testatrix became entitled each to one-half of the fee of the estate. The trustees are directed to divide it between them, and although there is no direction in words to pay their halves over to them, there is no other way in which a division between them of the fee could be made, and unless the deed has that meaning there is no disposal of the estate of Mrs Jane Lesslie by it. But while it is thus certain that the testatrix disposed of her estate in favour of her daughters she had evidently a desire that it should as much as possible be protected for them, and accordingly she gave the special direction which I have quoted as to the investment of the funds. I am unable to see how that direction can be carried out. To invest the funds in such a way as to make them alimentary only would be practically the creation of a new trust, and the restriction of the rights of the daughters to a liferent. For unless they were restricted to a liferent, it would be impossible to protect the property given to them by the will from the claims of creditors or the deeds of the ladies themselves. But there is no power to create a new trust of this description, and even if it could be created, power could not be given to it to turn the gift to these ladies into a mere alimentary provision, protected from attack for the beneficiaries' liabilities and from the acts of the ladies themselves.

I am therefore of opinion that the questions put to us must be answered, the first and second in the affirmative generally, and the third in the negative. As regards the testatrix's exclusion of the husbands' *jus mariti* and right of administration, it appears to me that the precedent set by the decision in the case of *Allan* should be followed, and that the receipts for the shares of the ladies who take the fee should bear that the *jus mariti* and right of administration of their husbands are excluded.

Lord Young concurred.

Lord Lee—I was anxious to look into the case of *Balderston* v. *Fulton* and the other cases of that class before coming to a decision, but having now had the opportunity of examining them I have no doubt that the opinion expressed by your Lordship is the correct one.

There is no question now about the fee. The only question is, whether payment is to be postponed, whether in fact the trust is to be kept up.

The peculiarity of this case is that there is no ulterior destination beyond the two ladies. There is therefore nothing to be protected by keeping up the trust. The direction is that the money is to be divided between the daughters of the testatrix. In these circumstances *Balderston* v. *Fulton* cannot be founded upon as an authority for keeping up the trust. The cases of *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 639, and *Rennie* v. *Ritchie*, April 25, 1845, 4 Bell's App. 221, are quite distinct and distinguishable, because they are cases of annuity. I therefore concur with your Lordship's opinion.

Lord Rutherfurd Clark was absent when the case was heard.

The Court answered the first and second questions in the affirmative and the second in the negative.

Counsel for the First Parties—Strachan. Agent—J. Logan Mack, S.S.C.

Counsel for the Second Parties (Trustees)—Adam. Agents—Mack & Grant, S.S.C.

Wednesday, May 29.

SECOND DIVISION.

RAMSAY *v.* ROBIN, M'MILLAN, & COMPANY.

Reparation—Master and Servant—Fault—Known Risk—New Trial.

An employer who supplies his men with the usual appliances necessary for their work will not be liable in damages if in a place not belonging to the employer where these appliances are unsuitable the workmen adopt a recognised method of manual labour without making any complaint or requesting other appliances.

A cellarman was injured while storing barrels along with three other skilled workmen in a cellar, which was too small for the use of "skeggs," and in which consequently the barrels were tiered by hand labour. The cellar did not belong to the employers. In an action of damages against his employers, on the ground that they had not provided the necessary appliances, it appeared that hand labour was a recognised method of tiering where skeggs could not be used, although a block-and-tackle was sometimes used, and that the pursuer had never complained or asked for further appliances. The pursuer obtained a verdict. On a motion for a new trial, the Court set aside the verdict, *holding* that there was no evidence of fault.

Simon Ramsay, 333 High Street, Edinburgh, brought an action against Messrs Robin, M'Millan, & Company, brewers, Summerhall, Causewayside, Edinburgh, for £800 as damages for an accident sustained by him upon 28th July 1886 while in their employment as a cellarman.

The pursuer averred that "the accident occurred through the fault of the defenders. The cellar in question was of very small dimensions, and there

was insufficient space for the pursuer and those he was assisting to store the barrels to move safely in lifting the barrels at the time of the accident in the manner the defenders had ordered and directed the work to be done. The floor of the cellar was uneven. . . . There was no window in the cellar. The only light in it was from a small gas jet. . . . It was the duty of the defenders to have had more gaslight in the cellar, as well as to have erected a small crane or hoist in it. . . . They also culpably and recklessly failed and neglected to supply either a hoist or skeggs or ropes or any other necessary appliances for having the work of storing the barrels performed safely at the time of the accident to the pursuer."

The case was tried before LORD M'LAREN and a jury upon 12th July 1888.

From the evidence it appeared that the defenders were under contract to supply the Fish Bar at the Edinburgh International Exhibition during the summer of 1886 with beer. The cellar in which the barrels were stored was small, with a somewhat uneven floor, and was lighted only by the door and a single gas jet. The barrels were tiered by four cellarmen, who hoisted them to their places upon their shoulders, as the premises were too small and confined for the use of "skeggs"—the slides usually employed for altering the position of barrels—with which the defenders always supplied their men. There was no block-and-tackle in the cellar, but neither the pursuer nor any of his fellow-workmen had ever complained to the defenders or requested other appliances. The cellar did not belong to the defenders, but they had put in an extra roof to screen the beer from the heat of the sun. On 28th July 1886, while the pursuer and three other men were hoisting a barrel on to the second tier, the barrel canted over and crushed the pursuer's head between it and the next barrel, inflicting upon him serious injury.

The jury returned a verdict for the pursuer, on the ground that the defenders were in fault in not supplying mechanical appliances, and assessed the damages at £200.

The defenders moved for a new trial, and argued that the case should never have been allowed to go to a jury. No fault was specified upon record or by the jury for which the defenders were responsible. All necessary appliances had been supplied. Tiering by manual labour was a well-known and recognised method where skeggs could not be used. If the premises had belonged to the defenders they might have erected a block-and-tackle though that was unnecessary. The pursuer and the other three men were skilled workmen, knew their work, had undertaken it, and had never made any complaints or requested further assistance. The pursuer had run a well-known risk, and had suffered by a pure accident.

The pursuer showed cause, and argued—Tiering without mechanical appliances was very dangerous. Other minor accidents had happened in this cellar. The defenders should have had a block-and-tackle erected. The cellar was, if not theirs, entirely under their control. They had put on a roof which was a more extensive alteration. They should have had the cellar better lighted and the floor improved—*Fraser* v. *Fraser*, June 6, 1882, 9 R. 896; *Grant* v. *Drysdale*, July 12, 1883, 10 R. 1159; *Murdoch* v. *Mackinnon*, March 7, 1885, 12 R. 810.

At advising—

LORD JUSTICE-CLERK—The operation performed by the injured man and those with him was the ordinary one of delivering hogsheads of beer for their master to a customer. It was not the case of storing barrels within the works of the employer, where there might have been a jury question whether he had supplied his workmen with sufficient appliances. In sending out beer to be delivered it is sufficient for an employer if he send with the beer men accustomed to the work, and such appliances as are usually employed in putting beer into cellars. Here the lorry was sent out in the usual way with experienced men and with the usual "skeggs." When these workmen arrive at the premises they find that the beer cannot be stored by means of the "skeggs" because the premises are not large enough, and I may say that up to this point no fault is alleged on the part of the master. At this point, if the experienced workmen thought that without further appliances they could not place the beer in the cellar with safety, it was their clear duty to return to their master, tell him the position of matters, and ask him either to supply other appliances, or to come and see for himself what ought to be done. Instead of doing that they adopt a mode quite common although more risky, namely, the four men use their own strength to hoist the barrels of beer up on the top of each other. It is clearly proved that such a mode of storing beer-barrels is perfectly recognised, and is quite proper, although it is not the best method. In any case, the men chose that mode; they took the risk, and in raising the barrels one of their number—the pursuer—unfortunately met with the injury for which he wishes to receive damages.

I fail to see anything to justify the jury in finding that the accident was due to the fault of the defenders. I understand the jury stated to the Judge who tried the case that they were of opinion that the employer had not provided sufficient appliances; their view is however entirely inconsistent with the evidence. I do not see wherein the alleged fault lay. It has been suggested now for the first time that the shed was under the control of and in fact belonged to the defenders. If it had been so it would have made the case entirely different, for if the premises had been their own the brewers could have put up what appliances they pleased, and it would have been a proper jury question whether they had put up all the appliances necessary for safety to their workmen. It was said that into the cellar which was not their own they should have inserted a beam so as to allow of a block and tackle being used. If that argument were sound it would come to this that in every case where customers' premises do not admit of the use of skeggs such a beam is to be erected, which is manifestly absurd.

I think therefore the verdict is bad and should be set aside.

LORD YOUNG—I am of the same opinion, and I am further of opinion that no good case has been stated on record. I would like also to add that my opinion is totally irrespective of the facts as

to the contract under which this beer was delivered. I do not think its terms can possibly affect this case. I suppose the pursuer and the other men never dreamt of inquiring as to the nature of that contract, and I further think that any such inquiry on their part would have been ridiculous.

The case is simply this. The pursuer was a cellarman. He had been in the employment of these brewers, storing beer for them in cellars, since February 1875. It did not appear how long before that he had been similarly employed, but even during the time he has been with the defenders he must have had ample experience for learning the proper modes and the risks incident to his employment. The defenders had to send beer to this place for the convenience of the Exhibition. However dark it may have been, it is not unlawful to put beer into a dark cellar. It could be seen by the cellarman, and the defenders who put the beer in were not to do it with their own hands but by perfectly qualified men. They had put beer into this cellar for months. What was the fault? That there was no window, no gas, and no machinery in the cellar, and that it was too small for the use of skeggs? I am of opinion there was no *culpa* at common law at all, and my opinion is not altered by the judgment of twelve jurymen who thought there was fault. I do not think it was a jury question at all. If it was a jury question it was fully laid before them, and we have no case for interfering with their judgment. We are interfering with the verdict because it was not a question for a jury at all.

I desire to say further that I distinguish cases of this sort altogether from cases where you have got machinery, or where workmen have to work underground. There the Legislature has interfered on behalf of human safety, and even the common law has interfered in protection of workmen, because in such cases they cannot judge for themselves. But where wine is being stored in a cellar, or boxes are being hoisted on to a cab, I incur no liability for accidents if I employ experienced men to do the work, who undertake it with its risks.

Lord Rutherfurd Clark concurred.

Lord Lee—If the cellar had been hired by the defenders it would have been a jury question whether there was or was not failure on their part to provide proper appliances, but as the cellar did not belong to the defenders, I agree with your Lordships that the verdict cannot stand.

Lord M'Laren—I would just like to say a word upon the question of whether there is here any issuable matter. Though that question is not strictly before the Court and was not argued before us, it has been made matter of observation from the bench by one of your Lordships. As it happened, when I allowed an issue I was quite ignorant, both theoretically and practically, as to the customary manner of storing beer, and it seemed to me that lifting barrels of beer might be a dangerous method, and that it was a jury question whether the defenders had or had not failed to furnish the proper appliances, and if they had, whether they were not responsible for the accident. I therefore do not concur in Lord Young's observation to the effect that the case was not one for a jury, and further, I have a strong impression that if I had held that there was no issuable matter, this Division would probably have sent the case back to me for proof. Upon the case as it now comes before us, I may say I think it would have been a question for a jury if the premises had belonged to the defenders. In the general case, where operations are performed in the employer's own premises, he must provide the customary appliances for the safety of his workmen. If the operations are performed in premises which do not belong to him, I think it is a question of circumstances whether he shall be held bound to inform himself personally on the subject. For example, if it had been the case of building a bridge or of fitting up engines in a vessel, it might not have been sufficient for the employer to stay at home and to plead that he had sent out proper workmen and the usual tools. But these cases are entirely different from the present, where we have delivery of goods with the ordinary appliances. In such a case it was the duty of the men to go and complain to their employer if they wanted more help. Wherever skeggs can be used they ought to be used. Where they cannot be used barrels are hoisted on the shoulders of four men, or a block-and-tackle may be used, but the latter method is exceptional and not a usual or necessary one.

It therefore appears to me that upon the weight of the evidence that the jury were wrong in their view that other mechanical appliances ought to have been provided, and I think we must order a new trial.

The Court set aside the verdict and granted a new trial.

Counsel for the Pursuers—Rhind—Salvesen. Agent—D. Howard Smith, Solicitor.

Counsel for the Defenders—Jameson—Shaw. Agents—Watt & Anderson, S.S.C.

Thursday, May 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CROUCHER *v* INGLIS.

Process—Issue—Interlocutor Approving and Fixing Day of Trial—Motion to Vary Issue—Court of Session Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 40—*Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28.

An interlocutor approved of issues as adjusted, and fixed a day for the trial of the cause. *Held* that the defender was not thereby precluded from moving the Court to vary the terms of the said issues, and an objection that the motion was made too late *repelled.*

Craig v. *Jex Blake*, 9 Macph. 715, *distinguished.*

In January 1889 Charles Croucher, residing at Kirkton of Auchterhouse, Forfarshire, sued the Rev. William Inglis, minister of the parish of Auchterhouse, for £500 in name of reparation and *solatium.*

Issues were adjusted for the trial of the cause, and on 23rd May 1889 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Approves of the issues as adjusted and settled for the trial of the cause, and appoints the same to be tried by a jury . . . on Tuesday the 2nd day of July next."

On 29th May the defender moved the Court to vary the issues.

The pursuer objected to the competency of the motion, and argued that it came too late, in respect that the Lord Ordinary had not only approved of the issues, but had fixed a day for trial, which had not been opposed by the defender—*Craig* v. *Jex Blake*, March 16, 1871, 9 Macph. 715; Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 40; Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 28.

Counsel for the defender was not called upon.

At advising—

LORD PRESIDENT—The interlocutor of the Lord Ordinary consists of two parts, one approving of the proposed issue, and the other fixing a day for the trial of the cause. For obvious reasons, and in order to allow the party objecting to the terms of the proposed issue an opportunity of appealing, these interlocutors ought to be kept separate, and an interval of six days ought to be allowed to elapse between the two interlocutors. I can quite understand, however, why in the present case the Lord Ordinary approved of the issue and fixed the day for trial in the same interlocutor. It was for the convenience of both parties, and in order that the 2nd of July, which the Lord Ordinary had offered the parties as the day of trial, might not be lost. As the Lord Ordinary had not many available days of trial, if the six days had been allowed to elapse between the approving of the issues and the fixing of the day of trial, then before the parties could again have come before the Lord Ordinary, not only might they have lost the 2nd of July as the day of trial, but the Lord Ordinary might not have been in a position to offer the parties another day this session.

On the other hand, the right of a party, who is dissatisfied with an issue which has been approved by a Lord Ordinary, to move the Inner House to have the terms of such an issue varied, is a very valuable one, and one which must not in any way be interfered with.

The case of *Craig* v. *Jex Blake*, to which we were referred, differs materially from that now before us. There one day elapsed between the approving of the issue and the fixing of the day of trial, and it was the defender who moved the Lord Ordinary to fix a day for the trial of the cause. No objection was then taken by her to the proposed issue, and it was reasonable to suppose upon that account that she was satisfied with its terms. Six days thereafter the defender moved the Court to vary the issue, but the Court in these circumstances held the motion to be incompetent. That, however, as I have already explained, was a very different state of facts from what we have here to deal with, and I am therefore for repelling the objection which has been taken to the present motion.

LORD SHAND—In the case of *Craig* v. *Jex Blake* an issue was lodged for the pursuer, to which no objection was stated by the defender, who on the following day moved the Lord Ordinary to fix a day for trial. To this motion the pursuer objected, and six days after the defender moved the Court to vary the issue which had been approved of by the Lord Ordinary, but the defender in the circumstances was held to be personally barred from stating any objection to the terms of the issue. It does not appear to me therefore that much assistance can be obtained from the case of *Craig* v. *Jex Blake*, as the circumstances were materially different.

As to the Outer House practice in such cases, I would not object to the course which the Lord Ordinary has adopted provided both parties consented to this being done. It might be desirable in such cases that a minute should be framed intimating that the parties consented to the Lord Ordinary approving of the issue and fixing a day for the trial of the cause in the same interlocutor. In the present case, however, I agree with your Lordship that the objection to the competency of this motion cannot be sustained.

LORD ADAM—I am of the same opinion. I think that if the parties are agreed there can be no objection to the Lord Ordinary approving of the issue and fixing the day for trial in one interlocutor, but if the parties are not at one, and if it is to be held on the authority of *Craig* v. *Jex Blake* that by consenting to the Lord Ordinary fixing a day for the trial of the cause all right of objecting to the terms of the issue is removed, then where any difficulty arises as to the terms of an issue, I think that the Lord Ordinary should not fix the day of trial in the same interlocutor in which he approves of the terms of the issue.

LORD MURE was absent.

The Court repelled the objections to the defender's motion to vary issues, and sent the case to the Summar Roll for discussion.

Counsel for the Pursuer—Hay. Agent—James Skinner, S.S.C.

Counsel for the Defender—C. S. Dickson. Agents—Guild & Shepherd, W.S.

Saturday, June 1.

FIRST DIVISION.

TAYLOR *v.* THE UNION HERITABLE SECURITIES COMPANY, LIMITED.

Public Company—Bankruptcy of a Shareholder — Rectification of Register — Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 35, 36, 62.

A shareholder in a public company which had a large uncalled capital was sequestrated, and after payment of a composition he was re-invested in his estates. *Held* that the amount unpaid on his shares did not form part of his debts and obligations from which he was discharged in the sequestration proceedings, and an application by him to have the register of the company rectified by the deletion of his name therefrom *refused*.

Robert Taylor, manure merchant, Easter Road, Leith, applied for the rectification of the register of the Union Heritable Securities Company, Limited, by the deletion of his name therefrom as the holder of 75 shares of the company.

Between 1875 and 1877 the petitioner was allotted 75 shares of the Union Heritable Securities Company, Limited, incorporated under the Companies Acts 1862 and 1867. £1 per share was paid on the said shares, and there remained £4 per share uncalled. The company sustained heavy losses from the depression in heritable property. It had paid no dividend since 1885, and in March 1889 a meeting was held to consider whether a call should not be made on the directors.

The petitioner's estates were sequestrated on 29th April 1885, and a trustee was appointed. He paid a composition of 5s. per £, and he was thereafter re-invested in his estate. On 5th May he intimated to the company that he was no longer a shareholder in consequence of the sequestration of his estates.

Argued for the petitioner—Under section 16 of the Companies Act 1862 the £4 per share uncalled formed part of the debt and obligations contracted by the petitioner for which he was liable at the date of his sequestration, and from which he was thereby discharged, and the petitioner was accordingly entitled to have his name removed from the register of members of the company. His intimation to the company was equivalent to a surrender of these shares—*Wishart* v. *City of Glasgow Bank*, March 14, 1879, 6 R. 823; *Galletly's Trustees* v. *Lord Advocate*, November 12, 1880, 8 R. 74; Companies Act 1862 (25 and 26 Vict. cap. 89), secs. 74, 75.

Argued for the respondents—The articles of association contained provisions for the transfer as well as for the surrender of shares. The petitioner had not complied with these, and he had not, in terms thereof, either transferred or surrendered his shares. The shares had since he acquired them stood in the register of shareholders in the name of the petitioner. All the proceedings in the sequestration took place without any intimation of any kind being sent to the company by the petitioner or the trustee on his sequestrated estates. The bankruptcy of the petitioner and his subsequent re-investiture did not free him from his liability for calls in respect of these shares, for on his re-investiture he took his estate with all the liabilities as it stood in the trustee—*Gordon* v. *Glen*, January 19, 1828, 6 S. 393.

At advising—

Lord President—In this case the petitioner before his bankruptcy held 75 shares in the Union Heritable Securities Company, Limited, and these shares were thus numbered 7481 to 7530 both inclusive, and 13,214 to 13,238 both inclusive. There is thus no difficulty whatever in identifying these shares as part of the property of the petitioner; and I use the word property advisedly, as shares in a company are property, and in bankruptcy they are often a valuable asset. In the sequestration which followed a trustee was appointed, and a composition of 5s. per £ was paid, and thereafter the bankrupt obtained his discharge all in the usual way. But the respondents say that the petitioner's bankruptcy, his composition settlement, and his subsequent re-investiture in his estate were all unknown to them; that no claim was made in the sequestration on their behalf; and that the first time that they became aware of what had taken place was the service of the petition praying that the petitioner's name might be removed from the list of members of their company.

The name of a shareholder cannot in this summary manner be removed from the list of contributories of a company.

There are only three ways in which this removing can in accordance with the statutes be accomplished—(1) By transfer, (2) by forfeiture, (3) by surrender. The statute does not say that such shares are to cease to exist, but the memorandum and articles of association may and sometimes do make provision for this. In the present case, however, the shares in question must belong to somebody, and it is clear that they belong to the petitioner until he succeeds in getting his name removed from the books of the company. I am therefore for refusing the prayer of this petition.

Lord Shand—Questions of considerable difficulty are likely to arise in dealing with applications like the present. Both as to the extent and mode of ascertainment of the petitioner's liability, and also as to whether, if the liability of the petitioner is to be limited, intimation to that effect ought not to be made to the company within a specified time. In the present case, however, I agree with your Lordship that this application cannot be granted, as no sufficient reason for so doing has been suggested. Bankruptcy followed by retrocession is certainly no sufficient ground, nor is there here anything of the nature of a surrender.

Lord Adam concurred.

Lord Mure was absent.

The Court refused the petition.

Counsel for the Petitioner—Lorimer. Agent—P. Morison, S.S.C.

Counsel for the Respondents—Crole. Agents—J. & R. A. Robertson, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, June 3.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Kinnear.)

GRANT *v.* ALLAN.

Justiciary Cases—Sentence—Suspension—Sentence proceeding upon Bad Previous Conviction.

A boy of nine years of age was charged with the crime of theft aggravated by two previous convictions. He pleaded guilty, and was convicted and sentenced. One of the previous convictions charged against him had been obtained when he was five years of age. In a suspension, *held* that this pre-

vious conviction was bad, and ought not to have been under the consideration of the Judge in giving sentence, and the sentence *quashed* accordingly.

Richard Grant, son of James Grant, carter, Bishopmill, Elgin, was charged in the Sheriff Court of Elginshire at Elgin at the instance of Alexander Grigor Allan, Procurator-Fiscal of that Court, upon a complaint which set forth that he "did on 9th April 1889, from Lesmurdie House, St Andrew's Lhanbryd Parish, Elginshire, occupied by Charles James Johnston, manufacturer, steal a football, and the said Richard Grant has been previously convicted of the crime of theft before the Police Court of Elgin on 12th September 1885 and 20th January 1887 respectively." He was convicted and sentenced to ten days' imprisonment, and to detention for five years in a reformatory thereafter. With the consent and concurrence of his father, the said James Grant, he brought a suspension of the conviction and sentence. From a certificate of the complainer's birth produced at the hearing of the suspension, it appeared that the complainer was nine years of age, and that at the date of his conviction on 12th September 1885 he was five years of age.

Argued for the complainer—The conviction of September 1885 was null, as a child of five years of age could not be guilty of theft. It followed that the present sentence—which proceeded upon a consideration, *inter alia*, of that previous conviction—must be set aside.

Argued for the respondent—The sentence was quite justified by the circumstances of the case, even if the conviction of September 1885 be left out of account.

At advising—

Lord Justice-Clerk—To all appearance the best thing that could happen to this boy is that he should be sent to a reformatory. But before we arrive at that result we must take a very strong course, which I am not prepared to take, and that is to hold that an utterly bad conviction, to which a boy of nine or ten years of age pleads guilty, is a conviction which can be considered by the Judge who tries the case in determining what sentence is to be pronounced.

This boy when he was five, or at the utmost six years old, seems to have been convicted of theft. In my opinion that was an utterly illegal conviction, and if it had been brought before us at the time by suspension it would have been quashed. But in considering what sentence was to be pronounced in this case, the Sheriff, we must assume, took into consideration the fact that there were two previous convictions for theft standing against the boy. Apparently his attention was not drawn to the fact that one of these convictions was obtained when the boy was a pupil, and we must assume that he took that conviction into consideration. I am of opinion that no sentence which followed upon such considerations can be allowed to stand. It may be quite true that if you put that conviction out of view there is still nothing improper in the sentence pronounced, but to put it out of view now, and to consider whether the sentence pronounced is otherwise a proper sentence, would be to make us the judges of what ought to be done in a case where we have neither the power nor the materials necessary. It is absolutely impossible for us to say what the Sheriff would have done had he left this conviction out of account. I am therefore of opinion, though I regret the result, that this conviction must be quashed.

Lord M'Laren—I concur in the judgment proposed. We are familiar with cases in which convictions proceeding upon evidence have been set aside in consequence of essential irregularities in procedure. One illustration which occurs to my mind is afforded by a case where a conviction was quashed because the Magistrate had admitted evidence not given upon oath. The admission of such evidence is fatal to a conviction, because it is impossible to say how far the mind of the judge may have been affected by it. In the present case the prisoner pleaded guilty, and there was accordingly no account of the crime or of the previous history of the prisoner, except what is contained in the complaint and the two extract convictions which accompanied it. These were the materials which the Sheriff had on which to form his opinion as to what would be a proper measure of punishment. It is here that the difficulty arises, for he had before him, and thought he was bound to take into account, two convictions, when in reality there was only one which he could consider. I look upon the case as precisely similar to one in which the complaint sets out two convictions, and there is produced an extract of one only. In that case if the prisoner pleads to the whole, and the Judge in his sentence deals with the case as one of a person twice previously convicted, there being no evidence of more than one conviction, it is plain that an error is committed. We must assume that the Judge took all the materials before him into account.

It appears to me that in the present case the sentence is affected by an error *in essentialibus*, the Judge having treated this as the case of an habitual offender, while it was really the case of a boy against whom only one previous conviction was established, and as we cannot review the sentence, it follows that the conviction must be quashed.

Lord Kinnear—I agree with your Lordship. We can know nothing of the considerations upon which the Sheriff proceeded in giving this sentence except what appears upon the face of the complaint and the two convictions which were before him. We know that one of these was one that ought not to have been obtained, and ought not to have been taken into consideration. We cannot estimate to what extent that was taken into consideration. The result is that the sentence cannot be sustained.

The Court quashed the conviction.

Counsel for the Complainer—Rhind. Agent—W. Officer, S.S.C.

Counsel for the Respondent—D. Robertson. Agent—Crown Agent.

VALUATION APPEAL COURT.

Wednesday, January 30.

(Before Lord Fraser and Lord Trayner.)

DOUGLAS FRASER & SONS *v.* THE ASSESSOR OF THE BURGH OF ARBROATH.

Valuation Roll—Mill Temporarily Silent.

The proprietors of a spinning mill kept their machinery standing for a year from reasons of temporary expediency. *Held* that it was properly entered in the valuation roll at its value as a going mill.

This was an appeal on a case stated from the decision of the Magistrates of the burgh of Arbroath at a Court for hearing appeals against valuations made by the Assessor of the Burgh, held on 11th September 1888.

The Assessor had entered the Wellgate Works occupied by Messrs Douglas Fraser & Sons, as tenants, at the yearly rent of £855.

Douglas Fraser & Sons appealed to the Magistrates against the above valuation, on the ground that a spinning mill, forming a distinct and separate part of the several subjects embraced under the designation of Wellgate Works, and included in the valuation, had been silent since Whitsunday last, and would not be re-started till Whitsunday next; and they claimed that the works should be entered as follows:—

Weaving Factory . . £427, 10s.
Spinning Mill . . . £213, 15s.

The appellant maintained that, as the spinning mill was at present standing, it was merely a warehouse for machinery, and they asked that, in accordance with principles laid down by the Judges, and in accordance with local usage, it should be entered as such at half of its valuation as a going mill. The appellants also expressed their willingness to give a guarantee that the mill would remain silent till Whitsunday 1889.

The Assessor admitted that if the appellants' contention were given effect to, the above figures might be taken as correct, but maintained that the spinning mill was part of the Wellgate Works; that the works fell to be valued as a whole, that the mill was silent for temporary purposes merely, and that the entry in the roll ought to be retained.

Mr John R. W. Clark, solicitor for the Parochial Board of St Vigeans, maintained that the Assessor's valuation ought to be retained.

The Magistrates found the facts of the case to be as follows:—That the Wellgate Works consist of a weaving factory, warehouses, and offices, all adjoining and communicating with each other, and a spinning mill; that there was no internal communication between the mill and the factory, &c., but that there was an outside communication within the walls enclosing the whole works; that the spinning mill had been silent since Whitsunday last; that this was owing to the spinning part of Messrs Fraser's business being at present unprofitable, and was a mere temporary expediency; and that Messrs Fraser had neither wished to sell or let the mill, nor endeavoured to obtain a return from it in any other way.

The Magistrates unanimously decided that Messrs Fraser were keeping part of their works standing from reasons of temporary expediency, and had made no attempt to obtain a return from the mill by letting it or otherwise; that £427, 10s., being one-half of the whole valuation of the Wellgate Works,' fairly represented the proportion applicable to the spinning mill, and that the same sum of £427, 10s. was the yearly worth or value of the spinning mill, taking one year with another. They therefore refused the appeal, and sustained the valuation made by the Assessor.

Authorities cited at discussion — *Barbour*, March 7, 1878, 9 R. 1236; *Staley and Another* v. *Overseers of the Poor of Castleton*, 1864, 33 L.J., M.C. 178; *Harter* v. *Overseers of Salford*, 1865, 34 L.J., M.C. 206.

At advising—

Lord Fraser—I am of opinion that the appeal should be dismissed. The case sets forth that "the Magistrates unanimously decided that Messrs Fraser were keeping part of their works standing from reasons of temporary expediency, and had made no attempt to obtain a return from the mill by letting it or otherwise." We must deal with the case assuming that to be the fact. Now, if the owner or tenant of premises from reasons of temporary expediency chooses not to carry on business as usual, that is no reason for reducing the valuation.

Lord Trayner concurred.

The Court sustained the valuation.

Counsel for the Appellants—Hay. Agent—W. Harris, L.A.

Counsel for the Respondent—Vary Campbell. Agents—Party.

COURT OF SESSION.

Wednesday, November 21, 1888.

OUTER HOUSE.

[Lord Kinnear.

SCHAW *v.* BLACKS.

Right in Security—Bond and Disposition in Security—Assignation of Writs—Receipt for Writs.

A bond and disposition in security contained an assignation of writs and an obligation to make them forthcoming, free of expense, on all necessary occasions. Terms of receipt for writs *approved* by the Court to be granted by a bondholder to the granter of the bond and disposition in security on receiving the writs for the purpose of effecting a sale of the property.

Robert Schaw, sometime residing at No. 28 Walker Street, Edinburgh, and at the date of this action in Sydney, Australia, was infeft in certain subjects in Fife under a bond and disposition in security granted by the defenders dated the 9th and recorded the 16th of May 1881.

The bond and disposition in security contained, *inter alia*, a clause by which the defenders, with joint consent and assent, assigned the writs and

bound themselves to make the same forthcoming to Schaw, free of expense, on all necessary occasions. The writs and title deeds of the property were not handed over when the bond was granted.

On 14th March 1888 the estates of Roger Black were sequestrated, and on 2nd April 1888 a schedule of intimation, requisition, and protest, in terms of the Titles to Land Consolidation (Scotland) Act 1868, was served upon him and Mrs Black.

Thereafter Schaw, through his agents, applied to Black for delivery of the titles of the property, so far as in his custody or under his control, in order that he might effect a sale of the property and deliver the writ to the purchaser, but Black declined to give them except upon an obligation for their re-delivery to himself within a reasonable time.

In these circumstances Schaw raised this action against Mr and Mrs Black to have them ordained to deliver up the titles of the property, so far as in their possession and under their control, to be held by him in security, and (in the event of a sale of the subjects by the pursuer) to be delivered by him to the purchaser as his own proper writs and evidents.

The pursuer pleaded—"(1) The defenders having by the assignation of writs contained in said bond and disposition in security assigned to the pursuer the writs and evidents of the *pro indiviso* portion both of the *dominium directum* and the *dominium utile* of the lands of Bruntshiels belonging to Mrs Black, the pursuer is entitled to delivery of said writs and evidents, to be held, used, and disposed of by him in terms of the provisions contained in said bond and disposition in security. (2) *Separatim*—The pursuer is entitled to possession of the titles for the purpose of advertising the property and carrying through a sale under his bond, and in order thereafter to deliver them along with a disposition to the purchaser. (3) The pursuer is entitled to delivery of the writs claimed, as his security is now endangered by the said title-deeds being allowed to remain in the defenders' custody or possession. (4) As the amount of the prior and postponed bond is in excess of the sum which the lands in question, if exposed to sale, may be reasonably expected at present to realise, the defenders have no interest to demand re-delivery of the writs."

The defenders pleaded—"(3) The claim of the pursuer to absolute delivery of said titles is unfounded, and in the circumstances stated the defenders should be assoilzied."

On 16th November 1888 the Lord Ordinary (KINNEAR) remitted to Mr Harry Cheyne, W.S., to prepare and adjust the receipt for the titles to be granted by the pursuer to the defenders.

On 21st November 1888 Mr Cheyne presented the following report to the Lord Ordinary:—"The reporter had a meeting with the parties at which they stated very fully their views in regard to the mutual rights to a proprietor and heritable creditor to possession of the titles, and referred the reporter to various decisions of the Court and to the statutory interpretation of the clause of assignation of writs contained in a bond and disposition in security. The decisions referred to have not, in the reporter's opinion, much bearing on the present question of the form of receipt to be granted by a bondholder on getting the titles from the debtor. The parties did not quite agree as to your Lordship's opinion in the case, and the reporter felt himself bound to assume that your Lordship had expressed no opinion except that the pursuer was not entitled to obtain decree in terms of the conclusions of the summons, but that he was entitled to get the use of the titles on all reasonable occasions.

"The Statute 10 and 11 Victoria, cap. 50, first introduced a statutory form of a bond and disposition in security, which form contains a short clause of assignation of writs in these terms—'I assign the writs.' By section 3 this clause is declared to import an assignation to writs and evidents 'to the same effect as in the fuller form now in use in a bond and disposition in security with power of sale.' On referring to the Juridical Styles in existence in 1847, which was the 3rd edition published in 1826, it will be found that under the clause in the old form the granter constitutes the grantee his lawful cessioner and assignee in and to the writs, evidents, rights, titles, and securities of and concerning the subject's whole clauses therein contained, and all action and diligence competent thereupon. The defenders' agent referred the reporter to the 4th edition of the Juridical Styles which was published in 1852, in which is contained a form of 'bond and disposition in security prior to the Act 10 and 11 Victoria, cap. 50.' In that form there is not only an assignation to the writs in very much the same terms as are contained in the older style, but there is also an obligation by the granter to 'make the writs forthcoming to the grantee upon all necessary occasions upon receipt and obligation for redelivery thereof within a reasonable time and under a suitable penalty; and in case of a sale of said lands and others by virtue of the powers before written to deliver up the whole of the said writs and title-deeds to the grantee or to the purchaser or purchasers from him under the penalty of £ over and above performance.

"This last form is understood to have been prepared by Mr Duff, W.S., and the reporter is satisfied from examination of numerous bonds dated prior to 1847 that this was not the form then commonly in use. The common form was that contained in the 3rd edition of the Juridical Styles, and it may be noted that Professor Bell in his lectures on conveyancing in dealing with the clause of assignation of writs in a bond and disposition of security refers to the 3rd edition for the form of the clause prior to 1847.

"It humbly appears to the reporter however, that Mr Duff's form expresses the fair and reasonable rights of the two parties in relation to the titles when these are retained by the debtor. The pursuer's agent expressed a fear that by giving a simple borrowing receipt he might thereby derogate from his right to demand absolute delivery in the event of a sale, and while the reporter does not think that there is any real ground for such fear, he has inserted a reservation in the receipt which he now submits for your Lordship's approval as follows:—'Received from Mrs Black her titles of Bruntshiels on behalf of Mr Robert Schaw, to be returnable to Mrs Black if a sale of the security subjects is not effected within a reasonable time, but without prejudice to our clients' right to demand absolute delivery of said

titles in the event of a sale of the security subjects under the powers of his bond.'

"The reporter had great doubts whether he should have troubled your Lordship with any details beyond giving the form of receipt he would suggest, but as the parties expressed a desire that he should state the views on which he proceeded in adjusting the terms of the receipt, he has entered more fully into the question than was necessary, or than perhaps your Lordship may desire."

The Lord Ordinary approved of the report.

Counsel for the Pursuer—Martin. Agents—Henderson & Clark, W.S.

Counsel for the Defenders—Shaw. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, May 31.

FIRST DIVISION.

[Sheriff of Argyllshire.

ROBERTSON'S TRUSTEES *v.* GARDNER.

Right in Security—Decree of Maills and Duties—Sequestration for Rent—New Tenant.

A heritable creditor who under a decree of maills and duties had entered into possession of the lands disponed in his bond, presented a petition for the sequestration for rent of a tenant who by assignation had entered to the subject of his lease prior to the signeting of a summons of maills and duties, but who had not been called as a party to that action.

Held, in the absence of any objection by the proprietor, or of any competition for the rent in question, that the heritable creditor being duly in possession under his decree was entitled to make use of the landlord's hypothec, and sequestration *awarded*.

On 21st April 1888 an action of maills and duties was raised by Mrs Harriot Holmes or Robertson and others, trustees of the deceased R. J. Robertson, W.S., against John Gardner, quarrymaster, Ibrox, near Glasgow, Alexander Gardner, quarrymaster, Lagnaha, Argyllshire, and James Young Gardner, heritable proprietor *pro indiviso* of the lands of Auchindarroch, Argyllshire, and of Lagnaha aforesaid, as principal debtors, and also against various other persons mentioned in the summons, who were described as the tenants or occupants of the lands and subjects at Lagnaha.

The pursuers averred that they were heritable creditors upon the said lands and estate to the extent of £9550, contained in a bond and disposition in security, and that the said sum and interest from Martinmas preceding were unpaid, and they had reason to fear would not be paid.

After various procedure the Lord Ordinary (Lee), on 25th May 1888, decerned in absence against the principal debtors, the proprietors, and also against certain of the tenants, who did not appear; and thereafter, on 19th July 1888, his Lordship pronounced the following interlocutor:—"Finds it not instructed that the compearing defenders have paid the rents and lordships due at and prior to 1st May 1888, or had ceased at the date of raising this action to be liable therefor: Therefore repels the defences so far as applicable to the rents and lordships for the possession up to May 1888, and decerns against the defenders the said John Gardner, Alexander Gardner, and George Jamieson Alison junior, as trustees for the firm of J. & A. Gardner & Company, jointly and severally, and the said J. & A. Gardner & Company, to make payment of the rents, lordships, and others concluded for in terms of the conclusions of the summons, save and except the rents, lordships, and others subsequent to 1st May 1888, as to which dismisses the action as against said defenders, and decerns." And this interlocutor was on a reclaiming-note adhered to.

In January 1889 a petition was presented in the Sheriff Court of Argyllshire at Oban by Robertson's trustees, as heritable creditors in possession of the lands of Auchindarroch and Lagnaha, under the decrees in the action of maills and duties against Duncan Macgregor Gardner, quarrymaster, Lagnaha, praying for sequestration of the defenders' effects in security, and for payment of (1) £25 as rent for the half-year from 1st May 1888 to 1st November 1888; (2) £25 as half-year's rent to become due and payable at 1st May 1889, and to grant warrant to inventory and secure the whole effects subject to the pursuers' hypothec, and for warrant of sale, &c.

It was admitted that the defender was and had been since 6th April 1888 lessee of the quarry at Lagnaha, and houses connected therewith, conform to (1) minute of lease between John Gardner and others, the proprietors, and the said John Gardner and others, trustees for J. & A. Gardner & Company, and assignation thereof by the latter to him and acceptance thereof. The rents were £50 for the quarry, with an alternative lordship, £50 for the houses, and £50 for the stores. It was also admitted that the rents as at Martinmas 1889 were unpaid.

The pursuers alleged that they had a right of hypothec over the subjects, that the action of maills and duties was effectual against the defender as the successor of the tenants therein named and whose assignee he was.

The defender denied that the pursuers, as heritable creditors, were in possession of that portion of the said estates which was occupied by him as tenant, and averred that none of the decrees of maills and duties founded on by the pursuers was directed against the defender as tenant, although the pursuers were informed that he was in possession at the date when the said action was raised. The defender further alleged that the rents claimed were neither due nor resting-owing to the pursuers, who were not in a position to give him a valid discharge thereof; that the decree in the action of maills and duties was not directed against the pursuers, but against the former tenants, who had ceased to be tenants before the action of maills and duties was raised, or to have any interest in the said quarries.

The pursuers pleaded (1) that as the defender was in arrear in payment of his rent they were entitled to sequestrate his effects in security, and for payment of rent, and (2) that as their right of hypothec was in danger of being defeated, they were entitled to the decree craved.

The defender pleaded, *inter alia*—(1) That as the pursuers had not entered into possession of the subjects occupied by him either under the decree of maills and duties or otherwise, they were not entitled to pursue the action; (2) that the pursuers had not the right of hypothec they claimed.

On 26th March 1889 the Sheriff-Substitute (MACLACHLAN) pronounced the following interlocutor:—"Finds that the pursuers are heritable creditors in possession of certain lands and others, including the subjects mentioned in the petition, in virtue of decrees of maills and duties dated 25th May 1888, and 19th July 1888, and 15th January 1889: Finds that the defender is, and has been since 6th April 1888, tenant of the said subjects, conform to a minute of lease and assignation thereof in his favour dated 11th and 12th April 1888, and relative minute of acceptance dated 12th and 14th April 1888: Finds that the said decrees gave the pursuers, as heritable creditors foresaid, a right to pursue for and recover the rents of said subjects from all parties in possession of the same: Therefore decerns against the defender in terms of the conclusions of the petition, &c.

"*Note.*—This is an action of sequestration for rent raised by heritable creditors holding decrees of maills and duties which were pronounced in an action raised by them on 21st April 1888, in which they called the proprietors of the subjects as principal debtors, and the several tenants or occupants for the respective rents due by them. The action was undefended by the proprietors and certain of the tenants, and decree was pronounced against them, conform to the conclusions of the summons, but the parties who were called in respect of their occupancy of other portions of the subjects, being those referred to in the present action, defended, on the ground that before the action of maills and duties was raised they had assigned their lease to the present defender by assignation duly intimated to and approved of by the proprietors, and they pleaded that having ceased to be tenants before the action was raised, the same, so far as directed against them, was incompetent. But as they failed to shew that they had paid the rents and lordships due at and prior to 1st May 1888, or had ceased at the date of the action to be liable therefor, decree of maills and duties was pronounced against them for these rents, and as to the rents, lordships, and others subsequent to 1st May 1888, the action was dismissed as against said defenders. The present defender pleads that as there was no conclusion against him these decrees of maills and duties do not affect him though he was in possession when the action was raised, and the same cannot apply to those portions of the estate which he occupied as tenant. This appears to be a plea against the competency of the proceedings in the action of maills and duties, and cannot now be considered. In that action decree was pronounced against the proprietors, and that decree gives a right to recover and intromit with the whole rents due, so far as the security extends and is operative, as a constant title of possession against the natural possessors of the ground, and also against the proprietors or liferenters who are in the civil possession, and from whom the natural possessors derive their right—(E. iv., 1, 49). By his assignation, which was duly intimated and ratified, the defender is the tenant of and derives his right from the proprietors, against whom there is a continuing decree, and not from the previous tenants, the decree against whom was limited to the rents applicable to the period of their possession. The rents, therefore, that are due by the defender are payable directly to the pursuers, and they must be allowed the ordinary means for recovering the same. This principle was recognised in the case of *Railton* v. *Muirhead*, June 20, 1834, 12 S. 757, where a creditor holding a decree of maills and duties had allowed the debtor, who was also proprietor, to enter into possession of the subjects, but was found not entitled to bring a sequestration for rent, because he failed to make out any agreement for lease with the debtor, or that the latter had entered on the subject otherwise than as a proprietor, and a poinding of the ground is the proper remedy when the proprietor is in possession."

The defender appealed to the Court of Session, and argued—That the decree of maills and duties was not operative against him, because, in the knowledge of the pursuers, though he was a tenant at the date of the signeting of the summons, he was not called as a party to that action. Besides, the decree did not warrant sequestration with reference to the portion of the estate occupied by the defender. The decree in the action of maills and duties would not found the present proceedings, and without the decree the clause of assignation of rents contained in the bond would not warrant sequestration—*Webster*, July 13, 1780, M. 2902; *Neils* v. *Lyle*, December 1, 1863, 2 Macph. 168; *Scottish Heritable Security Company* v. *Allan, Campbell, & Company*, January 14, 1876, 3 R. 333; Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101); Rankine on Leases, p. 324. The defender was willing to consign but not to pay, as he dreaded repetition as not being included in the decree. The respondents' title was bad as they should have set forth their assignation to rents in the bond—Bell's Prins. sec. 1243; *Railton* v. *Muirhead*, June 20, 1834, 12 Sh. 757; Rankine's Land Ownership, p. 44, instead of which they merely founded on the decree of maills and duties, which the appellant contended was bad.

Argued for the respondents—The only question of importance was, whether the pursuers had effectually ousted the landlord by entering as heritable creditors into possession of the lands in virtue of their decree of maills and duties. Their right of hypothec and to sequestrate for rent depended undoubtedly upon that. The action of maills and duties had a twofold effect, first against the landlord, and second against the tenants. By not defending the landlord did what was equivalent to assenting to the pursuers coming into his place, and it was an intimation to that effect to the tenants—Duff's Feudal Conveyancing, p. 274; Lothian, July 11, 1634. M. 14,087; *Forsyth* v. *Aird*, December 13, 1853, 16 D. 197. The defender, though not actually a party to the cause, was well aware of what was going on. Where the heritable creditor has by a decree of maills and duties displaced the landlord, he can uplift the rents of tenants not called in the process and can grant a valid discharge — Wedderburn, July 23, 1709, M. 10,399;

M'Glashan's Sheriff Court Practice, p. 405; *Budge* v. *Brown's Trustees*, July 12, 1872, 10 Macph. 958.

At advising—

Lord Shand—In this appeal the pursuers are the trustees of the late Robert James Robertson, W.S., Edinburgh, and they libel as their title in the present action against the defender that they are heritable creditors in possession of certain lands in Argyllshire under a decree of maills and duties dated 25th May and 19th July 1888, obtained by them against the heritable proprietors and the tenants or occupants, and they produce the decree which they then obtained.

The present action is one of sequestration for rent, and it is raised by the heritable creditors in possession under their decree of maills and duties against the defender who became a tenant of the subjects by minute of lease and assignation in his favour of dates 11th and 12th April 1888.

The Sheriff has found that the procedure in the previous action (which was undefended by the proprietors and certain of the tenants) was quite regular, and he has accordingly granted the prayer of the present petition. Against this the defender has appealed upon the ground that he was not called as a party to the former action.

It is to be observed here, in the first place, that the proprietors of the lands do not in any way oppose the present proceedings, and it is obvious that they could not very well do so; and second, it may be remarked that there is no competition as to who the parties are who are entitled to these rents. In such circumstances it appears to me that no legitimate ground exists for resisting the present claim provided that the pursuers have succeeded in establishing that they are heritable creditors in possession of these lands under their decree, and this, I think, they have satisfactorily done.

If we examine the terms of the decree we find that the parties called in that action were, first, John Gardner, Alexander Gardner, and James Gardner, *pro indiviso* proprietors of the lands of Auchindarroch and Lagnaha, as principal debtors; and then the tenants on the estate, first certain farmers, and then certain quarrymasters. In that action decree was granted in absence against the proprietors, so no question arises as to them, and with regard to the tenants, it was only those who defended against whom decree was taken. They maintained that they had paid their rents, and the Lord Ordinary dealt with that defence by repelling it so far as applicable to the rents and lordships for the possession up to May 1888.

Now, the result of this decree is, that the bondholders have vindicated their rights as in the landlord's place, and the leases were ceded to them. No doubt the decree only applied up to May 1888, while the parties against whom it had been taken had before that date ceased to be tenants, but the effect of that decree was to render the tenants liable to the pursuers for the rents. It appears that the present defender became a tenant in April 1888; so that as the decree in question affected all the rents of these lands his rent was also affected thereby. Nor was it necessary that any new proceedings should be instituted in order that he might be included in and affected by what had been done.

The decree is applicable to this whole estate, and all parties interested in the rents are liable and are properly called. Seeing, then, that there is no opposition on the part of the landlord, and no competition, I think that we should adhere to the Sheriff-Substitute's interlocutor.

Lord Adam—[*After stating the facts above narrated*]—When the action of maills and duties was raised it was, I think, very properly directed against the proprietors as principal debtors, and also against the various tenants upon the estate. The result of that action as seen by the decree was a decerniture against the defenders to make payment of the rents due up to May 1888. If the tenants at the time when the action of maills and duties is raised are properly called, then I do not think that in the event of a new tenant entering on the lands any additional proceedings are necessary with a view to making him a party to the action; besides, it is to be kept in mind that this present defender entered on his lease in April 1888, while the decree affected rents due as at May of that year. I therefore concur with the opinion expressed by Lord Shand.

Lord President—The summons in the action of maills and duties calls as defenders the proprietors of the lands, but it does not conclude for any decree or judgment against them, so it was a mistake to take decree against these parties in the undefended roll. The object of calling the proprietor in such a case as defender is in order to see if he has any reason to state why the heritable creditor should not enter into possession of the lands and levy the rents.

If the proprietor does not offer any objection to this being done, then it may be taken as an assent on his part to this course being followed. If the heritable creditor then calls all the tenants as defenders, and obtains a decree against them, he is entitled thereafter to enter on the lands and uplift the rents.

By the interlocutor of 19th July 1888 the pursuers obtained decree against the compearing defenders for the rents due up to May 1888. The decree was complete except in this, that as the defenders in that action had parted with their lease to the defender in the present action they could not be called upon to pay the rent due after the date of his entry.

But no arrangement entered into between these different defenders can prejudice the heritable creditor's right to levy the rents. The tenants who renounce their leases cannot of course be made responsible for the rents to become due, but the tenants who take their places become liable for their rents, and as the one set of tenants takes the place of the other no new action is necessary unless the new tenant has some special objection to urge which could not have been taken by his predecessors.

If the new tenant without any sufficient reason withholds payment of the rents, the heritable creditor can undoubtedly make use of the landlord's hypothec, for the new tenant although he may not perhaps have been personally decerned against, is yet personally responsible to the heritable creditor for the rents. Upon these grounds, therefore, I think with your Lordships that we ought, with some slight modifications, to adhere to the Sheriff-Substitute's interlocutor.

Lord Mure was absent.

The Court pronounced the following interlocutor:—

"... Vary said interlocutor [of 26th March 1889] to the effect of disallowing in the meantime the prayer of the petition, other than that portion of it which craves for warrant to sequestrate and inventory: *Quoad ultra* adhere to said interlocutor and remit the cause to the Sheriff to proceed further therewith," &c.

Counsel for the Appellant—Dundas. Agent—David Turnbull, W.S.

Counsel for the Respondents—M'Watt. Agents—Macrae, Flett, & Rennie, W.S.

Friday, May 31.

SECOND DIVISION.

EDWARDS *v.* HUTCHEON.

Reparation—Culpa—*Defective and Dangerous Machine—Threshing Mill without a Guard over the Drum.*

Held that a threshing mill without a guard over the drum is a defective and dangerous machine, and that a contractor who supplied such a machine was liable in damages for personal injuries caused thereby, especially as the occurrence took place in a neighbourhood where there had been previous similar accidents.

Jessie Helen Edwards, Rothriehill, Aberdeenshire, aged nineteen, with the consent and concurrence of her father David Edwards, farmer, Rothriehill, brought an action in the Sheriff Court at Aberdeen against William Hutcheon, traction engine proprietor, Parkhill, Newhills, for £500 as damages for injury sustained by her while going to her place as a "looser" upon a threshing machine or mill supplied by him to thresh upon her father's farm.

She averred that "the mill was defective in not having a cover over the drum to prevent accidents when the feeder is not engaged at his work. William Taylor, who was in charge of the feeding of the mill, was not in his proper place. . . . Had the drum been covered, or the said William Taylor been in the feeding-box, the accident might not have happened."

The pursuer pleaded—"(1) The pursuer having been injured in manner above libelled through the insufficient and defective machinery in use belonging to the defender, and under his charge, is entitled to compensation from the defender for said injuries."

The defender pleaded—"(1) No relevant case against defender. (2) There being no fault or negligence on the part of the defender, or of those for whom he is responsible, he should be assoilzied. (3) The risk of the plant used and of the employment being with the injured girl's employer, the action should have been directed against him, the pursuer David Edwards. (4) The plant was not defective."

A proof was allowed, from which it appeared that on 5th October 1887, the defender, who had on several previous occasions threshed for David Edwards, contracted to do the threshing on his farm. As the defender's two threshing machines, which both had guards over the drum, were engaged, he procured a "Robey" (English) threshing machine belonging to three brothers named Taylor, and sent it along with its three owners. In practice the men who come with such machines feed and work them, the farmer only supplying hands to "loose" the sheaves. When a machine has a guard it remains closed until the machine is at full speed and the "feeder" and "looser" are in their places, and it is then opened sufficiently to allow the sheaves to get down to the drum. When the operations began, William Taylor, one of the owners of the machine, was chosen to "feed," and the pursuer to act (for the first time) as a "looser." When the "loosers" were called to take their places the pursuer ascended by the ladder. William Taylor was beside the feeding-box, but not in it, and the machine was getting up speed. The pursuer slipped as she alighted on the platform, and falling across the funnel or "hopper," her foot went down through the feeding-hole into the drum, and her leg was wrenched off below the knee. Her father was present at the time. It was proved that there was a practice of guarding the drums of such machines. The defender admitted that his mills were provided with drums, and that he considered this necessary for safety.

The Sheriff-Substitute (Dove Wilson) on 12th July 1888 pronounced the following interlocutor:—"Finds that the female pursuer was injured through the fault of the defender, or those for whom he was responsible, in placing her at work upon a dangerous and defective machine supplied by him for the purpose: Finds that the defender is liable in damages: Assesses the same at the sum of £150: Finds the defender liable in expenses, &c.

"*Note.*—The female pursuer was severely injured while working at a portable threshing machine. Four possible causes for the accident require consideration. It may have been due to the female pursuer's own inexperience, to a defect in the machine, to carelessness on the part of those in charge of it, or to carelessness on the female pursuer's own part. I do not think that there is any evidence of carelessness on the part of the female pursuer. Some of the witnesses speak to the girl having gone hastily upon the machine, but if there was any haste upon her part it was more likely due to her being young, and possibly nervous, rather than to her having been careless. I have considerable doubt whether the female pursuer would be entitled to found upon the negligence of those in charge of the machine. They were fellow-servants, engaged in the same employment, and it does not appear sufficiently that the female pursuer was at the time under their orders. She seems then to have been under the orders of her father As against the defender, the inexperience of the female pursuer forms no ground of action. She was not employed by the defender, but by her own father, and although he was much to blame in putting a young and untried girl to such work, no ground of complaint upon this score can be made against the owner of the machine or the person answerable for it. Neither, however, does the girl's inexperience absolve the defender. If the accident was due partly to the girl's in-

experience and partly to the defective nature of the machine, and if it would not have happened with a properly constructed machine, the defender will be responsible for his fault, if he committed one, in supplying the machine. Where more than one person has through his fault materially contributed to cause an accident, each is liable in law to the injured party in the whole consequences. This brings us to the questions whether the accident was caused or materially contributed to by a defect in the machine, and whether the defender was to blame in supplying it. Upon the first of these questions I entertain no doubt. The machine was one which was very dangerous to those who had to do such work in connection with it as was expected from the female pursuer. She had to stand upon an elevated platform close to a funnel, at the bottom of which a drum revolved at a high speed. The least mistake or slip might cause her to fall upon the drum and to be mutilated. I think it clear that such a machine ought to have a guard. In England a guard is requisite by statute, and I think that the common law makes so simple and obvious precaution against a seen danger necessary in Scotland. The use of the guard is to cover the drum altogether while the machine is not threshing, and while it is threshing to contract the opening over the drum to the narrowest extent which will permit the supplying of the sheaves. As the machine was not threshing at the time of the accident the guard might have been closed, and the female pursuer's accidental fall might have been attended with perfect safety. Even if the guard had been open the pursuer might have had a chance of escape, as the guard might have checked her fall before she reached the drum. It seems to me to be beyond doubt that a person who supplies such a machine is at fault if it be sent out to work without a guard. Had there been no previous experience of danger from such machines a person might be allowed to plead that he could not be expected to think of it. But this is the third serious injury to girls from unguarded machines of this kind which has been made the subject of action in this Court within a comparatively short time. The danger therefore must have been notorious and patent to all persons supplying and using such machines. The last question is, whether the defender is to be held responsible for supplying the defective machine. I think that he must be. The contract to supply the machine was made with him as it was he who was to be paid for the work. For his own convenience he employed another person to do the work, and employed that other person's machine. As the contract with the defender was to supply a proper machine for the work, I think it follows that it was his duty when he deputed the performance to another to see that the other supplied the article which he was bound to supply. In regard to the amount of damages nothing requires to be said. I have simply followed the precedents set in former actions in this Court."

An appeal to the Sheriff (Guthrie Smith) was dismissed on 26th November 1888.

The defender appealed to the Court of Session, and argued—The action was irrelevant as against him. He was only an intermediary between the Taylors and the pursuer Edwards. The machine was not his. He was not responsible for it having no guard. His own had guards, but a guard would not have prevented this accident. Even if there had been a guard it would have been open as the machine had been started, and from the way the girl fell her foot would have gone in by the hole left for the sheaves. The accident was not caused by any defect in the machine, but by the way in which the ladder had been placed, and by the "feeder" not being in his place. These were not faults of his or of those for whom he was responsible, and, in any case, they were faults of collaborateurs of the injured girl or of her father, who was present, saw the position of the ladder and of the "feeder," and yet allowed her to go up—*M'Carthy* v. *Young*, 1861, 6 Hurs. & Nor. 329.

Argued for respondents—It was a new idea that the contract was not with the appellant but with the Taylors. There was no plea to that effect, and the appellant's own evidence was against that view. He was bound to supply a safe machine. The want of a guard made the machine defective and dangerous, and for that want the appellant was responsible. He knew the necessity of guards, for he had them on his own machine. It was not in the mouth of the appellant to say that possibly, even if a guard had been there, the accident might have occurred—*Edgar* v. *Law & Brand*, December 15, 1871, 10 Macph. 236.

At advising—

Lord Justice-Clerk—This is certainly a somewhat difficult and narrow case. We need not pay any attention to the argument of the defender that he was not the party contracted with, but only a go-between. He was in the practice of providing threshing machines for this farm, and not having one of his own in at the time he undertook to get one. The whole bargain was with him. He provided the machine, and was to be paid for it. If anything has occurred for which the pursuer is entitled to recover damages it is from the person who provided the machine—that is, from the present defender—that they must be recovered.

The difficult question is, whether the circumstances disclosed make it plain that there was fault on the part of the provider of the machine for which he is responsible? The real point is, whether or not there should have been a guard across the mouth, or what I have called the "hopper," of this threshing machine? It is certainly proved that it is usual in practice to have such a guard, and that they are preventive of real danger. The defender himself depones—"My mills have guards on the drum," and in answer to the question, "Do you consider that necessary for safety?" he answers, "Yes." It is quite plain therefore that there is a practice to this effect, and that the defender was aware of it, and a party to the necessity of providing such guards. But it is said that even if there had been a guard this accident would not have been prevented, because such guards must be open when the machine is going. I am not so clear about that. Even if open and upright it would have been of the greatest protection and help, in affording anyone stumbling, as this girl did, something to lay hold of. If her body had been sufficiently far forward to fall over the guard it would have prevented her foot getting down upon the drum. But further, if there had been a

guard it ought to have been shut at the time this accident happened. No doubt the machine must be set in motion to get up speed before the threshing begins, but until the "feeder" is in his place, and the other workers in position, the guard ought not to be opened.

The only difficulty then is, whether there is sufficient here to satisfy us that there should have been a guard. It is perfectly true that no owner is bound to have all the latest appliances, and that he does his duty if he has what are generally known to the trade as proper precautions. But the precaution of a guard is well-known and recognised as a proper precaution, and therefore the defender must be liable because he had not taken that proper precaution.

I am the more moved to this view because accidents of this sort, owing to the want of a cover to the drum, have been somewhat frequent, and on the whole matter I am of opinion that there is no sufficient ground here for interfering with the judgments of both the Sheriffs.

Lord Young—I am of the same opinion, and I can state in a few sentences the exact views on which I proceed. The Sheriff-Substitute and the Sheriff-Principal are both of opinion, and have so found, that this young woman lost her foot in consequence of the defective and dangerous condition of the threshing machine in question. I think there is reasonable evidence to support that view. Now, that being the fact as found by the Sheriffs upon reasonable evidence, what is the law?

The machine was supplied by the defender along with the services of two men to work it under a contract by which he undertook to do the threshing at the farm where this accident occurred. It was not exactly a contract of letting out the machine but of doing the threshing at the farm, sending not only the machine but men to work it, the farmer being only bound to supply men to feed it. This is the contract averred, and, I think, the contract proved. The defender himself says in evidence—"I have occasionally threshed for Mr Edwards. A few days before we went to the threshing at Mr Edwards he came to see about it. On that occasion I said to Mr Edwards that I would come soon. I found that I was so busy that I could not get soon. I accordingly saw him one night, and told him that I would send a mill. I said that the Taylors had got a mill out and that I would send them. . . . When I cannot get to a place I try to get another mill to go. On such occasions I draw the money and I pay the man that I send the same money that I get." We can pay no attention to the view that he did not contract himself but only acted as an intermediary. Now, was it his duty to send a safe machine? I think under the contract it was. I agree with the Sheriff-Substitute that a person who supplies such a machine under such a contract is at fault when he sends out a machine without a guard. If there had been no previous accidents it might have been pleaded that such a precaution was unnecessary, but the Sheriff-Substitute tells us that this is the third serious injury to girls from unguarded machines of this kind which have been made the subject of action in the Sheriff Court within a comparatively short time.

The Sheriff, after referring to the statute in England making guards to threshing machines compulsory, observes that while that statute is applicable to England only, the common law of Scotland implies as much, and I am with him in that opinion. The case becomes so clear as this. Assuming the facts as found proved by the Sheriffs and the law as they think it to be, is there any escape from liability on the part of the defender? The only thing to be said is that the farmer was present and seeing the state of the machine allowed his daughter to feed it. I cannot agree with the view that that act by the farmer bars his daughter from suing this action with his consent and concurrence. This case is by no means a gross one. It is a narrow case, but I do not feel justified in setting aside the judgment of both Sheriffs either in fact or law.

Lord Rutherfurd Clark — This case is attended with some difficulty, but on the whole I agree with your Lordships.

Lord Lee concurred.

The Court pronounced this interlocutor:—

"Find in fact that the defender on 5th October 1887 contracted with David Edwards, father of the pursuer, Jessie Helen Edwards, to thresh out part of the grain crop on the farm of the latter, and next day sent an engine and threshing machine with attendants to do the work: Find the machine supplied by the defender for that purpose was defective and dangerous in respect there was no guard to the drum, and that the injury sustained by the said pursuer when taking her place on the machine to assist said attendants as feeder is attributable to the want of such guard: Find in law that the defender is liable to her in damages accordingly: Therefore dismiss the appeal and affirm the judgments of the Sheriff and Sheriff-Substitute appealed against: Of new assess the damages at £150 sterling."

Counsel for the Pursuer — Gloag — Glegg. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender—M'Lennan. Agents—Macpherson & Mackay, W.S.

Friday, May 31.

FIRST DIVISION.

[Sheriff of Dumfriesshire.

MATHESON *v.* MATHESON AND OTHERS.

Judicial Factor — Curator Bonis — *Inventory—Statement of Accounts—Exoneration and Discharge.*

In June 1880 an executor *qua* factor for three pupil children was appointed and confirmed by the Sheriff of Inverness. In August 1882 he was appointed their *curator bonis* by the Sheriff of Dumfries, the children having meanwhile succeeded to certain legacies. The inventory and accounts

lodged with the Accountant of Court included both estates.

In administering the executry estate, which consisted chiefly of the stock of a farm, large losses were incurred, and the last account lodged with the Accountant of Court closed with a balance due to the *curator bonis*.

In a petition for discharge of the curatory, on the ground that the whole estate was exhausted, and for decree against the wards for the balance, *held* that the wards were entitled to an account of the curatory estate apart from the executry estate, and that the petitioner was only entitled to discharge on payment of any balance due to them on that account.

John Matheson, farmer, Garbole, Inverness-shire, died on 5th November 1879. He was predeceased by his wife and survived by three daughters, all in pupillarity.

On 17th June 1880 Daniel Matheson, a brother of the deceased, was appointed by the Sheriff of Inverness factor for the said children, and was confirmed as executor-dative *qua* factor. He gave up an inventory of the personal estate of the deceased, amounting to £3051, and consisting principally of farm stock, crop, and implements on the said farm of Garbole.

In 1881 the children of the deceased became entitled under the will of a relative to a share of the residue of his estate, amounting to £1037, divisible equally among them. In June 1882 Daniel Matheson was, upon the application of a maternal uncle of the children, appointed *curator bonis* to them in the Sheriff Court of Dumfries, and thereafter, down to 31st December 1885, he duly lodged with the Accountant of Court annual accounts of his intromissions.

In 1887 Daniel Matheson presented a petition in the Sheriff Court of Dumfries for the recal of his appointment as *curator bonis*.

He averred that the Accountant of Court had found the whole of the accounts correctly stated and properly vouched; that in making up his original inventory he had, at the desire of the Accountant of Court, included not only the funds to which the wards succeeded as legatees, but also the executry of their late father, and that he had intromitted with the whole estate as *curator bonis*. He further averred that he had succeeded in getting the landlord's consent to a renunciation of the lease of the farm of Garbole at Whitsunday 1884, and that the farm stock and implements had been sold by public roup; that owing to the very unfavourable seasons the whole curatorial funds had been used, and that there remained a balance due to him as at 31st December 1885 of £363, 7s. 4d.

The wards, in answer, claimed that the petitioner should state a separate account with reference to the £1037, which came to them in their own right, and was not liable to the diligence of their father's creditors.

The petitioner pleaded that he was entitled (1) to discharge, as the estate was exhausted, and (2) to decree for the balance due to him.

The respondents pleaded, *inter alia*—"(2) The estate coming to the defenders in their own right not being liable to their father's debts, the defenders are entitled to an account of the pursuer's intromissions therewith, apart from his intromissions with their father's executry estate, and the pursuer is not entitled to his discharge until he has made payment to them of the balance ascertained to be due on such account."

The Sheriff-Substitute (Hope) on 12th February 1889 pronounced the following interlocutor:—"Finds that in accounting for his intromissions with the estate under his charge as *curator bonis* for the respondents, the petitioner is not entitled to take into account his intromissions with the estate under his charge as factor *loco tutoris* under the appointment made by the Sheriff of Inverness-shire: Therefore sustains the second plea-in-law for the respondents, and decerns; and appoints the petitioner to lodge an account, framed with reference to the above finding, of his intromissions with the curatory funds within ten days; and allows the respondents to lodge objections thereto, if they any have, within ten days thereafter."

The petitioner appealed to the Court of Session, and argued—That throughout all his actings he had acted in good faith, and for the best interests of the respondents. His actings in the matter of carrying on the farm must be looked at as at June 1880, when he had to decide whether the farm was to be carried on or the lease abandoned, and not as at 1882, when the respondents unexpectedly succeeded to their maternal grand-uncle's bequest. As there were thirteen years of a lease to run if the farm had been abandoned, damages to the extent of £1300 would have been incurred to the landlord. He could not anticipate the depression of farming interests which succeeded his appointment. The two estates were included in the inventory and accounts with the knowledge and authority of the Accountant of Court."

Counsel for the respondents were not called upon.

At advising—

Lord President—The Sheriff-Substitute and the Sheriff seem to have taken great trouble over this case, and to have perplexed themselves unnecessarily. The last interlocutor pronounced by the Sheriff-Substitute on 12th February 1889 seems to be quite well founded, except that the mode in which it is expressed is not quite so explicit as it should be, and I shall subsequently suggest that it should be varied in a way that will render it more applicable to the present position of this case.

Mr Matheson, the appellant, was appointed to act as *curator bonis* to the three pupil children of his deceased brother, who was a farmer in Inverness-shire. The object of his appointment was that he should take charge of a legacy which had come to these three children in their own right, and which was the only property belonging to them in their own right. Their father was, as I have said, a farmer in Inverness-shire, and his personal estate consisted only of the stocking of his farm. Mr Matheson, the same gentleman as was appointed *curator bonis* to the three pupil children, applied to the Commissary of Inverness-shire to be decerned executor-dative for the purpose of taking up the personal estate of his deceased brother, and after being confirmed as executor he entered into possession of that estate, and went on to take possession of the farm as the executor of his deceased brother, and in

the course of carrying on the farm he incurred very considerable losses.

Prima facie, the pupil children are in no way liable for these proceedings. If the appellant had been in a position as executor to pay over a free balance to himself as *curator bonis*, he might as *curator bonis* very properly have received that free balance, because it would certainly have belonged to his wards. But there being no such balance, there is no connection between the estate in Inverness-shire, which he holds as executor, and the estate in Dumfries-shire, which he holds as *curator bonis*. Therefore I quite concur in the result arrived at the by the Sheriff and Sheriff-Substitute, that Mr Matheson must not be allowed to mix up the two things when he comes here to obtain his discharge as *curator bonis*.

The interlocutor of the Sheriff-Substitute of 12th February, as I propose to alter it, will stand thus:—"Finds that, in accounting for his intromissions with the estate under his charge as *curator bonis* for the respondents, the petitioner is not entitled to take into account his intromissions with the estate under his charge as executor-dative *qua* factor under the appointment made by the Sheriff of Inverness-shire and confirmation following thereon: Therefore sustains the second plea-in-law for the respondents, and decerns; and appoints the petitioner to lodge an account, framed with reference to the above finding, of his intromissions with the curatory funds within ten days; and allows the respondents to lodge objections thereto, if they any have, within ten days thereafter."

Now, the second plea-in-law for the respondents is in these terms:—"The estate coming to the defenders in their own right not being liable to their father's debts, the defenders are entitled to an account of the pursuer's intromissions therewith, apart from his intromissions with their father's executory estate, and the pursuer is not entitled to his discharge until he has made payment to them of the balance ascertained to be due on such account." I think that is quite a sound plea, and it has been given effect to by the Sheriff-Substitute. The result is therefore that Mr Matheson must lodge a statement of his accounts as *curator bonis*, and if he attempts to bring into that account any losses he may have sustained as executor, that will no doubt be objected to.

Lord Shand—I am of the same opinion. In August 1882 the petitioner was appointed *curator bonis* to these three girls. This is an application on his part to be discharged of that office and his intromissions therein. *Prima facie*, there is no question that when a *curator bonis* is asking his discharge his account should embrace only his transactions as *curator bonis*. But here he proposed to bring into the account a number of intromissions relative to matters which as executor he thought fit to undertake as representative or factor for these children, his object being to recoup himself for losses sustained in his capacity of executor. I am of opinion that he cannot bring in these items. It is quite true that if in his character of executor he held a free and unencumbered fund, which was also the property of these young women, he might as curator assume possession of that fund and bring it into his account, but if he is in possession of a liability and not a fund, he cannot bring that into his account as curator in order to relieve himself of liability as executor. The case may be illustrated by supposing that another brother had taken the office of executor. There was a certain amount of moveable property on the farm, and, on the other hand, heavy obligations. These circumstances would make it matter for consideration whether the farm should be meddled with. But if he, assuming the character of executor, were to take the farm, and loses money in carrying it on, he cannot be allowed to throw the burden of that upon the children, but must bear it himself.

It has been argued that the children were not really injured by giving up their legacy if against that large obligations had to be set. But if an executor takes upon himself to act for young children, he cannot be allowed to throw on them the loss he may incur. Suppose, as I have said, that the executor is a different person from the curator, and he comes to the *curator bonis* and demands half the children's legacy for losses incurred in carrying on the farm, it would be the duty of the *curator bonis* to pupil children to say, "Pay the loss yourself." That being my view if the executor and curator are different persons, I cannot see that it makes any difference if they are the same person. If as executor that person, it may be from motives of kindness, chooses to do certain acts, still it is as *curator bonis* that he must give account for his actions here, and he is not entitled to mix up therewith proceedings undertaken by him in his capacity of executor.

Lord Adam concurred.

Lord Muir was absent.

The Court pronounced the following interlocutor:—

"... Vary the said interlocutor [of Feb. 12, 1889] by deleting the words 'factor *loco tutoris*'... and substituting therefor the words 'executor-dative *qua* factor,' and also by inserting after the word 'Inverness-shire' the words 'and confirmation following thereon:' *Quoad ultra* adhere to the said interlocutor; ... *quoad ultra* refuse the appeal."

Counsel for the Petitioner — Shaw — Walton. Agent—Thomas White, S.S.C.

Counsel for the Respondents—Law—Dudley Stuart. Agent—R. C. Gray, S.S.C.

Tuesday, June 4.

SECOND DIVISION.

[Lord Lee, Ordinary.

FRASER (M'DOUGALL'S TRUSTEE) *v.* GIBBON.

Bankruptcy—Illegal Preference—Act 1621, *c.* 18 *—Act* 1696, *cap.* 5*—Reduction.*

A trader being indebted to a creditor arranged with a friend to join him in giving a promissory-note to the creditor. This friend was not at the time his creditor in any sum, and in security of his obligation on the

note, he obtained from the trader a disposition to certain heritages, and gave him a back-letter bearing that the disposition was intended to secure him if he should become liable on the promissory-note.

Within 60 days of the transaction the trader was sequestrated. His trustee raised an action to reduce the disposition as having been indirectly a further security for the creditor. He did not, however, seek to reduce the promissory-note itself or make the creditor a party to the conclusion for reducing the disposition. *Held* (Lord Lee *diss.*) that in the absence of the creditor, whom it was alleged that the transaction was intended to benefit, the disposition was not reducible.

The estates of James M'Dougall & Son, wood merchants, Bellfield Street, Glasgow, and James M'Dougall, the only surviving partner of the said firm, were sequestrated on 23rd April 1887. Robert Dick Fraser, C.A., was appointed trustee.

This was an action of reduction by the trustee against Edward Gibbon, joiner, Glasgow, to reduce a disposition dated 31st March and recorded 1st April 1887, whereby the bankrupt and the defender, as trustees and individuals, disponed to the defender certain subjects at Springburn, Glasgow. The action was raised in the following circumstances: — For some time before the bankruptcy the bankrupt firm had obtained goods from Brownlee & Company, timber merchants, Glasgow. He had become indebted to them in the sum of £701, 11s. 8d., consisting partly of a past due bill and partly of a sum as open account. The defender had been associated with M'Dougall in building speculations. They were engaged in building certain subjects in Avenue Street and Springburn Road. On 31st March 1887, the same date as the disposition brought under reduction, they granted a promissory-note for £701, 14s. 1d., and payable three months after date to Brownlee & Company. Upon 1st April the defender executed a back-letter addressed to M'Dougall. By it on the narrative that he had signed the note along with M'Dougall for the letters-accommodation, and that by the disposition they had, as trustees and as individuals, conveyed to him the subjects at Springburn, "And whereas, although the said disposition bears *ex facie* to be an absolute and irredeemable conveyance of the subjects therein contained, yet the same was truly granted, so far as regards the beneficial interest of the said James M'Dougall therein, to secure me in the event of my being called upon to pay the principal sum contained in the said promissory-note, and to secure me against all sums of money advanced or lent or paid, or which may hereafter be advanced or lent or paid by me to the said James M'Dougall, or for which I may become bound on his behalf by bill, promissory-note or otherwise, . . . I bind myself and my foresaids to reconvey to the said James M'Dougall one-half *pro indiviso* of the said subjects acquired by me under the foresaid disposition, and for that purpose to grant, subscribe, and deliver to and in favour of the said James M'Dougall, at his expense, a formal reconveyance of one-half *pro indiviso* of said subjects." It was in respect of the transaction thus arranged that the action of reduction was brought. The pursuer concluded also in the action as originally brought for reduction of certain other bills and of an alleged cash payment granted to Brownlee & Company, but these conclusions were settled extra-judicially, and need not be further alluded to. He did not conclude against Brownlee & Company for reduction of the promissory-note for £701. It had not been paid at maturity, and Brownlee & Company were claiming it in the sequestration. The grounds of reduction of the disposition stated against the defender were thus stated by the pursuer—"The said disposition was arranged for and granted in pursuance of a fraudulent and collusive scheme between them to defeat the just claims and debts of prior creditors of M'Dougall and his firm by withdrawing the property from them and transferring it to Gibbon. The said disposition is struck at by and is reducible under the Act 1696, cap. 5, and is reducible also at common law. . . . Further, the said disposition conveyed a very valuable interest, and was granted without true, just, and necessary cause, and without a just price really paid. It was made to the prejudice of prior creditors of M'Dougall and his said firm to Gibbon, who is a conjunct and confident person in relation to M'Dougall, and it is reducible under and in virtue of the Act 1621, cap. 18."

The pursuer pleaded—"(2) The disposition challenged is reducible, both at common law and under the Act 1696, c. 5, as having been made and granted, in satisfaction or security of prior debts, within sixty days of notour bankruptcy, in preference to other creditors. (3) The disposition challenged is reducible, under the Act 1621, cap. 18, as having been granted to a conjunct and confident person, in prejudice of the rights of prior creditors, without true, just, and necessary cause, and without payment of a just price therefor. (4) The said disposition having been granted by a person in a state of insolvency, fraudulently to defeat the claims of his just creditors, under arrangement therefor with the grantee, is reducible at common law."

The defender pleaded—"(3) The said disposition dated 31st March 1887, not being reducible in virtue of the Statutes 1621, c. 18, and 1696, c. 5, or at common law, the present defender is entitled to be assoilzied from the conclusions of the summons."

After a proof the Lord Ordinary (Lee) pronounced this interlocutor:—"Finds it proved that the disposition called for in the summons was granted by the bankrupt James M'Dougall in favour of the defender Edward Gibbon as part of an arrangement in which the defender was participant to enable the said James M'Dougall and Edward Gibbon to use the bankrupt's share of the subjects conveyed by said disposition as a security for a prior debt due by the said James M'Dougall to Messrs Brownlee & Company, timber merchants, and for which the said Edward Gibbon became liable as a cautioner under the promissory-note for £701, 14s. 1d., then granted and payable at three months' date: Finds that the whole transaction was within sixty days of the sequestration of the said James M'Dougall's estates under the Bankrupt Statutes, and finds that the said disposition was granted, though not directly in their favour, for the further security of the said Brownlee & Company contrary to the Act 1696, c. 5: Therefore repels the defences of

the said Edward Gibbon: Reduces, declares, and decerns in terms of the reductive conclusions of the summons, and finds the said Edward Gibbon liable to the pursuer in the expenses of process as between him and the pursuer, &c.

"*Opinion.*—I am unable to distinguish this case from that of *Miller* v. *Duncan*, December 8, 1825, 4 S. 283, and my opinion is that the conveyance in favour of the defender Gibbon is reducible under the Act 1696, c. 5.

"The evidence shows that the defender was jointly interested with the bankrupt, not only in the various building speculations mentioned on record, but also in sundry bill transactions between the bankrupt and Messrs Brownlee & Company, of the City Saw-Mills, with whom the bankrupt had dealings in connection with their building operations. In March 1887 the bankrupt was due to Brownlee & Company a sum of £701, 14s. 1d., partly on open account and partly on a bill which became due on the 25th of that month. He was pressed for payment by Brownlee & Company, and it appears from the correspondence with Messrs Hill that he was being pressed at the same time for payment of a debt of £2000 heritably secured over certain subjects in King Street of Glasgow. It is established by the proof that the disposition under reduction in this action, though *ex facie* absolute, was granted as part of an arrangement between the defender and the bankrupt and Messrs Brownlee & Company, the object of which was to enable bankrupt to satisfy the claims of Brownlee & Company through the intervention of the defender. This was not done by a cash payment in respect of which the defender at once extinguished the debt due to Brownlee & Company, and became himself immediately the creditor of the bankrupt, taking the disposition in question as his security. The arrangement was that as Brownlee & Company refused to be satisfied with a disposition to the Springburn Road subjects in their favour the defender (who was joint proprietor of these subjects along with the bankrupt) should join the bankrupt in a promissory-note, payable in three months, to Brownlee & Company, and should take from the bankrupt a disposition to his *pro indiviso* half of the subjects 'to secure me (Edward Gibbon) in the event of my being called upon to pay the principal sum contained in the said promissory-note.' (See back-letter, No. 21 of process.)

"This transaction was arranged, and the promissory-note and disposition were executed on 31st March, but the arrangement appears not to have been completed until the delivery of the promissory-note on 7th April. The disposition was delivered and recorded on 1st April, but delivery of the promissory-note to Brownlee & Company was withheld for a time owing to the defender's desire to have an express undertaking from them that the promissory-note should be held as contingent on the security over the property being effectual. (See Messrs Brownlee, Watson, & Beckett's account, No. 33, and the letters in No. 110 of process.) But the whole transaction was within sixty days of the bankrupt's sequestration, the date of which was 23rd April 1887.

"It is said that Brownlee & Company were not parties to any agreement that the promissory-note should be enforceable against the defender only in the event of the disposition in the defender's favour being effectual. This appears to be the case, although it is worthy of notice that in fact the note never has been put in force against the defender by Brownlee & Company, who have claimed in M'Dougall's sequestration without valuing the obligation of the defender, 'the bankrupt being the primary debtor in said debt.' But the material question under the Act 1696 is as to the footing on which the defender entered into the transaction with the bankrupt. This appears clearly enough from the evidence already referred to. He trusted that there would be no sequestration, but he took his chance of it. He accepted the position of becoming answerable for Brownlee & Company's debt on the security of the disposition in question. But he acknowledged that the disposition was only to secure him in the event of his being called upon to pay the promissory-note. In that event he would acquire right to Brownlee & Company's debt, and would of course, become a creditor of the bankrupt in place of Brownlee & Company. In short, the substance of the transaction was that the disposition was given to the defender as a substitute for Brownlee & Company, and in satisfaction of or security for the debt of Brownlee & Company, which he undertook to pay, and for payment of which previously there was no security over the bankrupt's heritable estate.

"It was urged that the Act 1696 could not apply, because the defender was not a creditor before he obtained the disposition in question. If that were true, it would be a question whether the disposition was not granted contrary to the Act 1621 in favour of a conjunct and confident person, without true, just, and necessary cause, and without just price really paid. But in the view I take of the case, it is not true that the defender, under the arrangement by which he obtained the conveyance, became creditor in a new debt. What he did was to interpose himself as security for an old debt, upon obtaining a conveyance in relief which could not have been granted to the creditor directly without being struck at by the Act 1696; and I think that the conveyance is not the less struck at by the Act 1696 when granted in favour of one who so interposed. The statute expressly applies to deeds granted 'directly or indirectly' in favour of creditors. The observation of Lord Gillies in the case of *Miller* v. *Duncan* appears to be applicable to the present case with the alteration of the name. 'This was just a security for a prior debt, and it is proved that Patrick Duncan was participant in and a party to the arrangement, so that it must be set aside as to all the parties in order to do justice to the other creditors.'

"The case of *Miller* v. *Duncan* does not stand alone as an authority for setting aside a conveyance granted, not to the original creditor, but to one who interposes as cautioner. I think, notwithstanding the observation of Professor Bell (vol. ii. p. 227, 5th ed.), that the point was tried and decided in the case of *Swinton's Creditors*, M. 1181. It appears from the report that the Lord Ordinary's judgment, so far as setting aside the vendition obtained by the cautioner, was acquiesced in by the cautioner, and that it was only as regards the validity of the promissory-note in the hands of the creditor that his interlocutor

was altered. But it is unnecessary in this case to decide the abstract point referred to by Professor Bell, as there is evidence that the arrangement to which the defender was a party was a device for the purpose of granting a security which could not have been granted to the original creditor, by granting it in favour of a cautioner who paid no money, but obtained the conveyance as a security against the contingency of his being called on to meet the obligation which he undertook by signing the joint promissory-note, payable at three months' date.

"The case of *Speir* v. *Dunlop* (5 Sh. 729) went even further, and sustained the application of the statute to a cash payment made to an endorser of a bill not then due, as a provision for payment of the bill when it become due. I think it unnecessary, however, to proceed upon that case in deciding the present.

"I have not thought it necessary in explaining the grounds of my judgment to go over the evidence in detail. But the evidence of the bankrupt shows that he knew his difficulties, and explained them to the defender. This is not contradicted by the defender. These difficulties were such that Mr Young, on behalf of Brownlee & Company, asked to see his books, and that the defender refused to interpose his security without getting a conveyance of the Springburn Road subjects in relief. They arose not only from the pressure of Brownlee & Company, who were the principal trade creditors, but also from the pressure of an heritable creditor; and it must have been obvious to the defender, as well as to the bankrupt, that the effect of the arrangement by which he obtained a conveyance to the Springburn Road subjects was to satisfy the largest of the trade creditors in a manner which must prejudice the other creditors who held no securities, and also those heritable creditors whose securities were insufficient."

The defender reclaimed, and argued—It was proved that the defender had not entered into this transaction knowing and having in view that M'Dougall was insolvent, and taking his chance that he did not become bankrupt within the sixty days. If then the parties did not negotiate with bankruptcy in view the case did not come within the Act 1696, cap. 5, and could not be cut down by the Act. But even if the proceedings had been taken with a view to M'Dougall's insolvency the granting of the disposition was not struck at by the Act. The granting of the disposition made Gibbon a new creditor. It gave him no preference over any other creditors. Although he became security to Brownlee & Company for their debt, if that was a preference to them, although that was not admitted, it was no preference given to Gibbon. This case was ruled by that of *Monteith's Trustees* v. *Douglas*, December 10, 1794, Bell's Folio Cases, 127. In both the cases of *Duncan* and *Swinton*, cited against the defender, the final decisions which had been quoted as upholding the principle that a cautionary obligation might be sustained while the cautionary security was cut down, the decision had been given in the upper Courts, where only a part and not the whole of the case was before the Court—*Low* v. *Bell*, June 12, 1827, 2 W. and S. 579; *Miller* v. *Low*, December 11, 1822, 2 S. 77; *Campbell* v. *Macgibbon*, August 10, 1780, M. 1139; *Blaikie* v. *Robertson*, March 9, 1781, M. 887.

The pursuer argued—It was plain from the proof that the arrangement was a scheme or device to enable Brownlee & Company to get their debt paid in full at the expense of the other creditors. The defender knew that M'Dougall was insolvent; he was a partner in the joint-adventure with him, and at least must be taken as having known. He therefore could not object if he is left to bear the burden of the debt although his security should be cut down. The Act of 1696 struck at any arrangement between the debtor and one of his creditors that tended to disturb the equality of distribution among the creditors. The arrangement between M'Dougall, Gibbon, and Brownlee had done that, and was therefore cut at by the Act although Brownlee was not present as a defender. It could not be pleaded that the conveyance to Gibbon constituted a *novum debitum*, because the estate got no value for the obligation that was incurred; all that was done was that Gibbon intervened to pay off an old debt due by the debtor to Brownlee & Company, therefore that was giving a security for an old debt in the meaning of the Act. The case of *Miller* v. *Duncan* was a direct authority in favour of the pursuer. As regards the case of *Monteith*, there was nothing shown in that case of a collusive design and desire to evade the statute —*Carter* v. *Johnstone*, March 5, 1887, 13 R. 698; *Barbour* v. *Johnstone*, May 30, 1823, 2 S. 351; *Miller* v. *Duncan & Low*, December 8, 1825, 4 S.283; *Swinton's Trustees* v. *Forbes*, February 19, 1790, M. 1181.

At advising—

Lord Young—The pursuer is trustee in the sequestration of James M'Dougall, wood merchant, Glasgow, and the action contains both declaratory and reductive conclusions. The declaratory conclusions are, I think, superfluous, and had better have been omitted. The only reductive conclusion with which we have to deal regards a disposition of date 31st March 1887 by the bankrupt of part of his property in favour of the defender Edward Gibbon, who is now the only defender in the case. There were others, and among them Messrs Brownlee & Company, but they have been assoilzied, the case so far as they were concerned having been settled to the pursuer's satisfaction and theirs.

The disposition in question is challenged on the Act 1696, c. 5. It is also challenged on the Act 1621, c. 18, and at common law, but as the Lord Ordinary has decided the case only on the Act 1696 I shall confine my observations, in the first place at least, to that ground of challenge. And the disposition being on 31st March and the sequestration of the disponer on 23rd April following, the disposition is undoubtedly reducible on the Act 1696, provided the disponee received it in satisfaction or security of a debt then owing to him by the disponer. It is, however, admittedly not the fact that the disponee (the defender Gibbon) so received it. It was granted subject to a back-letter, which expresses the history of it with admitted truth, viz., that it was for the defender's security and relief of a promissory-note for £701, 14s. 1d., which he of the same date signed and delivered for the disponer's accommodation. This promissory-note was granted by the defender in conjunction with the bankrupt in favour of Messrs Brownlee & Company, who were at the time creditors of the

bankrupt to the amount of it. It is plain, *resipsa loquitur*, that Brownlee & Company were pressing their debt, which the bankrupt was unable to meet, and that the defender Gibbon was induced to join in the promissory-note to them on the condition of receiving the disposition to secure his relief.

It was contended by the pursuer that an undue preference contrary to the Act 1696 was thus given to Brownlee & Company, and that the defender, being a party to the proceeding by which they got it, thereby exposes his security to a reduction on that Act. Any creditor is entitled to demand and receive security or satisfaction from his debtor, no fraud being practised. Should the debtor become bankrupt within sixty days it will be set aside—that is to say, he will be deprived of it however honest he may have been in taking it, and his debtor in giving it. So here if the delivery to Brownlee & Company of this promissory-note for £701, 14s. 1d. was an undue preference to them for their satisfaction or security within sixty days of their debtor's bankruptcy the pursuer is at liberty to challenge it accordingly, and if the challenge is successful all virtue will be taken out of the disposition to the defender, which he holds only for his relief of the obligation upon him by that promissory-note, which will thereupon cease to exist. But in the absence of Brownlee & Company, and they are not parties to the case before us, we cannot possibly hold that they received any undue preference, and, on the contrary, must assume that they not only honestly but lawfully and regularly received the promissory-note signed by the bankrupt and the defender, and are entitled, as the holders, to enforce payment of it, or to transfer it by indorsation (which for aught I know they may have already done) to any other, it being a negotiable document of debt.

I must therefore deal with the case on the footing that the only defender before us is no otherwise connected with the bankrupt M'Dougall than as the grantee of the disposition in question, and as an obligant on the promissory-note which he gave in return, and which was the only consideration for it. The idea of satisfaction or security for prior debt is thus excluded, and with it challenge on the Act 1696. The only debt of the bankrupt to the defender was the contingent debt arising on the promissory-note, which the defender signed for his accommodation on the condition of receiving the disposition in question delivered in return for it, and the legal aspect of the case would not in my opinion have been different had it been a promissory-note to the bankrupt himself or to bearer, so that the bankrupt might use it by discounting it in a bank or indorsing it to any one he pleased, or holding it in his own hands. The notion of reducing the disposition and leaving the promissory-note, which was given in exchange for it, to stand as a valid document of debt against the defender, is I think inadmissible. If the transaction is challengeable it must, I should think, be challenged as a whole, and restoration made to both the parties to it against the obligations which it involves *hinc inde*.

The pursuer plainly cannot invoke the provision of the Act 1696 without referring to some creditor of the bankrupt as having received an undue advantage in preference to other creditors, directly or indirectly by and through the deed which he challenges. He accordingly refers to Brownlee & Company as the creditor thus preferred. I shall return to this topic, which I notice now only to observe that it not alleged that Gibbon, the only defender before us, is such a creditor. The disposition to him was for a consideration given at the time, and he was therefore, to use the language of Professor Bell, "in no sense a creditor at the time of entering into the transaction," in pursuance of which the disposition was given, and so not a creditor receiving satisfaction or security "in preference to other creditors." But to return to the reference made by the pursuer to Brownlee & Company, it is averred that the preference designed, and effected, if the transaction shall be allowed to stand, was to Brownlee & Company for a prior debt due by the bankrupt to them, that Mr Gibbon was participant in this design, and that the disposition to him was, "though not directly in their favour, for the further security of the said Brownlee & Company, contrary to the Act 1696, c. 5." I quote these words from the Lord Ordinary's interlocutor affirming the pursuer's contention, and notice that his Lordship says in the note to his interlocutor that "the disposition was granted as part of an arrangement between the defender and the bankrupt and Messrs Brownlee & Company, the object of which was to enable the bankrupt to satisfy the claims of Brownlee & Company through the intervention of the defender;" and again, "in short, the substance of the transaction was that the disposition was given to the defender as a substitute for Brownlee & Company, and in satisfaction of or security for the debt of Brownlee & Company, which he undertook to pay." Now, if this be all true, and the decision of the Lord Ordinary proceeds on the footing that it is, and on no other, it is I think clear law that the whole transaction is reducible on the Act 1696, and that Brownlee & Company cannot be permitted to retain the promissory-note for £701, 14s. 1d., which the bankrupt delivered to them signed by himself and by the defender Gibbon, a result which, as I have pointed out, would at once terminate the defender's interest in and right or even desire to retain the disposition in question.

But can we, behind the back of Brownlee & Company, in an action to which they are not parties, affirm these alleged facts to any effect? I am humbly of opinion that we cannot, and that as we cannot it is prudent to abstain from forming, or at least expressing, any opinion on the import of the evidence respecting them which I think ought not to have been taken in the absence of Brownlee & Company.

It is, I think, sufficient for the decision of the case that in this action of reduction on the Act 1696, the only creditor of the bankrupt who is alleged to have received and to retain contrary to the Act a document for his satisfaction or security in preference to other creditors is not called as a defender, and that the document which he so received and retains is not challenged or sought to be reduced.

The law on the subject of a security given to a cautioner for such a debt as the Act 1696 applies to is, I think, rightly and satisfactorily stated by Professor Bell (2 Comm. 215–227). The case of *Monteith* v. *Douglas*, December 12th,

1794 (Bell's Folio Cases, 127) which he cites, distinctly supports his opinion, and it appears from a statement made in that case by the then Solicitor-General (afterwards Lord President Blair) that a corresponding question which arose in the case of *Swinton's Trustees* v. *Sir W. Forbes*, February 19th, 1790, "was not before the Court so that no decision could be given on it, and was afterwards settled and never received a judicial decision."

The reports of the case of *Miller* v. *Duncan*, both here and in the House of Lords, require examination, and I have read them carefully. In that case two actions were brought at the instance of the trustee in bankruptcy. The one against the Dundee Bank, the creditor alleged to have been unduly favoured by the indorsation and delivery of a bill for £615, and of which reduction was asked under the Act 1696; and the other against Patrick Duncan, who had joined with the bankrupt as acceptor of the bill on receiving from the bankrupt a disposition in security for his relief, of which reduction was asked under the Act 1696. The Court of Session pronounced decree of reduction in both actions, and ordered the bank to deliver up the bill to the trustee. Now, this was in accordance with the law as stated by Professor Bell, and the opinion which I have expressed, assuming the facts to be as found by Lord Eldon, whose interlocutor was affirmed, viz., "that the bond and disposition in security was granted in pursuance of a collusive plan to which Patrick Duncan was a party, intended for the purpose of giving a partial preference to the Dundee Bank to the prejudice of the other creditors of James Duncan at a time when he was insolvent and in bankrupt circumstances, and within sixty days of the sequestration of his estate." Now, this judgment reducing the disposition to Patrick Duncan was not appealed, or the action in which it was pronounced ever before the House of Lords in any way. The two actions appealed (apparently by two appeals) were, first, that in which decree was pronounced reducing the indorsation to the bank of the bill for £615, and ordering its delivery to the trustee, and second, a Sheriff Court action by the bank on this bill directed against Patrick Duncan, in which, reversing the judgment of the Sheriff, the Court of Session assoilzied the defender. In the *first* of these appeals Patrick Duncan was not a party, while the trustee in the bankruptcy was no party to the second. Both appeals appear to have been heard and decided in the House of Lords indeed, but by the then Chief Baron, Sir William Alexander. The result was that in the *first* appeal—that against the reduction of the indorsation of the bill and order to deliver it to the trustee—the decree was affirmed, except in so far as the bill was thereby ordered to be delivered up; and in the *second* the decree of absolvitor was reversed, with a declaration that the bank were at liberty to sue on the bill, "for as much as it does not appear, either by admission or evidence, that the cashier of the Dundee Banking Company, or any other person authorised on their behalf, did concert with James Duncan (the bankrupt) or the said Patrick Duncan that the said James should give to the said Patrick the heritable security mentioned in the proceedings in consideration of his the said Patrick's accepting the bill of exchange for £615 in question." I notice that the Chief Baron pointedly asked the question—"Have we before us the question as to the heritable bond, except in so far as it may be used in argument," and was of course answered in the negative.

I cannot regard this as an authority adverse to the statement of the law by Mr Bell in his Commentaries, or to the decision in the case of *Monteith* v. *Douglas*, or to the legal views which I have expressed in this case. I rather incline to think that the Chief Baron, holding the views in point of fact which are expressed in the judgment of the House of Lords (and which contrast strikingly with those of the Lord Ordinary in this case), would have set aside the reduction of the bond and disposition in security, as well as the indorsation of the bill, had the question as to its validity been before him.

I have only to say further that I think the pursuer has no case either on the Act 1621 or at common law.

Lord Rutherfurd Clark concurred.

Lord Lee—I remain of opinion that the disposition in question was granted by the bankrupt as part of an arrangement to which the defender Gibbon was a party, and the effect and purpose of which was to give a security to Brownlee & Company in preference to other creditors; and I still think that the security is struck at by the Act 1696, c. 5.

It does not affect my opinion that the security was not granted directly to Brownlee & Company, but was granted to Gibbon in consideration of his becoming liable along with the bankrupt for the debt due by him to Brownlee & Company. For I consider it clear that the debt which was being secured was Brownlee & Company's debt, and that Gibbon was aware that the security was conveyed to him to enable him to pay Brownlee & Company. I think it unnecessary under the statute to make out fraudulent collusion. The statute was not required to cut down fraudulent transactions. The question is, in my opinion, whether such an arrangement entered into for the purpose of defeating the statute, though in the belief that it was a legitimate mode of doing so, is struck at, and this is the question which I think must be answered in the affirmative.

I accept the law as stated by Professor Bell (5th ed. vol. ii., 226)—"Where the security is granted not to the creditor in a prior debt, but to a cautioner who becomes bound to that creditor, it would appear that whenever the creditors" (or trustees) "cannot establish that there was a device to defeat the statute, and in which the cautioner is participant, or at least of which he has notice, they will not succeed against the cautioner."

I cannot regard the case of *Monteith's Trustees* v. *Douglas*, Bell's Folio Cases, 127, as having settled the law otherwise. That case has never been so regarded. It was not so regarded in the case of *Miller* v. *Duncan and Low*, 4 S. 282, and I think that it proceeded upon an erroneous view of the case of *Swinton's Trustees* v. *Sir William Forbes & Company*, which is reported in Morrison's Dict. p. 1181, as having turned on the question whether there had been any concert for giving a preference, not whether there had been any fraudulent concert to that effect.

The judgment of the Court in *Miller* v. *Duncan and Low* setting aside the heritable security granted to the cautioner was not appealed, and I find nothing in the report of the proceedings in the appeal relating to the bills which should suggest that the learned Chief Baron who heard that appeal gave any opinion against the soundness of the decision of the Court of Session in the case which was not before him.

The question then is, was there any concert in this case between the parties for the purpose of giving a preference to Brownlee & Company? According to my view of the evidence the proof on this subject is clear. The evidence of M'Dougall and Gibbon and Young, as well as the documents, and particularly the entries in the agent's accounts, show that Gibbon knew the involved position of the bankrupt's affairs, and obtained the disposition in question to enable him to meet the promissory-note in the event of his being called on to pay it. He even asked a promise that the promissory-note should not be put in force in the event of the disposition proving invalid. No doubt Brownlee & Company declined to give such an undertaking. But the fact that it was asked proves Gibbon's view of the transaction, and his knowledge that he was receiving this disposition to enable him to give on behalf of M'Dougall a preference to Brownlee & Company.

On the whole therefore my opinion is that the Statute of 1696 applies to this disposition, because it applies to any deed granted by a bankrupt for the satisfaction or further security of a creditor, if it be directly or indirectly, in preference to other creditors, and within sixty days of bankruptcy.

With regard to the question as to Brownlee & Company's claim upon the promissory-note, I assume that Gibbon will be liable to pay it. He will thereby acquire right to Brownlee & Company's debt. But the fact that reduction of his security will have the effect of leaving him without any further security than could have been given to Brownlee & Company, is in my opinion no reason why he should be allowed contrary to the statute to retain M'Dougall's property, conveyed to him within sixty days of bankruptcy, for the purpose of securing or enabling him to pay Brownlee & Company's debt.

It is said that Brownlee & Company were absent, and that we cannot decide in their absence that this was a preference. I notice that there is no such plea on record, and I think this not surprising. For in point of fact Brownlee & Company were called, and all we know of their absolvitor and absence is that it was in respect of a minute in which they concurred in stating that they had "acceded to the pursuer's claims as contained in the said summons." My opinion, however, is that the pursuer was entitled to challenge the only deed granted to the prejudice of the bankrupt estate, and if that deed be bad on the ground I have stated, I think it can afford no defence to Gibbon that Brownlee & Company were not called, and that Gibbon has not attempted to reduce his promissory-note, or to make such reduction a condition of this action being entertained.

Gibbon's plea has been that the transaction was *novum debitum*, and I think that plea is not well founded upon the facts.

LORD JUSTICE-CLERK — The bankruptcy to which this case relates took place upon the 23rd April, 1887, and it is undoubted that the whole transaction by which the defender joined with the bankrupt in granting a promissory-note to Brownlee & Company, thus accommodating the bankrupt, and received a disposition to the bankrupt's *pro indiviso* share of certain heritable subjects, to secure him for his risk in giving the accommodation, took place within the sixty days preceding the bankrupt's sequestration.

It is also quite certain that the defender Gibbon had no interest or advantage to secure in the way of securing debt due by thus mixing himself up with the bankrupt's obligations. He was not a creditor of the bankrupt, and it is not alleged that prior to the sixty days before the sequestration Gibbon and the bankrupt stood to one another directly or indirectly in the relation of creditor and debtor. The transaction into which the defender entered was not one by which he, being then a creditor, sought to obtain a preference over the other existing creditors of the bankrupt for a debt due. What he did was to bring himself under obligation to a firm who were creditors of the bankrupt by becoming joint obligant in a promissory-note, and in respect of his doing so securing himself if he should be called on to pay the amount or any part of the amount in the promissory-note to the bankrupt's creditor, by taking a disposition to the bankrupt's share of heritable subjects.

It appears that the defender was anxious to obtain from the bankrupt's creditor an undertaking that the promissory-note was to be held as contingent upon the security over the property being effectual. Ultimately the defender did not withhold the note but delivered it, and as it is described in the lawyer's account, left himself in the creditors, Messrs Brownlee's, hands. Thus Brownlee & Company were no parties to any arrangement by which the promissory note was to be held by them on any other footing than the ordinary one, as regards enforcement of it against the obligants whose names were attached. There was thus in my opinion no collusive arrangement, no concert to give a preference in favour of a prior creditor.

The real question in this case is, whether the words of the Statute of 1696 apply, and whether the transaction which the defender Gibbon desires to uphold must be cut down as being directly or indirectly a preference to a prior creditor in defraud of the interests of the other creditors of the bankrupt?

I am unable to see how in a question solely between Gibbon and the pursuer it can be held that the granting of a disposition of the heritable property in question to Gibbon, subject to a back-letter, can be held to be a preference given to a prior creditor. It is only when the transaction with Brownlee & Company, by which they received from the bankrupt the promissory-note for £701 with Gibbon's endorsation upon it, is introduced into the inquiry, that any question of preference to a prior creditor can arise. Brownlee & Company were undoubtedly creditors of the bankrupt prior to the time when the sixty days preceding bankruptcy began to run. It is a question which does not arise here whether the granting of this promissory-note is open to attack under the Act, on the ground that

the delivery of that note to Brownlee & Company placed them in a position of preference. This may or may not be, but there is nothing of the nature of preference apart from the promissory-note. For the disposition which Gibbon received had no force or effect independently of the promissory-note. For unless Gibbon was compelled to pay the sum in the note he was debarred by the back-letter he had granted from obtaining any benefit by the disposition. If the note can be challenged as an illegal preference, the whole virtue—as Lord Young has expressed it—is taken out of the disposition which the pursuer is attacking, and it falls as a matter of course. The defender has no interest to maintain it.

Now, we have no parties before us but the pursuer and Gibbon. There can therefore be no challenge of the validity of the note. Gibbon's position is that not being a creditor he exchanged his obligation on the note for a disposition of property. There was in this no giving by the bankrupt of satisfaction for a prior debt. He owed Gibbon nothing. Gibbon's right to demand anything depended upon his being called on to pay the sum in the note. The debt was not existing but contingent. If M'Dougall succeeded in retiring the note with his own funds all right in Gibbon ceased, and under the back-letter he would have been compelled to recovery. The whole case therefore turns upon the note—not upon who is the debtor in the note, but upon who is creditor in the note. The pursuer has clearly no case unless he can establish that he is suing some one who at the time of the transaction challenged was already a creditor of the bankrupt, and was by the transaction receiving "satisfaction or security" for his debt in preference to other creditors. But is there here any such creditor? I think it is clear that there is not. And if there is as such creditor here we have no basis for the application of the Act of 1696. To deal with the disposition to Gibbon by reduction apart from the counterpart of the transaction in the promissory-note would be in my judgment unjust in itself, and would be applying the Act of 1696 to a case to which it has no application.

On these grounds I concur in the opinion expressed by Lord Young, and have only to add that I also concur in his views upon the cases referred to in the Lord Ordinary's note, and in the opinion that the pursuers have no case here either at common law or upon the Act of 1621.

The Court recalled the interlocutor and assoilzied the defender.

Counsel for the Pursuer—Sol.-Gen. Darling—A. S. D. Thomson. Agent—W. Elliot Armstrong, S.S.C.

Counsel for the Defender—D.-F. Mackintosh—Baxter. Agent—F. J. Martin, W.S.

Friday, June 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HASTIE *v.* THE FOREIGN MISSION COMMITTEE OF THE CHURCH OF SCOTLAND.

Church—Foreign Mission—Power of Mission Committee to Dismiss Missionary—Induction by Presbytery—Munus publicum.

H was appointed by the Foreign Mission Committee of the Church of Scotland to be Principal of that Church's Institution at Calcutta, which was supported by voluntary subscriptions. At the request of the committee he was ordained to the office of the ministry by the Presbytery of Edinburgh, but the minute of the Presbytery which recorded the fact of the ordination bore further that he was "inducted to the office of Principal of the General Assembly's Institution at Calcutta." H performed the duties of his office for several years till he was summarily recalled by the Foreign Mission Committee.

In an action by H against the Foreign Mission Committee the pursuer sought to have it declared that in virtue of his induction by the Presbytery he became entitled to the salary attached thereto till he demitted the office, or was legally removed therefrom in accordance with the laws of the Church of Scotland, and that he had been wrongfully removed therefrom; and to have the defenders ordained to pay the salary to him, and also to pay him a sum as damages. The Court *assoilzied* the defenders from the conclusions of the action, in respect that (1) it was established on the evidence that the appointment had been made subject to certain regulations, under which the defenders had power to recal the appointment of the pursuer at any time; (2) that in its nature the office was not such that a life appointment was necessarily implied; and (3) that the induction by the Presbytery had no such effect as to alter the terms of his appointment and make it one for life.

In the year 1878 William Hastie, Bachelor of Divinity, was appointed by the Foreign Mission Committee of the Church of Scotland to be Principal of the Institution of that Church at Calcutta, an institution supported by voluntary contributions. Towards the close of that year he entered on the duties of his office, which he continued to discharge till December 15, 1883, when he was recalled by the committee without notice, but receiving from the committee six months' salary in lieu thereof.

This was an action by Mr Hastie against the Rev. John M'Murtrie, convener, and John Thomson Maclagan, secretary of the Foreign Mission Committee of the Church of Scotland, who by agreement between the parties were taken as representing the committee and its whole individual members. The pursuer sought to have it found and declared—"(First) that upon the 16th day of October 1878 the pursuer was by the Presbytery of Edinburgh ordained and set apart to

the office of the holy ministry in the Church of Scotland, and inducted to the office of Principal of the General Assembly's Institution at Calcutta, to which office he had been nominated and elected by the said Mission Committee, by which ordination and induction he became entitled to the emoluments, salary, and whole profits attached to the said office so long as he continued to hold the same, and should not demit the said office or be legally removed therefrom according to the laws and constitution of the said Church of Scotland; and (second) that immediately thereafter the pursuer went to Calcutta and entered upon the discharge of the duties attaching to the said office of Principal of the General Assembly's Institution there, and continued in the discharge of said duties until the 15th day of December 1883, when he was wrongfully, illegally, unwarrantably, and maliciously extruded and removed from the said office, and prevented from discharging the duties thereof by the defenders the Foreign Mission Committee aforesaid, or by representatives thereof for whom the said defenders are responsible, and that since the 15th June 1884 he has been wrongfully and illegally deprived of the emoluments, salary, and whole profits attached to his said office in violation of the rights conferred upon him by his ordination and induction thereto as aforesaid under the laws and constitution of the said Church of Scotland." Decree being pronounced in terms of the two foregoing conclusions, the pursuer sought to have the defenders decerned and ordained to make payment to the pursuer of the sum of £2700 sterling, being the arrears of the emoluments, salary, and profits of said office from the date of the last payment made to the pursuer down to the 31st day of December 1887, with the interest thereon at the rate of five per cent. from the said last-mentioned date until payment; (fourth) to pay to the pursuer in equal amounts upon the last current day of January 1888, and on the last current day of each month following thereafter, the sum of £55 sterling, being the amount of the emoluments, salary, and profits of the said office of Principal of the General Assembly's Institution at Calcutta, in all time coming during the pursuer's lifetime, or until he demits the said office, or is lawfully removed therefrom according to the laws and constitution of the said Church of Scotland; and (fifth) in any view, to make payment to the pursuer of the sum of £7500 sterling as damages.

The pursuer, *inter alia*, averred—"He accepted the nomination on the condition that he should not be bound by the special rules applied by the committee to their other missionaries. On the motion and request of the Foreign Mission Committee the pursuer was taken on trials, and was ordained and set apart and inducted as above set forth. In virtue of his ordination and induction by the Presbytery of Edinburgh he became subject to its jurisdiction, and has remained ever since without interruption subject to its jurisdiction as a court of the Church of Scotland. His induction to the office of Principal of the General Assembly's Institution in Calcutta conferred upon him a vested right to the office, and to the emoluments, salary, and profits attached thereto, so long as he continued to hold the same, and should not have demitted it, or been legally removed therefrom according to the laws and constitution of the said Church of Scotland. . . . The conditions upon which the pursuer held his rights as the ordained and inducted Principal of the General Assembly's Institution at Calcutta were exceptional and special as regarded his relation to the Foreign Mission Committee. He was not an applicant for the office, and only agreed to accept the call of the committee on the ground of the special arrangements made for his exemption from the special rules of the committee, and for his holding his office under the same securities as apply to other ordained and inducted ministers of the Church."

The defenders in answer averred—"The pursuer accepted office on condition, *inter alia*, that he might be dismissed on six months' notice and being paid his passage to this country, and the Foreign Mission Committee had no power to make or sanction an appointment on a different tenure."

The pursuer pleaded—"(1) The pursuer having been elected to the said office by the said Foreign Mission Committee, and having been ordained and inducted thereto in due and competent form according to the laws and constitution of the Church of Scotland, is entitled to declarator in terms of the conclusions of the summons. (2) In respect of said election and of the pursuer's ordination and induction as aforesaid, he is entitled to the salary and whole profits and emoluments of said office, and to declarator of his right thereto. (3) The pursuer neither having demitted the said office, nor been legally removed therefrom, is entitled to the salary and emoluments thereof from the date of his wrongous extrusion therefrom, as concluded for. (4) In any event, the pursuer, having been wrongfully and illegally removed from the said office without notice or any just or sufficient cause, is entitled to damages with expenses as concluded for."

The defenders pleaded, *inter alia*—"(1) The action is incompetent. The Foreign Mission Committee is a mere committee of the General Assembly. (2) All parties not called. (3) The pursuer's statements are irrelevant. (4) The pursuer's whole material averments being unfounded in fact, the defenders should be assoilzied."

On 30th May the Lord Ordinary (Fraser) repelled the first, second, and third pleas for the defenders, allowed to both parties a proof of their averments, and to the pursuer a conjunct probation.

Against this interlocutor the defenders reclaimed, but at the hearing in the Inner House counsel for the parties consented to the proof allowed by the Lord Ordinary's interlocutor of 30th May, reclaimed against, being restricted to a proof of the terms and conditions of the pursuer and respondent's appointment to the Principalship of the General Assembly's Institution at Calcutta, and the tenure of said appointment, and craved the Court to affirm the said interlocutor so far as it repelled the first and second pleas, and remit the cause to the Lord Ordinary to proceed, reserving to the parties their whole pleas, so far as not disposed of by this interlocutor, and a joint minute to that effect was lodged.

The result of the proof which was led before the Lord Ordinary on the 17th of July 1888 was to the following effect—Early in the spring of 1878 Dr Herdman, the then convener of the Foreign Mission Committee, opened negotiations

on behalf of the committee with the pursuer as to whether he would accept the office of Principal of the Institution at Calcutta. Certain communications passed on the subject of the salary to be paid to the pursuer if he were appointed, and as the minute of the committee, of date 16th April 1878, bore that "it was unanimously agreed to offer Mr Hastie the appointment on the usual salary and allowance, with an additional special allowance of £100 per annum; also to make him an allowance until his departure for India at the rate of £100 per annum."

It appeared that both parties had had in view in their negotiations certain regulations with regard to the employment of missionaries which had been in existence since January 1877, and which were entitled "Regulations of the Foreign Mission Committee of the Church of Scotland in reference to the employment of European Missionaries in India, as from 1st January 1877." These regulations dealt with (1) ordained missionaries, and (2) European missionary teachers. Under the head of "ordained missionaries" the first five regulations were as follows:—"*Period and Terms of Engagement.*—1. Twenty-five years shall be taken as the full period of a missionary's service, at the expiry of which time his engagement ends without notice on either side. All further engagements shall be matter of special arrangement between the committee and the missionary. 2. A missionary may resign at any time by giving six months' notice; but if he resign within the first five years he shall, if called upon, refund the outfit and passage money paid on his account, and shall not be entitled to a passage home. Notice of resignation by a missionary shall count from the date of his letter addressed to the Home Committee. 3. The committee may dispense with the services of a missionary at any time by giving six months' notice, and paying his passage if he wishes to return to this country at the close of that period. 4. In case of immorality or other gross misdemeanour, the committee shall have power of summary dismissal. The committee shall be sole judges of the merits of any case coming under this and the preceding rule, and their decision shall be final. 5. The committee reserve the right of determining the place at which, and the work in which, a missionary is to be employed."

It was not clear at what particular period of the negotiations the pursuer was put in possession of a copy of these regulations, but he himself stated in his evidence that he had a printed copy of them "about the time that this call was received by me, and when I was just considering the matter of accepting it, and before accepting it. My impression is that it was after I received the letter from Dr Herdman saying that they had agreed to call me. It was then I gave serious consideration to these rules at anyrate."

On the 8th of May, as the minute of the committee of that date bore, the pursuer was introduced by the convener, and expressed his willingness to accept the appointment of Principal of the Institution at Calcutta, on the terms minuted at last meeting.

The pursuer deponed as to the proceedings at this meeting of the 16th of April in support of his averment that he had been exempted from the special rules of the committee—"It was a large meeting. I was introduced by Dr Herdman. He turned to me and made a short address, in which he said that he hoped I was now prepared to accept of this offer—I think he said 'call,' but he certainly said 'offer'—and hoped that I saw my way to undertake the duties of the office, with some other general expressions of that kind. Then I made a short statement in reply. I began by saying that they knew that I had not been an applicant for this office; that I had done nothing to bring before them any qualification which I might be supposed to have for the duties of the office; that their call had weighed with me very greatly, and that I had resolved now to accept it, but only on four conditions, which I distinctly stated. The first was that I would not be bound by the special rules applicable to the appointment of other missionaries. The second was that I should only be appointed Principal of the Institution and not also Superintendent of the Mission, as I had studied the duties involved in the former office, but did not quite understand what responsibilities were attached to the latter. The office of Superintendent of the Mission involves evangelistic work entirely outside the Institution. The Institution is a teaching establishment. The third condition was that I should not be bound by any particular period of service. The fourth was that I should be allowed to go away quietly, without any public demonstration being made about my appointment. By going away I meant going away from this country. I stated these conditions articulately, just as I am putting them now. I did make further remarks of a more general character. Dr Herdman was in the chair at the time. He demurred to one of the conditions. He said—'It is advisable that Mr Hastie should be the head of our mission; should be Superintendent of our Mission as well.' That was all he said. I don't think I replied anything to that. I acquiesced. I did not press my objection . . . I had with me for reference a jotting of these four conditions that I made, but I cannot say that I held it in my hand. I have not got it just now, as all my books and papers have gone smash in consequence of this business. I don't know whether that jotting exists or not. I searched for it previously to this."

The members of the Foreign Mission Committee who were present at the meeting of the 8th of May gave evidence to the effect that no proposal was made by the pursuer to alter the tenure of his appointment, or to limit the power of recal by the Foreign Mission Committee, and that if such a proposal had been made it would certainly have been rejected as one which they had not power to consider.

On 16th July the pursuer was formally appointed, the minute of that date being in these terms:—"The committee resumed consideration of the case of the Rev. William Hastie, B.D., and being satisfied of the ability, scholarship, and piety of Mr Hastie, . . . do hereby appoint him to be one of their missionaries to India, and to be Principal of their Institution at Calcutta, on the terms, and under the conditions already agreed to. The secretary was instructed to forward extract of this minute to the Rev. the Presbytery of Edinburgh, with the request that they would be pleased to take Mr Hastie on trials for ordination to the office of the ministry. The committee would suggest that if

agreeable to the Presbytery the ordination should take place within the first fortnight of October." An extract of this minute was forwarded to the Presbytery of Edinburgh, who took the pursuer on trials accordingly.

On the 16th of October the ordination took place, the minute of Presbytery bearing that Mr Hastie was, by solemn prayer and imposition of the hands of the Presbytery, set apart to the office of the holy ministry, and inducted to the office of Principal of the General Assembly's Institution in Calcutta.

Shortly thereafter the pursuer proceeded to Calcutta and entered on the duties of his office, which he continued to perform till 15th December 1883, when his appointment was recalled, the committee allowed him six months' salary in lieu of notice.

The Lord Ordinary (FRASER) after the proof on 20th July 1888, assoilzied the defenders, and found neither party entitled to expenses.

"*Opinion.*—I regret that there ever should have been any cause for this litigation. The pursuer of this action is, according to the evidence of all the gentlemen called as witnesses for the defence, a man of much learning and varied gifts. If he had been a priest of another communion than the Church of Scotland, or of any other Presbyterian Church, these gifts would have been utilised in a different sphere, if they had proved unsuccessful, from that where he was first planted. But the utilisation of talent in this way is not a characteristic of our Presbyterian governing bodies. When a collision comes between them and a minister, the course adopted is to cut him off, without reference to his powers of usefulness in some other department of the Church's labour. The pursuer did not seek the place of Principal of the Calcutta College. He was besought by the Foreign Mission Committee to take it, and bribed to do so by an increased salary beyond that had by other missionaries and his predecessors in the Calcutta College. One cannot but sympathise with a man so inveigled away from the fair prospects he had of advancement in his own country when we find him roughly turned adrift on the first collision with the Mission Committee.

"However, I am not called upon to express further any opinion upon this aspect of the case. My duty here is simply to decide in a civil action as to whether the pursuer has proved his case. The action is for damages for breach of contract, and nothing else. The defence *in limine* is that there was no breach of contract, in respect that what the defenders did they were entitled to do, according to the very terms of the contract. They dismissed, or rather, to use more appropriate language, they recalled their appointment of the pursuer as Principal of their Institution at Calcutta, and Superintendent of their Mission there, holding that according to the terms of the contract they could do so upon giving him six months' notice. They did not give him six months' notice, but in lieu thereof they gave him six months' salary. The rule upon which they found is in the following terms:—'The committee may dispense with the services of a missionary at any time by giving six months' notice, and paying his passage if he wishes to return to this country at the close of that period.

"Now, the question is whether such was the contract, and I am of opinion that the contract was as stated by the defenders. The pursuer has not proved to my satisfaction any special agreement with him, to the effect that he should be exempted from the rules and regulations applicable to other missionaries, and that his appointment was one *ad vitam aut culpam*. It would be rather a hazardous and extraordinary contract to enter into on the part of the Foreign Mission Committee to appoint any missionary *ad vitam aut culpam*. The labours of a missionary are in a foreign land, and under a climate somewhat obnoxious to Europeans, and no Foreign Mission Committee would in these circumstances be justified in entering into a life engagement with any missionary. Exceptions were made in two points with regard to the pursuer on account of his energy and his abilities. He received £100 a-year more than other missionaries did, and when the physician declined to certify him as a good life, he was exempted from the obligation to insure his life for £500, which is required by the rules. But there were no further exceptions made in the pursuer's favour from the rules binding upon all missionaries. He himself admits that he had read these rules before his appointment, and it would have been very odd if he had not. A man of the pursuer's acuteness was not the person to enter into the service of the defenders without knowing exactly what were the conditions under which he was to work. The minute of 19th November 1878, which sets forth that he had received a copy of the rules and regulations, and was satisfied therewith, truly sets forth what took place at that meeting. The result is that the defenders must be assoilzied from this action. It is true that before dispensing with the pursuer's services the defenders did not give him six months' notice as required by the rules, but turned him out of the Institution at Calcutta without any notice at all. A more gentle, and a more considerate mode of treatment of the man whom they had invited to go to India might have been expected from persons in the position of members of the Committee of the Foreign Missions of the Church of Scotland. If the connection was to be broken, it might have been done in such a way as not unnecessarily to hurt the feelings of the servant who was to be dispensed with. But this is a matter also for which the law provides no redress. When a servant is entitled to notice before dismissal, the obligation is complied with if the wages during the period of notice are paid; and there is much to recommend this rule, for it frequently would be impossible to carry on the work when the servant appointed to discharge it is under notice to quit. The defenders have paid the salary for six months to the pursuer, and his passage money home from India, and having done that they have fulfilled their legal obligation.

"With reference to expenses, I am of opinion that these should be found due to neither party. The defenders set up a number of untenable preliminary pleas, and my judgment repelling these was carried to the Inner House, whose judgment also was adverse to the defenders. The pursuer has no doubt lost his case upon the proof, but he was successful on the preliminary pleas. Upon the whole matter, the justice of the case will be attained by finding neither party entitled to expenses."

The pursuer reclaimed, and argued—The contract between the pursuer and defenders was not an ordinary contract of service. The pursuer was ordained and inducted to his office by the Presbytery of Edinburgh. The effect of that induction was that he held an *ad vitam aut culpam* appointment, just as a parish minister in this country, subject only to the law of the Presbytery. Accordingly he could only be dismissed by the Presbytery in accordance with that law. A temporary induction was a thing entirely unknown. The defenders had therefore no such right of dismissal as they claimed and had exercised—Act of 1592, cap. 117; Act of 1690, cap. 5; 6 and 7 Vict. cap. 61; 37 and 38 Vict. cap. 82, sec. 3. The office held by the pursuer was by its nature one which implied an appointment for life—*Duff* v. *Grant*, February 20, 1799, M. 9576. Further, the evidence showed that pursuer at the meeting on the 8th of May had specially stipulated for exemption from the special rules of the committee to which other missionaries were subject.

The defenders argued—The evidence established that the pursuer was employed as a missionary by the Foreign Mission Committee. He was in contract with them, and held his office under the regulations of the Foreign Mission Committee. The pursuer had not proved his averment that he had stipulated for exemption from the special rules of the committee. The pursuer's argument, based on the effect of ordination and induction, was ill-founded. He confused the spiritual and material effects of ordination. Ordination had no effect as to the emoluments of a parish minister. These depended upon his election, which, if valid, induction necessarily followed. The argument involved that the Presbytery, being requested to ordain the pursuer by the Foreign Mission Committee, could thereby innovate entirely upon the contract between him and that committee, and create a new relation between them, altered in its most essential particulars. Further, this was not a case in which an appointment, not bearing to be *ad vitam aut culpam*, would be assumed to be of that character. There was no permanent fund dedicated to the Calcutta Institution, nor was it a constituted college. The whole missionary scheme, depended on voluntary subscriptions, and the grant which was received from the Indian Government went into the common fund of the school—*Mitchell* v. *Elgin School Board*, June 15, 1883, 10 R. 982; *Gibson* v. *Directors of Tain Academy*, December 22, 1837, 16 S. 301, and 1 Rob. App. 16; *Bell* v. *Mylne*, June 15, 1838, 16 S. 1136, and 2 Rob. App. 286; *Adam* v. *Directors of Inverness Academy*, July 7, 1815, 14 S. 714, footnote.

The pursuer at the close of the argument craved leave to amend his record in order to have his claim against the defenders for slander dealt with in this action, and he tendered the following minute of amendment—"The pursuer respectfully craves leave to amend the record in this action so that his fourth plea-in-law may read as follows—4. In any event, the pursuer having been wrongfully and illegally removed from the said office by the defenders, and the defenders having libelled and slandered the pursuer to his loss, injury, and damage, and the sum sued for being only reasonable reparation in the premises, decree should be granted therefor in terms of the conclusions of the summons."

At advising—

Lord President—This is an action for breach of contract. The defenders are the Foreign Missions Committee of the Church of Scotland, who are appointed annually by the General Assembly to administer the Scheme of the Church for sending missionaries to foreign countries, and more particularly to India.

The maintenance of this Scheme depends entirely on voluntary contributions, the only accumulated capital possessed and administered by the Committee consisting of savings of such voluntary contributions. There is nothing in the way of permanent endowment belonging to the Scheme, or attached to any office or appointment under the Committee.

The pursuer was appointed in 1878 by the defenders, in terms of a minute to be more particularly noticed hereafter, "to be one of their missionaries to India, and to be Principal of their Institution at Calcutta." On the 6th of November 1883 the defenders recalled the pursuer's appointment, giving him a half-year's salary from the date of his receiving notice of his recal, which was afterwards confirmed by the General Assembly. This recal constitutes the breach of contract of which the pursuer complains in the present action.

The contract is a parole agreement. There is no document signed by the parties embodying the terms and conditions of the contract. There is no interchange of missives sufficient of themselves to constitute a contract. There are certain minutes of meetings of the defenders; but these so far from constituting a contract are not even admissible in evidence in such a question, until it is established either by evidence or admission that they accurately represent the *res gestæ* of the meetings of which they bear to be the minutes.

The pursuer avers that "the conditions upon which the pursuer held his rights as the ordained and inducted Principal of the General Assembly's Institution at Calcutta, were exceptional and special as regarded his relation to the Foreign Mission Committee. He was not an applicant for the office, and only agreed to accept the call of the committee on the ground of the special arrangements made for his exemption from the special rules of the committee, and for his holding his office under the same securities as apply to other ordained and inducted ministers of the Church."

The defenders, on the other hand, aver that "the pursuer accepted office on the condition, *inter alia*, that he might be dismissed on six months' notice, and being paid his passage to this country, and the Foreign Missions Committee had no power to make or sanction an appointment on a different tenure." This averment is denied by the pursuer.

In this state of the record it was apparent that the whole dispute between the parties depended on the terms of their parole agreement. If the pursuer was appointed *ad vitam aut culpam*, his recal in November 1883 was unauthorised and constituted a breach of contract. On the other

hand, if he was appointed on the condition that he might be recalled by the defenders at any time on six months' notice, the recal in November 1883 was within the powers of the defenders, and there is no breach of contract. The parties therefore most properly and reasonably agreed by joint minute that the proof should be "restricted to a proof of the terms and conditions of the pursuer's appointment to the Principalship of the General Assembly's Institution at Calcutta, and the tenure of said appointment." Upon this arrangement evidence was led by both parties, and upon the concluded proof the Lord Ordinary pronounced judgment in favour of the defenders.

The pursuer contends that he was inducted into an office, the natural tenure of which is *ad vitam aut culpam* (independently of the appointment of the defenders), by virtue of an act of ordination and induction by the Presbytery of Edinburgh. This argument I shall examine by-and-bye; but in the meantime, dealing with the agreement of parties as being truly a contract of employment, I have very little difficulty as to the import and result of the evidence. It is not seriously disputed that the minutes of the defenders as a committee accurately represent what took place (though perhaps in the pursuer's view not all that took place) at their meetings. On 18th April 1878, on the report of the convener, it was unanimously agreed "to offer William Hastie the appointment on the usual salary and allowances, with an additional special allowance of £100 per annum, also to make him an allowance till his departure for India at the rate of £100 per annum." The pursuer was not present at that meeting, but he attended the next on the 8th of May "and expressed his willingness to accept the appointment of Principal of the Institution at Calcutta on the terms minuted at last meeting."

Then follows on the 16th July a more formal appointment in the following terms:—"The committee resumed consideration of the case of the Rev. William Hastie, B.D., and being satisfied of the ability, scholarship, and piety of Mr Hastie, . . . do hereby appoint him to be one of their missionaries to India, and to be Principal of their Institution at Calcutta, on the terms, and under the conditions already agreed to. The secretary was instructed to forward extract of this minute to the Rev. the Presbytery of Edinburgh, with the request that they would be pleased to take Mr Hastie on trials for ordination to the office of the ministry. The committee would suggest that if agreeable to the Presbytery the ordination should take place within the first fortnight of October."

The bargain was thus completed so far as regards the fact of appointment and the emoluments of the pursuer. But it certainly would have been a very strange and unbusinesslike proceeding if no agreement were made as to the nature of the duties expected of the person thus appointed, and as to the length of his service under the defenders. And accordingly, it now appears very clearly from the evidence that both parties had in view certain regulations adopted by the defenders so far back as January 1877 "in reference to the employment of European missionaries in India." It does not very clearly appear at what particular stage of the negotiations the pursuer was put in possession of a copy of these regulations, but he certainly had a printed copy, as he himself in his evidence states—"About the time the call was received by me, and when I was just considering the matter of accepting it, and before accepting it;" and from other parts of his evidence it appears that he studied the regulations very carefully as a matter vitally affecting his own position if he should accept the appointment offered to him.

The regulations are divided into two heads, the first applying only to "Ordained Missionaries," and the second to "European Missionaries." Under the general head of "Ordained Missionaries" the first sub-division is entitled "Period and terms of Engagement," consisting of five articles. These five articles provide in unequivocal language that the full period of a missionary's service in any case shall be twenty-five years, that a missionary may resign at any time by giving six months' notice, that "the committee may dispense with the services of a missionary at any time by giving six months' notice and paying his passage if he wishes to return to this country at the close of that period," that in cases of immorality or gross misdemeanour the committee may dismiss summarily, and that in this last case, as well as in the case of recalling on six months' notice, "the committee shall be the sole judges of the merits of any case," "and their decision shall be final." The remaining portions of the regulations have no material bearing on the present question.

Obviously, if these regulations form part of the contract between the parties, they furnish a complete and conclusive defence to this action. But the pursuer contends that he refused to be bound by these articles of the regulations, distinctly intimated his refusal to the defenders, and that they acquiesced in this arrangement. This contention is to be found not on the record, but only in his evidence as a witness, and to do full justice to the pursuer's view of this part of the case his evidence must be given in his own words. At the meeting of the 8th May, when the appointment was offered to him by Dr Herdman, the convener of the committee, the pursuer says—"I made a short statement in reply. I began by saying that they knew that I had not been an applicant for this office; that I had done nothing to bring before them any qualification which I might be supposed to have for the duties of the office; that their call had weighed with me very greatly, and that I had resolved now to accept it, but only on four conditions, which I distinctly stated. The first was that I would not be bound by the special rules applicable to the appointment of other missionaries. The second was that I should only be appointed Principal of the Institution, and not also Superintendent of the Mission, as I had studied the duties involved in the former office, but did not quite understand what responsibilities were attached to the latter. The office of Superintendent of the Mission involves evangelistic work entirely outside the Institution. The Institution is a teaching establishment. The third condition was that I should not be bound by any particular period of service. The fourth was that I should be allowed to go away quietly, without any public demonstration being made about my appointment. By going away I meant going away from this country. I

stated these conditions articulately, just as I am putting them now. I did make further remarks of a more general character. Dr Herdman was in the chair at the time. He demurred to one of the conditions. He said, 'It is advisable that Mr Hastie should be the head of our mission—should be superindentent of our mission as well.' That was all he said. I don't think I replied anything to that; I acquiesced. I did not press my objection." Again he states—"I had with me for reference a jotting of these four conditions that I made, but I cannot say that I held it in my hand. I have not got it just now, as all my books and papers have gone smash in consequence of this business. I don't know whether that jotting exists or not. I searched for it previously to this, but not just now."

It is unfortunate that the pursuer did not preserve the jotting from which he spoke on the 8th of May; but this is the less to be regretted, because if it was not more definite than the account he now gives of the statement he made to the meeting, it would not much advance the decision of the question before us. He says he proposed four conditions. The first was that he was not to be bound by the special rules applicable to the appointment of other missionaries. But as these special rules comprehend the whole arrangements for salaries and allowances, which had been settled, and a variety of other matters about which apparently he was indifferent, the statement of this condition was apparently altogether wanting in point. The second, that he was to be Principal of the Educational Institution only, and not also Superintendent of the Mission, he says he after some discussion abandoned. The third that he was not to be bound to any particular period of service was already secured to him in the rules to which he says he was objecting, and which provide that he may resign on six months' notice. As regards the fourth, he seems to have had his own way entirely, but whether in consequence of what passed at the meeting of 8th May or not is of no consequence.

But having thoroughly studied the regulations, if he intended to object to the power of the Mission Committee to recal him on six months' notice, then was the time to state that objection and to protest that his appointment was to be *ad vitam aut culpam;* and yet there is nothing approaching to such objection and protest. Neither the power of the committee to recal nor the tenure of his office was according to his statement of the *res gestæ* suggested by him for consideration.

Whatever may have been the impression on the pursuer's mind when he left the meeting, the other persons present who are examined as witnesses for the defenders are quite clear that if any proposal had been made to alter the tenure of office of the pursuer, and to give him an appointment for life, or to limit the power of recal by the Foreign Mission Committee, the proposal would have been at once rejected as one which they had no power even to consider, and that such a proposal if made would certainly have dwelt in their memory as something quite exceptional and unprecedented.

If there had been any conflicting or even ambiguous evidence to weigh or analyse, I should have been inclined to attach a good deal of importance to the suggestion of the Lord Ordinary that it would be a hazardous and extraordinary contract for a foreign mission committee to appoint a missionary *ad vitam aut culpam*. But it is unnecessary to resort to antecedent improbability when the direct evidence is so clear.

So far therefore as the appointment of the pursuer by the defenders, or more properly speaking, the contract of employment between the parties, is concerned, there is no room for doubt as to the soundness of the Lord Ordinary's interlocutor; but the pursuer relies very confidently on what followed on his appointment by the defenders as giving him a tenure for life.

It was necessary that the pursuer should be ordained as a minister of the Church of Scotland, because he was to go to Calcutta as an "ordained missionary," and the defenders by their minute of 16th July 1878 requested the Presbytery of Edinburgh "to take Mr Hastie on trial for ordination to the office of the ministry." The Presbytery of Edinburgh took Mr Hastie on trial accordingly, and ordained him "to the office of the holy ministry;" but their minute of 16th October bears further, that they "inducted him to the office of Principal of the General Assembly's Institution at Calcutta." The pursuer seems to attach some mysterious importance to the term "inducted," but he has not been able to explain what precise significance he ascribes to it.

What is meant by "inducting" an ordained minister of the Church to an office? Induction is not a *nomen juris*, neither is it a *vox signata* in the existing ecclesiastical law of Scotland. By the canon law, which was the ecclesiastical law of Scotland prior to the Reformation, induction was the legal name of a ceremony, by which, after collation by the bishop of the diocese, some inferior ecclesiastical persons gave the presentee actual and corporal possession of the church and benefice, under mandate from the bishop, by the use of certain symbols, which it is needless to enumerate. The ceremony was formal and imposing, and necessary to complete the presentee's title to the benefice. During the two comparatively short periods in the 17th century when the National Protestant Church of Scotland was governed by bishops, induction had again a fixed and technical meaning, and was the name for a somewhat similar ceremonial conducted under the authority of the bishop, which consisted in the inferior clergy of the diocese, after collation by the bishop, carrying the collated presentee into the church and placing him in the pulpit or some other conspicuous part of the church, and there delivering to him the keys of the church. But with the ceremony the name of induction as a *nomen juris* has perished. There is no use of the name in any of the numerous statutes relating to the settlement of ministers under Presbyterian Church government.

In the earliest of these statutes (1567) it is provided "that the examination and admission of ministers be only in the power of the kirk." By the Act of 1592, c. 116, presbyteries are "bound and astricted to receive and admit quhatsumever qualified minister presented," &c. The Act of 1690 simply revived the Act of 1592. By the Act 10 Anne, c. 12, restoring patronage, the presbytery is "bound to receive and admit such qualified person or persons, minister or

ministers, as shall be presented." The Aberdeen Act (6 and 7 Vict. c. 61) bears in its title to be an Act respecting the admission of ministers, and by section 3 presbyteries are directed to "admit and receive into the benefice." Lastly, in the Act 37 and 38 Vict. c. 82, abolishing patronage, and giving the appointment of ministers to congregations, it is enacted, sec. 3, that "the Courts of the Church are declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof." As to the form of admission to the benefice, the Church Courts are left at perfect liberty to exercise their own discretion. But it is clear that they could not use, and never have used, the old ceremonial of induction.

It may be true that the name of the old ceremony of induction still lingers in the common speech of the country, and may be used popularly even in the proceedings of church courts as an equivalent of "admission to a benefice." It is remarkable, however, that in the earlier authoritative or *quasi*-authoritative Church documents, as distinguished from Acts of Parliament, the term "induction" entirely disappeared. In the first and second Books of Discipline, in Pardovan's Collections, in Principal Hill's View of the Constitution of the Church of Scotland, "admission of ministers," and not "induction," is the phrase used. But what is the act of admitting a minister to a benefice, and what is its effect? There is no *actus solemnis* apart from ordination. By the imposition of the hands of the Presbytery the candidate is admitted and set apart to the office of the holy ministry. If he has been already ordained the fact is minuted. What follows is not a ceremony at all, but merely a recognition of the new minister as a member of Presbytery in his capacity of minister of the benefice to which he has been presented or elected.

If the term induction was used in a merely popular sense by the Presbytery of Edinburgh in the present case it can have no effect whatever in law, because the pursuer had not been appointed to a benefice in the Church, but to an entirely precarious office, depending for its subsistence on the continuance of voluntary contributions, and from which by his contract of employment he was liable to be recalled on six months' notice. If the pursuer was to be admitted in any sense to the office of Principal, one would expect that to take place at Calcutta, and not in Edinburgh.

It is said that there is no *ministerium vagum* permitted in the Church of Scotland, and that no man can be ordained unless for the purpose of undertaking a cure. This is true with a certain qualification. The Church will not ordain any man to the ministry unless he is about to be employed in the proper work of the ministry. But the Church is in use to ordain ministers who have no endowed benefice or appointment *ad vitam aut culpam*, otherwise there could never have been ordained ministers in chapels of ease, and just as little could there have been ordained missionaries whose emoluments and the continuance of whose office depend on the continuance of voluntary subscriptions.

This subject is well illustrated by the recent case of *Maclagan* v. *Brown*, 14 R. 1083. In that case the Court held that Mr Brown when he became the ordained minister of the Chapel of Ease of St Michael's in 1881 was not admitted to a benefice, because he had no permanent endowment or fixity of tenure, but was merely employed as an ordained minister of the Church to conduct the services in a chapel which was the property of certain benevolent persons who had built it at their own expense, and who engaged to pay £150 a-year for three years to the person undertaking to conduct the services in the chapel. The Court laid it down emphatically that the relation subsisting between Mr Brown and the owners of the chapel was that of parties to a mutual contract of employment. But the chapel, with a surrounding district, was subsequently, with the consent of the proprietors of the chapel, erected into a *quoad sacra* church and parish under the Act 7 and 8 Vict. cap. 44, with a permanent endowment. Mr Brown was then no longer acting under a contract of employment, but was a beneficed clergyman of the Church of Scotland, and was there for the first time received and admitted as such by the presbytery of the bounds.

The law applicable to appointments *ad vitam aut culpam* may be summarised thus—Either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied. In this last class are embraced only offices of the nature of *munera publica*. Public officers are irremovable except for fault. Holders of benefices in the Church are public officers, and these offices are *munera publica*. But the pursuer's office was not of such a nature, for the reasons already fully explained.

At the conclusion of the hearing of the cause the pursuer tendered a minute of amendment, which now falls to be disposed of. It is in these terms—"The pursuer respectfully craves leave to amend the record in this action so that his fourth plea-in-law may read as follows—(4) In any event, the pursuer having been wrongfully and illegally removed from the said office by the defenders, and the defenders having libelled and slandered the pursuer to his loss, injury, and damage, and the sum sued for being only reasonable reparation in the premises, decree should be granted therefor in terms of the conclusions of the summons." This proposed new plea is based on breach of contract, and as I have already negatived that ground of action, the new plea seems necessarily to follow the fate of the pursuer's other pleas. But if it be intended by this new plea to convert the present action into an action for libel or slander on the assumption of there being no breach of contract, then it must be kept in mind that the proposal was made for the first time not only after final judgment by the Lord Ordinary, but after the argument on the reclaiming-note had been completed on both sides, and the Court had intimated that they would consider the cause in private before giving judgment. In such circumstances it would not be possible to admit such an amendment in any case except under condition of the pursuer paying the whole previous expenses. But I am for refusing the amendment *de plano*, because I think it involves a proposal at this last stage of the process to alter entirely the nature of the action, which would in my opinion be an abuse of the privilege of amendment.

On the merits of the cause I propose, with your Lordship's concurrence, to refuse the reclaiming-note and adhere to the interlocutor of the Lord Ordinary.

Lord Shand—Having had an opportunity of reading and considering the opinion which your Lordship has now delivered, I have to express my entire concurrence in the views which your Lordship has expressed. I shall only therefore, avoiding detail, endeavour to state shortly the grounds on which I am clearly of opinion that the judgment of the Lord Ordinary must be affirmed.

The pursuer's claim is rested entirely on the view that he held an appointment *ad vitam aut culpam*, and that consequently he could not be dismissed on six months' notice, or on payment of six months' salary. His office was that of a missionary to India and Principal of the Institution of the Church of Scotland at Calcutta, maintained in connection with the Indian Mission by the Foreign Mission Committee of the Church.

In regard to such an appointment it is clear that the *onus* lies on the pursuer to instruct his averment that the person appointed has right to the office for life, for there is every presumption against the notion that the Foreign Mission Committee of any church would give a missionary or teacher, or even the head of their Institution, a life appointment, inferring continuing obligations, for a salary of considerable amount, and without any power to dispense with his services even if they found that the person appointed proved after a time to be quite unsuited to the duties required of him. The pursuer, contending against this presumption, has undertaken to show that the defenders conferred on him a life appointment, and his whole case depends on his establishing this to be the fact. An appointment to an office for life might arise, as your Lordship has observed, in either of two ways—either because of an express contract, or because of the nature of the office itself.

At the close of the very full argument submitted by Mr Hastie in support of his appeal against the Lord Ordinary's judgment it was by no means clear whether he maintained that there was an express contract between the Foreign Mission Committee of the Church and himself giving him an office for life. I understood that he did not contend that anything of the kind had been proved, and that he rather rested his argument on the view that life tenure was to be inferred from the nature of his office, and the induction, as it has been called, to that office by the Presbytery of Edinburgh. But whatever the argument may be, I am very clearly of opinion that on the proof there is not the smallest ground for saying that the parties—the Foreign Mission Committee on the one hand and Mr Hastie on the other—contracted that Mr Hastie should have an appointment for life. In the negotiations and arrangements for the employment of the pursuer, next to the ascertainment of the services and duties to be required of him, it was of course necessary that the salary to be paid, and the period of service, should be fixed. It is scarcely conceivable that an engagement could be made without having these points settled; and I think they were clearly fixed by the rules which are admittedly referred to in the minutes of the committee of 16th April 1878, which records that it was "agreed to offer Mr Hastie the appointment on the usual salary and allowance, with an additional special allowance of £100 per annum." These rules were in the pursuer's hands and their terms were fully known to him, and it is clear that both parties contracted with reference to them. They provide in regard to ordained missionaries, of whom the pursuer was to become one, (1) that 25 years should be the full period of service, at the expiry of which time the engagement should end without notice on either side; (2) that a missionary might resign on six months' notice, and (3) that the committee might dispense with the services of a missionary at any time by giving six months' notice. I have no doubt as the result of the proof that these rules were a part of the contract of service between the parties. The pursuer does not maintain that there was any special and exceptional arrangement made with him to give him an appointment for life, and it appears to be clear that the committee had no power to make any such appointment.

It remains only to consider whether there was anything in the nature of the situation or office which the pursuer accepted, or in what followed on his appointment, which could convert his service, which by contract was determinable by six months' notice on either side, into an engagement *ad vitam aut culpam*, and having listened patiently to the pursuer's argument I have heard no intelligible ground to support his contention. The office conferred by the committee was described as "one of their missionaries to India and Principal of their Institution at Calcutta"—an educational institution carried on mainly in furtherance of the Mission. The appointment had nothing about it to suggest the idea of a public office—a *munus publicum* under the state or otherwise. The Mission of the Church to India was begun and has been carried on entirely by voluntary contributions which might cease at any time; and the Church itself might at any time, for reasons which to it might seem good, cease to carry on the Mission at all. Everything therefore in the nature of the office indicates that it must be, as in fact it was under the committee's rules, an office terminable on six months' notice on either side.

But the pursuer says, though all this be true, I was inducted into my office by the Presbytery of Edinburgh, and the virtue of this act or ceremony of induction was so great as to convert my office—precarious in its nature, terminable on six months' notice on either side—into an office for life, with an obligation on the Foreign Mission Committee to pay a salary of several hundreds a year, rising with the lapse of time, for my lifetime. I confess I find it difficult to treat this argument seriously. I am unable to conceive how anything which the Presbytery of Edinburgh could possibly do could add to or alter the terms or conditions of the contract between the Foreign Mission Committee of the Church and the pursuer. It was necessary that the pursuer should resort to the Presbytery for one purpose, and for one purpose only—for ordination as a minister of the Church, for he could only enter on his duty under his contract after becoming an ordained missionary. Accord-

ingly the committee requested the Presbytery to take Mr Hastie on trials for ordination to the office of the ministry, and suggested that the "ordination" should take place at an early date. He was taken on trials accordingly. The questions appointed to be put to all ministers previous to ordination were put, and he was ordained in ordinary form to the office of the ministry. The minute of Presbytery bears as part of it also, that he was "inducted to the office of Principal of the General Assembly's Institution at Calcutta." So far as I can see, the Presbytery of Edinburgh had no warrant in the terms of the extract minutes of the Foreign Mission Committee, containing the limited request above quoted, for proceeding to induction of the pursuer to any office, and if that proceeding could have had any such marvellous effect as to convert an engagement terminable at six months' notice into an engagement for life, it was clearly unauthorised, and therefore could have no such effect. The so-called induction, indeed, seems to me to have been a mistake altogether, proceeding on some supposed analogy between the case and that of a presentee to a benefice in Scotland, while there is no true analogy between the cases.

But, finally, suppose the induction to have been all regular and in order it could never have the effect, for which the pursuer contends, of giving him his office for life. It was, in any view, besides ordination to the ministry, merely an act of recognition of his admission to his office—admission which could properly proceed only from the Foreign Mission Committee of the Church. The pursuer points to other cases of induction, to the ordinary case of a presentee before the abolition of patronage, or of a minister called or elected to a new charge under the recent statute, and because in these cases induction it is said gives an office *ad vitam aut culpam* the same result must follow in his case. For the reasons so fully stated by your Lordship, I consider the term "induction" as now commonly used means admission to the office only. But the important consideration is that it is not by the admission or induction that the right to usè office for life is given. That right is inherent in the nature of the office itself—a permanent charge with a right to stipend from the heritors which is a permanent fund, and the right is conferred not by the act of the Presbytery admitting to the charge, but by the presentation or the call or election under the statute, which no doubt must receive the sanction of the Presbytery, which indeed the Presbytery in ordinary circumstances is bound to give. There is no analogy or similarity between such a presentation or election to a benefice of the church, and the precarious office of a missionary and Principal of the Church's Institution in Calcutta—precarious because there is no permanent fund like the teinds payable to the minister of a parish, for the Church's Mission Scheme to India may fail for want of the annual voluntary contributions which support it—and precarious because the parties have wisely provided by their contract that the service of the missionary and Principal or teacher shall terminate by six months' notice on either side. A clergyman presented or elected to a benefice carries in his hand to the Presbytery his title to a *munus publicum* with a right to an office *ad vitam ad culpam*. The pursuer had no such office, and his engagement or contract expressly excluded any such right, and so his argument on the effect of induction or admission to his office by the Presbytery entirely fails.

It may be that the proceedings of the Foreign Mission Committee in suddenly terminating their connection with the pursuer paying him six months' salary was a harsh measure, or at least an act in which due consideration was not shown towards his feelings. On the other hand, it may be that the conduct of the pursuer in the management of the mission made it necessary summarily to bring his connection with the mission to an end. Any question of this kind is not before the Court, and I have no opinion in regard to it. But one thing is to my mind abundantly clear, and that is that the Foreign Mission Committee in what they did acted entirely within their legal rights, and in the result they are therefore entitled to succeed in this action.

LORD ADAM concurred.

LORD MURE was absent.

The Court pronounced this interlocutor:—

"Adhere to the interlocutor of the Lord Ordinary, and refuse the reclaiming-note: Further, having considered the minute for the pursuer, No. 103 of process, tendered by him at the close of the debate on the reclaiming-note on 23rd May 1889, craving leave to add a new plea to to his summons, Refuse the desire thereof," &c.

Counsel for the Pursuer (Reclaimer)—Party. Agents—Welsh & Forbes, S.S.C.

Counsel for the Defenders (Respondents)—Sir Charles Pearson—Low. Agents—Menzies, Coventry, & Black, W.S.

Tuesday, June 4.

SECOND DIVISION.

STRACHAN'S TRUSTEES *v.* WILLIAMSON AND OTHERS.

Succession—Trust of Special Fund—Joint Gift of Income in Liferent with Power of Disposal failing Children.

A testator directed his trustees to hold £60,000 of his estate in trust "as a special fund for the sole use and behoof of the four daughters of my brother . . . the survivors and survivor of them, share and share alike . . . in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent."

He further directed his trustees—"that the interest or annual income arising from said special fund . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly during their respective lives, . . . and that, subject to said liferent

the said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters or either of them, to the extent of their respective mothers' share in said special fund in fee, and that immediately and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand however informal the same may be, and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing."

These four nieces survived the testator. The first deceaser left neither children nor deed of nomination. The next left children. *Held* that she properly liferented one-third of the special fund from her predeceasing sister's death until her own, and that her children were entitled under the trust-deed to the fee of that third, unburdened by any liferent to their surviving aunts.

The late Patrick Strachan, York Place, Portman Square, London, died on 31st July 1872, leaving a last will and testament by which he bequeathed his whole estate to trustees whom he appointed his executors. By the sixth article of said will he directed his trustees to hold the sum of £60,000 "as a special fund for the sole use and behoof of the four daughters of my brother . . . Jane, Barbara, Helen Patricia, and Georgina, the survivors and survivor of them, share and share alike . . . in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them, severally and respectively in liferent." By the seventh article he further directed "that the interest or annual income arising from said special fund of sixty thousand pounds sterling, . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly during their respective lives, and that, subject to said liferent, the said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters or either of them, to the extent of their respective mothers' share in said special fund in fee, and that immediately and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand however informal the same may be, and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing; . . . and I further direct that the residue or remainder of my whole estate, when its sterling value is ascertained and secured at the period more particularly described and provided for as aforesaid, over and above the said special fund of £60,000, or the equivalent of that sum as aforesaid, shall be paid over to my nephew, John Strachan, presently a merchant in Liverpool, for his sole use and benefit."

The testator was survived by the four nieces mentioned above. Miss Jane Strachan, one of the said nieces, died unmarried and intestate on 12th March 1881, and Mrs Georgina Strachan or Williamson died on 21st April 1887, survived by two pupil children, William Frederick Williamson and Constance Rose Williamson. Mrs Barbara Strachan or Haynes, and Mrs H. P. Strachan or Thackeray, the remaining two nieces, were still alive, but had no children. The revenue of the trust funds was equally divided among the four nieces until the date of Miss Jane Strachan's death, and thereafter was divided among the survivors.

Difficulties having arisen as to the construction of the provisions of the will, a special case was prepared for the opinion of the Court by (1) the trustees, (2) the two daughters of the deceased niece Mrs Georgina Strachan or Williamson, and their guardians, (3) the two surviving nieces, (4) the representatives of the heirs *in mobilibus ab intestato* of the testator, (5) the testator's residuary legatee, and (6) the heirs *in mobilibus ab intestato* of the deceased niece Miss Jane Strachan.

The questions submitted were as follows—"(1) Are the second parties entitled to a conveyance of one-third of the said special fund of £60,000, or are they entitled to a conveyance of only one-fourth of the said fund? (2) Are the third parties entitled to the liferent of the one-fourth which was payable to Miss Jane Strachan? (3) Are the fourth parties entitled to the fee of Miss Jane Strachan's one-fourth of the trust fund, and if so, is their right burdened with a liferent in favour of the surviving nieces of the testator? (4) Is the fifth party entitled to Miss Jane Strachan's one-fourth share of the trust fund, as residuary legatee of the testator, and if so, is his right burdened with a liferent in favour of his sisters? Or (5) Are the sixth parties entitled to Miss Jane Strachan's one-fourth share of the trust fund as next-of-kin of Miss Jane Strachan, and if so, is the right burdened with a liferent in favour of the surviving nieces of the testator?"

Argued for second parties—They were entitled to one-third share of the fee, because the settlement gave it "to the extent of their mothers' share," and Mrs Williamson was rightly liferented in one-third. It was clear that in the joint gift of income there was an implied survivorship in the event of a niece dying without children, and without disposing of the fund by will. The words "severally" and "respectively" were not necessarily fatal to implied survivorship—*Barber* v. *Findlater*, February 6, 1835, 13 S. 442; Bell's Prin. 1879. The express power to disburden of an accrescing liferent implied survivorship where the power was not exercised—*Tulloch* v. *Welsh*, November 23, 1838, 1 D. 94, where Lord Moncrieff points out that words of severance in a joint gift must be controlled by the context. The words "share and share alike" were merely demonstrative of the mode of distribution. Besides, in a gift of income, "survivors" did not primarily mean surviving the testator; hence there was an express survivorship in the gift of income. No such consideration existed in the case of *Paxton's Trustees*, *infra*.

Argued for third parties—The second parties were only entitled to an immediate conveyance of a fourth, and the fourth, the liferent of which had been set free by the death of Miss Jane Strachan, fell to be paid to them and the

survivor of them in liferent from and after the date of the death of their sister Mrs Williamson.

Argued for the fourth parties — (1) The residuary legatee was excluded by the terms of the deed. The residuary clause was not a bequest of residue in the ordinary sense, that being a bequest of a whole estate burdened with the debts and legacies—*Storie's Trustees* v. *Gray and Others*, May 29, 1874, 1 R. 953. The residuary clause carried only the residue as ascertained at a particular date, in a particular way, and "over and above the said special fund of £60,000." The residue and the special fund were here as distinct and separate as if there had been two separate trust deeds. (2) The beneficiaries in the special provision (the second, third, and sixth parties) were equally excluded by the terms of the deed. The terms of the bequest to George Strachan's daughters in the *sixth* trust purpose implied merely a liferent. Though words importing fee occurred, they were restricted to a liferent by other words in the same clause, and not, as in *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281, by words in a subsequent and distinct part of the deed. This liferent was granted to the four daughters "severally and respectively," and the mention of survivors related only to survivance of the testator. The same considerations applied to the initial clause of the *seventh* trust purpose, disposing of the liferent. The liferent of one-fourth vested in each of the four daughters at the testator's death, and on the death of one of the four there was no accretion. "Share and share alike" excluded accretion—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191. The fee of each fourth went to the liferentrices' children, if any, and if none, to her appointee, provided she made an appointment. But failing these contingencies, it fell into intestacy. It could not be maintained that the liferent clause had a different meaning where a deceasing daughter left children from what it had where she left none; and whatever its meaning was it must apply where children were left, because the bequest to children was "subject to said liferent as hereinbefore expressed." Clearly therefore there was no accretion either of liferent or fee. Therefore (3) the heirs *in mobilibus ab intestato* of the testator were entitled to succeed. No doubt the law was unfavourable to intestacy, but where it clearly appeared that a testamentary provision had failed, and that the fund was not otherwise disposed of, intestacy was inevitable—*Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566. Here it was natural that a testator who preferred strangers appointed by the liferentrices to the fiars under the deed should similarly prefer his own next-of-kin *ab intestato*.

Argued for fifth parties—There was no vesting of their shares in the nieces who died—*Byron's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. There was no accretion—*Paxton's Trustees*, July 16, 1886, 13 R. 1191, and *Stobie's Trustees*, 15 R. 340. Intestacy was to be avoided—*Aberdeen's Trustees*, March 19, 1870, 8 Macph. 750. The residuary legatee was entitled to every thing that in the event turned out not to be well disposed of by the testator—Jarman (4th ed.) i. 761.

Argued for sixth parties—Miss Jane Strachan's next-of-kin were entitled to a fourth of the special fund. To that extent she had a right of fee, or, at any rate, a general power of disposal which she had not exercised—*Alves* v. *Alves*, March 8, 1861, 23 D. 712.

At advising—

Lord Justice-Clerk—The late Mr Patrick Strachan by his last will and testament set apart in the hands of the executors a sum of £60,000, as a special fund for the sole use and behoof of four nieces and of "the survivors and survivor of them, share and share alike," and as regards the nieces themselves, the testator's executors were directed to hold the money "in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent." He directed that the annual proceeds were to be divided and annually paid over to the neices, "the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly during their respective lives." Subject to this liferent provision he directed the fund to be held for the children of the nieces "to the extent of their respective mothers' share in fee," and this fee on the death of the mother is declared not to be burdened with a liferent to the surviving nieces. Failing children each niece is entitled to test on her share either with or without the burden of a liferent to the surviving sisters as she might express by any document under her hand. These are all the important parts of this deed which it is necessary to refer to in deciding this case. The testator was survived by four nieces. One of these, Jane, died in 1881, leaving no issue, and another, Georgina, died in 1887, leaving two children. The two other nieces are still alive, and have no issue.

Now, the two questions which it seems to me require to be answered here, are—(1) How is Jane's share to be disposed of as at her death, and (2) how is the share of Georgina as at her death to be disposed of? I am of opinion that the true interpretation of the deed is, first, that on the death of Jane without issue the fund fell to be divided by three instead of by four, so that the three other sisters as surviving Jane became each entitled to the liferent of one-third of the fund. And second, that on the death of Georgina her two children became entitled to the one-third of the fund of which their mother had enjoyed the liferent between the time of the death of Jane and her own death. This being my view, the answers I would suggest your Lordships should give to the questions will be as follows—To the first question, that the second parties are entitled to a conveyance of one-third of the special fund; in the second question the answer will be, No—that they are entitled only to a liferent of one-third each of the whole fund; and the three other questions will be answered in the negative.

Lord Young—One of the nieces died in 1881, eleven years after the truster, and she left neither children nor nominee to take the fee of what she liferented. The disposal of the share she had previously liferented depends upon the expression "survivors or survivor." Did the testator mean to limit that expression to the survivors or survivor of himself taking the period to be surviving his own

life. That is the meaning which such words may bear, and most commonly do bear, it being manifest upon the face of the deed that that is the intention. But they may also mean, and frequently do mean, survivorship *inter se*, and if that shall appear to be according to the intention of the testator, that meaning must be attached to the words. Now, if we put that latter meaning upon the words here the result will be that the £15,000 which Jane liferented till her death will go to the three surviving nieces. Admittedly that would have been the case if Jane had died before himself. I think it quite clear that this accords with the intention of the testator, for he only intends these four nieces, and their children or nominees, to participate in this trust fund, as to which they are the only beneficiaries named.

The next deceaser was liferentrix of £20,000. She left children, and I think, according to the language of the deed, the fee of that £20,000 which she liferented on her death must go to her children.

If, in the future, one of the surviving daughters die without children or nominees, the survivor will liferent £40,000, and the fee of whatever she liferents will go to her children or nominees. But if the last should leave no children or nominees, then there will be a fund liberated, and no recipients according to the trust. That will be a case of resulting trust, and there will be a question whether the trustees then hold for the residuary legatee or for the next-of-kin.

In the meantime my opinion is with your Lordship that Jane's death after the testator, without children or nominees, put matters in exactly the same position as if she had predeceased the testator, and that the surviving three thus took the whole fund.

Lord Rutherfurd Clark concurred.

Lord Lee—My only doubt has been whether the terms of the deed are not such as to confer the fee of an equal share upon the nieces who survived the testator. On the whole, however, after considering the case with the benefit of your Lordship's views, I am satisfied that there are no grounds for that view, and I therefore concur.

The Court pronounced the following interlocutor:—

"Answer the first of the questions therein stated to the effect that the parties of the second part are entitled to a conveyance of one-third of the special fund of £60,000: Find it unnecessary to answer the second question: Answer the third, fourth, and fifth questions in the negative."

Counsel for the First and Second Parties—Graham Murray—W. C. Smith. Agents—Auld & Macdonald, W.S.

Counsel for the Third and Sixth Parties—Gloag—Lyell. Agents—Horne & Lyell, W.S.

Counsel for the Fourth Parties — Low—M'Lennan. Agents—Auld & Macdonald, W.S.

Counsel for the Fifth Party—Dickson—G. W. Burnet. Agent—James F. Mackay, W.S.

Tuesday, June 4.

SECOND DIVISION.

[Lord Trayner, Ordinary.

TAIT & CRICHTON *v.* MITCHELL.

Contract—Implement—Sale of Shares—Principal and Agent.

An offer to sell a specified number of shares of a company was accepted, the acceptor adding, "You will require to execute two transfers."

In an action for implement, *held* that this was not a condition of the contract added by the acceptor, which required the offerer's consent, and decree of implement *granted*.

This was an action by Messrs Tait & Crichton, W.S., Edinburgh, against Miss Mary Sawers Mitchell, residing in Edinburgh, for implement of a contract of sale by delivery to the pursuers of sixty-eight shares of the Caledonian Fire and Life Insurance Company.

The following correspondence had passed:—Upon 15th July 1888 the pursuers wrote to the defender that they wanted fifty shares of this company for a client, and asked what price she expected. Upon 21st July the defender wrote—"I have a balance of sixty-eight shares of the Caledonian Insurance Company to dispose of, and I understand that the price is regulated by the market value. I had made up my mind to sell them as a whole at 29¼, so I hope your client may find it convenient to take them all at this figure." Upon 23rd July the pursuers wrote—"We have received your letter of the 21st offering to sell us sixty-eight shares of the Caledonian Insurance Company at 29¼ per share. We accept your offer. As our client only wishes fifty shares, you will require to execute two transfers." Upon 25th July Miss Sawers wrote—"I have received your letter of the 23rd inst. I fear that you have not apprehended the meaning of my former letter, which was simply that if your client would take the sixty-eight shares in a lot, the price was to be 29¼. With this your letter does not comply, and I am not inclined to agree to your proposal."

The pursuers pleaded that a valid contract of sale had been constituted by the missives, and the defender had refused to fulfil her part of the agreement.

The defender pleaded—"(2) No title to sue. (5) There having been no valid contract constituted between the pursuers and the defender, the defender should be assoilzied."

Upon 21st December 1888 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Ordains the defender to implement and fulfil the contract of sale set forth in the conclusions of the summons, and that by forthwith executing and delivering to the pursuers a formal and valid transfer in their favour of sixty-eight shares of the Caledonian Fire and Life Insurance Company, the pursuers always, on delivery being made as aforesaid, making payment to the defender of the sum of £1989 sterling.

"*Opinion.*—I think there was a concluded contract between the parties, which both are bound to fulfil, and which either may enforce.

"The defender's letter of 21st July was a distinct enough offer to sell sixty-eight shares of the Caledonian Insurance Company at £29, 5s. per share. The pursuer's letter of 23rd July was a distinct acceptance of that offer.

"To the pursuers' acceptance there was added, 'you will require to execute two transfers.'

"The defender says that this was a condition added by the pursuers, to which she did not consent; that the acceptance did not therefore exactly meet the offer; and that no contract was thus concluded. I think this quite a mistaken view of the pursuers' letter. The reference to two transfers was not a condition of the contract. It was a mere detail—a proposal—as to the manner in which the contract was to be carried out or executed, not in any way affecting the terms of the contract itself."

The defender reclaimed, and argued—There was no title to sue. If the pursuers were acting for a client they ought to have disclosed him, so that the defender, in the event of loss, might have the option of proceeding against either the client or the agent. Here the pursuers did not disclose the principal, and it appeared that they were buying the stock partly for themselves, as was shown by their desire to have two transfers granted. The action should have been at the instance of the principal—*Armstrong* v. *Stokes and Others*, July 6, 1872, L.R., 7 Q.B.D. 598; *Maspono y' Hermano* v. *Mildred Goyeneche & Company*, July 7, 1882, L.R., 9 Q.B.D. 530; *Bowes, &c.* v. *Shand and Others*, June 8, 1877, L.R., 2 App. Cas. 455. There was no contract. The bargain was for the sale of sixty-eight shares. The pursuers added a condition which the defender did not accept.

Counsel for the respondent was not called upon.

Without delivering opinions the Court adhered to the judgment of the Lord Ordinary.

Counsel for the Reclaimer—D.-F. Balfour, Q.C. —C. S. Dickson. Agents—T. & R. B. Ranken, W.S.

Counsel for the Respondents—Sir C. Pearson —Macfarlane. Agents — Waddell & M'Intosh, W.S.

Thursday, June 6.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

REID *v.* SOMERVILLE & COMPANY AND OTHERS.

Bankruptcy—Cessio—*Citation*—*Wilful Absence*—*Bankruptcy and Cessio (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 22), *sec.* 9.

The Bankruptcy and Cessio (Scotland) Act 1881, sec. 9, provides—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*."

In a petition for *cessio* a diet was fixed, but before the date thereof it was agreed in view of certain concessions of the debtor that the diet should be continued *sine die*. In disregard of this agreement the agents for the petitioning creditor moved the Sheriff-Substitute to fix an adjourned diet, which was not intimated to the debtor, and to which he was not cited. At the adjourned diet decree of *cessio* was granted "in respect of no appearance by or for the defender." *Held* that the defender had not wilfully absented himself from the diet, and the decree *reduced*.

Opinion that an interlocutor granting *cessio* under section 9 of the Bankruptcy and Cessio (Scotland) Act 1881 should contain a finding that the debtor had wilfully absented himself from the diet.

On 8th February Messrs Somerville & Company, wine merchants, Leith, presented a petition for *cessio* in respect of a promissory-note for £50, 13s. 6d., granted by John Reid, publican, Barachnie, Lanarkshire, on which there was an expired charge without payment. The proceedings were instituted by the directions of Robert M'Caig, debt collector, who acted for J. Somerville & Company, and the local solicitors were Messrs Rose & Shearer, solicitors, Airdrie. When the petition for *cessio* was presented Reid was a notour bankrupt within the meaning of the Bankruptcy and Cessio Acts, not being able to pay his way at that time. But he was possessed of means which, when ultimately realised in March 1888, should have been sufficient to discharge all his outstanding liabilities, and to leave a considerable surplus.

A diet of Court was fixed for 28th February, to which the debtor was duly cited.

Reid consulted Mr D. Munro, accountant, Glasgow, in whose favour he granted certain trust conveyances, and in view of these it was agreed on 13th February, between Munro and M'Caig, that the diet fixed should be adjourned *sine die*.

In disregard of this arrangement, on the 28th February the agent for the petitioning creditors obtained a continuation of the diet till the 16th March. No intimation of this was made to the debtor, or to anyone on his behalf, nor was he cited to the adjourned diet. On the 16th March the Sheriff-Substitute (MAIR) pronounced this interlocutor—"In respect of no appearance by or for the defender, decerns the debtor John Reid to execute a disposition *omnium bonorum* to and in favour of Robert Burns M'Caig, accountant, Glasgow, who is hereby appointed trustee for behoof of the creditors of said debtor, dispensing with the trustee finding caution *hoc statu*."

Reid raised this action of reduction against Somerville & Company and M'Caig, and pleaded —"(1) Said decree of *cessio* having been obtained by the defenders in violation of the terms of the arrangement come to between the said D. Munro junior and the defender M'Caig, decree as concluded for ought to be granted. (2) The procedure in said petition of *cessio* having been illegal and disconform to the Cessio Acts and relative Acts of Sederunt, the said decree should be reduced in terms of the conclusions."

Proof was allowed, the import of which appears from the note by the Lord Ordinary

(WELLWOOD), who pronounced this interlocutor:—"In respect the late John Reid was not duly cited to the diet at which the decree of *cessio* under reduction was pronounced, and that no intimation of the said diet was made to him; finds, in the circumstances, that the said decree is reducible: . . . Therefore reduces . . . in terms of the conclusions of the summons," &c.

"*Note.*—[*After stating the facts and quoting the ninth section of the Bankruptcy and Cessio Act* 1881]—It appears from the section thus quoted, which is the only statutory authority for granting decree of *cessio* in the absence of the debtor, first that the debtor must have been cited to the diet at which decree is pronounced; and secondly, that the Sheriff shall be satisfied that the debtor's failure to appear is wilful. It will be observed that the Sheriff does not state in his interlocutor that he was satisfied that the debtor's failure to appear was wilful. I shall hereafter consider whether it was necessary for him to do so; in the meantime I shall state as shortly as I can my views upon the proof which has been led. . . . .

"The conclusions at which I have arrived on the proof are as follows:—*First*, I do not think that it is proved that the defender M'Caig undertook to abandon the *cessio* proceedings altogether. There is evidence on which it may be plausibly argued that he did so, but I do not think that he ever intended to do so, and I think that the bulk of the evidence goes to show that in point of fact he did not give such an undertaking. But—

"*Secondly*, I think it is quite clear that after obtaining from Reid a trust-deed in favour of himself (M'Caig) and Munro, M'Caig intended and undertook that the *cessio* proceedings should drop in the sense of being continued *sine die*, until it should be seen whether Reid's estate could not be satisfactorily wound up under the trust. If there was any doubt upon this point, it is made perfectly plain by M'Caig's letter to his agents, Rose & Shearer, at Airdrie, on 14th February 1888, in which he says—'Reid has granted a conveyance of the property, and also a trust-deed in favour of Mr Munro and myself, and so soon as the former can be placed on the register the *cessio* proceedings will drop.' The conveyance was placed on the register on 16th February. Now the diet for the first meeting in the *cessio* had been fixed for the 28th of February, and on 27th February M'Caig writes to Rose & Shearer—'I will feel obliged by your asking the Sheriff to continue it *sine die*. Reid has executed a trust-disposition and conveyance for behoof of his creditors in favour of Mr D. Munro jr., and myself, and we are endeavouring to wind up the estate under said deed, but we should prefer the *cessio* proceedings being continued, in case it might be necessary to ask the Sheriff to appoint a trustee.' It is plain that it was not expected or intended by any party concerned that the debtor should lodge his accounts or attend the diet fixed for 28th February; such an idea was utterly inconsistent with the proceedings which were being taken under the trust-deed. What happened on 28th February was that Messrs Rose & Shearer alone appeared before the Sheriff, and instead of asking the Sheriff to continue the diet *sine die*, as directed by M'Caig, they, in the exercise of their discretion, asked the Sheriff to fix 16th March for the adjourned diet. Now, I do not find the slightest evidence that this adjourned diet was ever made known to the debtor, or to anyone acting for him.

"*Thirdly*, I think it is proved that D. Munro junior, *bona fide* but erroneously, as I think, believed that M'Caig had undertaken to withdraw the *cessio* proceedings altogether, and that he acted on this belief by giving notice to that effect to the debtor and to the creditors. I think it right to note in passing that Munro, though perhaps not so shrewd a man of business as M'Caig, gave his evidence in a straightforward and truthful manner. It appears to me, however, that Munro's mistake in the matter is immaterial, because it is sufficient for the decision of this case that by M'Caig's actings Reid was led to believe that M'Caig would not move in the *cessio* proceedings without further notice. The matter may be tested in this way—Could M'Caig have moved for decree on 28th February in respect of Reid's failure to appear on that day? It is clear that it would have been a gross breach of faith to have done so. But further, as I have said, the understanding of all parties was that Reid should neither lodge a state of his affairs nor appear at that diet.

"*Fourthly*, Reid was not specially cited to the diet of 16th March, at which decree was pronounced, and no intimation of that diet was given to him. Even Munro only heard accidentally that M'Caig was talking of resuming proceedings, but no diet was mentioned.

"*Fifthly*, Reid's failure to appear was not wilful. In the first place, he did not know of the diet; and in the next place, he was in such a state of health that he could not have attended if he had known; and lastly, I cannot doubt that if the diet had been intimated to the witness Martin, who was then acting for him, steps would certainly have been taken to object to decree of *cessio* going out. Whether the objections would have been successful is another matter; but there would have been this at least to say, that Reid's estate had by that time been realised, and that the proceeds were much more than sufficient to meet all his liabilities. It is true that at the time when decree was pronounced, Reid, or at least his family in his name, were disputing the validity of the trust-deed in favour of M'Caig and Munro; but if they had been faced with the alternative of a decree of *cessio*, I cannot doubt that the opposition to the proceedings under the private trust would have been withdrawn, and the consigned money would have been at once available for payment to the creditors.

"Now, if the facts are as I have stated, it only remains to apply the law to them. As to the pursuer's plea that the procedure was disconform to the Cessio Acts, I should hesitate to rest my opinion on the ground that the Sheriff does not state in his interlocutor that he was satisfied that the debtor's failure to appear was wilful, although I think that this should appear on the face of the interlocutor. But I think that it sufficiently appears from the process that the Sheriff had not before him evidence that the debtor had been duly cited to that diet. Reid no doubt was cited to the diet of 28th February, and if he had appeared at that diet he would not have required to be cited to an adjourned diet; but he did not appear at the diet of 28th February, and the petitioning creditors gave an ample explanation

of his non-appearance. Now, I think that, looking to the fact that the procedure was unusual and *extra cursum curiæ* (the Cessio Acts and Acts of Sederunt not containing any provisions for an adjournment in such a case), the Sheriff was bound to have seen, before pronouncing decree of *cessio*, that due intimation of the adjourned diet had been given to the debtor.

"But be this as it may, I think that it was contrary to the good faith of the arrangement made by M'Caig on 13th February to move again in the *cessio* without of new citing or giving intimation to the debtor. I do not think that M'Caig acted from any fraudulent motive in taking decree without intimation to the debtor; and further, I do not say that there were not grounds for his wishing to revive the *cessio* proceedings. But he was so intent on obtaining decree and having himself appointed trustee that he appears to have acted in utter forgetfulness or disregard of the interests of the debtor. He was actually present when decree was pronounced, and knowing what he did, he was not entitled to sit silent and allow the Sheriff to pronounce decree on the assumption that Reid's absence was wilful. Mainly on this ground, I think it is impossible to allow the decree so obtained to stand. I arrive at this conclusion with some reluctance, because I think that it was in great part owing to the wrong-headedness of the present pursuer that decree was taken. If she had not impugned the trust in favour of M'Caig and Munro, and had ceded possession of the premises, they would have been handed over to the purchaser, the price would have been available for the creditors, and there would have been no excuse for resorting to the *cessio* proceedings. Besides, on record the charge of impetration is renewed. For those reasons, and others which I need not specify, there must be a material modification of expenses found due to the pursuer."

The defenders reclaimed, and argued—There had been no informality. The debtor had been properly cited to appear at the meeting of 28th February, and *cessio* could have been competently taken out then. The adjourned meeting was the same as the meeting upon the 28th February, and his absence was therefore wilful.

Counsel for the pursuer was not called on.

At advising—

Lord Young—I think it is very important as regards the future practice in such matters that we should express an opinion upon the case now before us. My opinion upon the matter is quite clear, and it is founded upon section 9 of the Bankruptcy and Cessio (Scotland) Act of 1881. The purpose of that section was to provide a sharp remedy against any creditor who was contumacious and wilfully refused to obey the orders of the Court. The words of the section are—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful he may in the debtor's absence pronounce decree of *cessio bonorum*." It is a course taken with the view of preventing a debtor who had been duly cited to attend the diet from contumaciously absenting himself. But he must be duly cited to attend the diet, and there must be no excuse which can reasonably be taken for his absence; the Sheriff in fact must be satisfied that the debtor is wilfully contumacious. I have no doubt that the Sheriff could adjourn the diet, and that the *cessio* could be granted at the adjourned diet, but then it must be given at a diet called according to the statute—*i.e.*, a meeting to which the creditor had been cited—and the Sheriff must be satisfied that he was wilfully contumacious. I do not think that these things could be predicated of the meeting at which this decree of *cessio* was given. Reid was not duly cited to attend the diet, and so he could not be wilfully contumacious. I think the whole proceedings are inept.

Lord Rutherfurd Clark—I do not think it necessary to give a decision as to the wording of the interlocutor of the Sheriff-Substitute, but I wish to state my opinion upon it. If the Sheriff in such a proceeding as this pronounces what is practically a decree in absence, upon the ground that the debtor has wilfully absented himself from the diet of the Court, I think that he should state that in his opinion such is really the case. I do not wish to decide that such a finding in his interlocutor is necessary, but I think that it would be much better if there was such a finding.

Lord Lee concurred.

Lord Justice-Clerk—I quite agree with all that has been said by your Lordships as to the advisability of the Sheriff showing that in his opinion the debtor had wilfully absented himself from the diet of the Court by making some finding in his interlocutor. In this case the Court is of opinion that Reid had not been duly cited to appear upon the 16th March, and therefore the decree of *cessio* must be reduced.

The Court adhered.

Counsel for the Appellants—H. Johnston—Wilson. Agent—James Coutts, S.S.C.

Counsel for the Respondent — Salvesen — A. S. D. Thomson. Agents—Sturrock & Graham, W.S.

Friday, June 7.

FIRST DIVISION.

DELANEY *v.* COLSTON AND OTHERS.

Parent and Child—Custody—Child placed Voluntarily in Charitable Institution.

In 1882 a father voluntarily placed his three children, aged respectively four years, two years, and a few months, in the hands of the founder and superintendent of a charitable institution for children, who, after keeping them in one of the homes of the institution for a period of four years, removed them in 1886, without the consent of their father, to a property belonging to her in Nova Scotia. In 1884 directors were appointed, but they did not assume the management of the institution until 1887, when the superintendent resigned. In consequence of threatened legal proceedings, the superintendent, on the advice of the direc-

tors, brought back the children in the end of 1886, but the directors allowed her to conceal them from their parent, and from the directors themselves. After her resignation in 1887 the superintendent again removed the children abroad.

In a petition by the father for an order on the directors to deliver his children to him—*held* that though the superintendent was originally alone responsible for their custody, yet the respondents by becoming directors incurred the obligation of re-delivering the children to their father, and as through their negligence the children had been removed outwith the jurisdiction of the Court, the prayer of the petition was *granted*.

The Edinburgh and Leith Children's Aid and Refuge was founded by Miss E. M. Stirling, who was its honorary superintendent, and contributed largely to its maintenance.

In December 1882 Arthur Delaney, painter, Cowgate, Edinburgh, applied for admission to the homes of the institution for his three children, aged respectively four years, two years, and a few months. Delaney agreed to pay 5s. per week for the children's board, and they were accordingly received into one of the homes situated in Mackenzie Place, Stockbridge. The total payments made by him amounted to £1, 17s.

In June 1888 Delaney presented this petition for recovering the custody of his children.

Answers were lodged by the directors of the institution, in which they denied liability, and averred that it was Miss Stirling who had taken the children away, and that they had done all in their power to assist the petitioner to recover them.

A proof before Lord Adam established the following facts:—Prior to 1884 Miss Stirling managed the institution along with a committee, some of whom afterwards became directors. After 1884 directors were appointed, but Miss Stirling continued to manage the homes. In 1887 Miss Stirling terminated her connection with the homes in favour of the respondents. Miss Stirling had acquired a property in Nova Scotia that it might be a temporary home where she could maintain destitute and neglected children sent out from this country until they were placed in suitable homes in Nova Scotia. Of the petitioner's children, one was taken by Miss Stirling to Nova Scotia in May 1886, and the other two in August of the same year. In the end of the year 1886 the petitioner, through a law-agent, applied to the respondents for the children's address, which was at once given to him. He thereafter threatened proceedings for the return of the children. Shortly afterwards, and in order to save any trouble, the respondents communicated with Miss Stirling, recommending her to bring the children back to this country on her return. Miss Stirling, acting on this advice, brought back the children with herself in November 1886, and the respondents believed she took them to her private residence, which was then at Wardie, near Edinburgh. Miss Stirling, however, never restored the said children to any of the homes under the management of the respondents, and she never informed them how the said children were disposed of. Miss Stirling returned to Nova Scotia with the children on or about May 1887. The directors of the homes had no connection with Miss Stirling's property abroad, nor were they in any way responsible for Miss Stirling's conduct of children whom she took out with her.

Delaney prepared a similar petition to the present in the end of 1886, when the children were in this country, but it was not proceeded with owing to want of funds. He had made frequent applications at the homes and to Miss Stirling, and through his solicitor, but he had not been able to obtain any definite information regarding his children, or to secure an interview with them. It was believed that at the date of the present application the children were in Nova Scotia.

Argued for the petitioner—Miss Stirling was in fault in removing the children abroad, but the respondents had assisted her in keeping the children. They could have forced Miss Stirling to give him both information of and access to them in 1886. The blame was joint, and the respondents ought to be ordained to restore the children to the jurisdiction of the Court.

Argued for the respondents—The children were committed by the petitioner to Miss Stirling, and not to the respondents. Her connection with the homes was severed in 1887, and the respondents could in no way control Miss Stirling's actings, nor were they aware where the children were at the present time. The petitioner was himself to blame for not taking action when the children were brought back to this country in 1886. He virtually consented thereby to their being taken away again, as it was supposed he had abandoned them.

After the discussion the following minute was lodged by the respondents:—"Lorimer, for the compearing respondents, stated that in consequence of the expression of opinion by the Court that the prayer of the petition could not be refused, the respondents undertake to apply forthwith to Miss Stirling for the return of the children to them, and if necessary, to take proceedings in the Canadian Courts for that purpose; and they crave that in the meantime any judgment pronounced by the Court should be limited to the first finding in the prayer of the petition, namely, that the petitioner is entitled to the custody of his children."

At advising—

Lord President—When the petitioner applied in the month of December 1882 to have his children received into what is called the Edinburgh and Leith Children's Aid and Refuge, in point of fact the children were received by Miss Stirling, and it does not appear that anybody else was responsible for the custody of the children at that time except Miss Stirling. But it must be quite clear, I think, that when the respondents became directors of this institution in the year 1884 they assumed a responsibility for the safe custody of all the children that were in these homes or in other places belonging to the institution. And among other obligations and responsibilities which they thus incurred by becoming directors was the obligation to re-deliver the children to their parents when they were demanded.

Now, in point of fact, these children were taken out of the jurisdiction of this Court and out of the United Kingdom in 1886, and that was cer-

tainly a most indefensible proceeding. Nothing could justify that without the consent of the parents. The respondents, the directors of the institution, seem to have been sensible of that very soon after it took place, and they remonstrated with Miss Stirling, who had carried the children to Nova Scotia, and desired her to bring them back. In that I think they acted quite rightly. But then I think they acted very far short of their duty after the children were brought back to this country, because they allowed Miss Stirling, after she had brought the children to the neighbourhood of Edinburgh, to conceal these children—conceal them from their parents, and also from the respondents themselves.

Indeed there is an appearance on the part of the respondents of an indisposition to require any knowledge of where these children were, and to all applications on the part of the petitioner for access to his children there could be no satisfactory answer made. The consequence was that the children were again carried out of the country. Now, for that I think the respondents must be answerable, because they were thus violating the obligation which they had undertaken, to be responsible for the safe custody of the children while they were in the institution, and to deliver when the parents required them. It is therefore, I think, impossible not to say that the respondents are under an obligation to deliver these children now to the petitioner; and the only question which perplexes one in dealing with the case is, that as the children are not here it may require the lapse of some considerable time, perhaps proceedings in another country, in order to accomplish the object for which this petition was presented. I approve entirely of the spirit in which this minute is expressed, which Mr Lorimer has just read, and I am very glad to find from that that the respondents are now fully alive to what their responsibilities are. But I think it would be hardly consistent with the duty of the Court to abstain now from pronouncing an order against the respondents for the re-delivery of the children. Of course that must be qualified to this extent, that they must have time; and the order which I would propose, with your Lordships' concurrence, to pronounce is to ordain the whole parties called as respondents in the petition to deliver to the petitioner his children James, Annie, and Robina Delaney, named in the petition, and that on or before the first sederunt day in October next; and further appoint the respondents to report to the Court on Thursday 18th July next what steps have been taken in pursuance of this order.

Lord Shand and Lord Adam concurred.

Lord Mure, who had been absent during a part of the proceedings, delivered no opinion.

The Court ordained the respondents to deliver to the petitioner his children on or before the first sederunt day in October next, and further ordained the respondents to report to the Court on Thursday the 18th July next what steps had been taken in pursuance of this order.

Counsel for the Petitioner—James Clark. Agent—E. Denholm Young, W.S.

Counsel for the Respondent—Lorimer. Agent—R. C. Gray, S.S.C.

Tuesday, June 11.

SECOND DIVISION.

MACDONALD AND OTHERS *v.* MACDONALD'S EXECUTOR.

Deposit-Receipt — Donation — Value of Terms of Receipt where Gift alleged.

A deposited £286 in deposit-receipt in a bank in name of himself and B his brother, "to be drawn by them, or either or survivor," and retained the deposit-receipt in his possession. B and his daughter deponed that ten days before his death A, believing himself to be dying, made a donation of the money to B, and delivered to him the deposit-receipt.

Held that donation had been proved on the evidence of the donee and his daughter, corroborated by the terms of the deposit-receipt, as indicating some intention on the part of the deceased to benefit B.

The late John Macdonald died in Edinburgh, aged about seventy, unmarried and intestate, on 22nd December 1887. His brother Alexander Macdonald, 29 Marchmont Road, Edinburgh, was decerned his executor-dative *qua* next-of-kin. He delayed giving up an inventory of the deceased's estate and expeding confirmation, as he declined to include in said estate a sum contained in a deposit-receipt left by his brother, which was in the following terms:—

"*British Linen Company Bank*, "£286, 19s. 2d. stg. *Inverness, 5th May* 1887.

"Received from Mr John Macdonald, Dochfour, and Mr Alexander Macdonald, his brother, to be drawn by them, or either, or survivor, Two hundred and eighty six pounds, 19/2 stg., which is this day placed to the credit of their deposit account with the British Linen Company."

There was also a deposit-receipt of the same date in the following terms:—

"*Caledonian Banking Company, Limited*, "£280, 11s. 4d. *Inverness, 5th May* 1887.

"Received from Mr John Macdonald, Dochfour, and Mr Hugh Macdonald, Balmore, Abriachan, Two hundred and eighty pounds, 11/4 stg., repayable to either or survivor, which is placed to their credit on deposit-receipt with the Caledonian Banking Company, Limited."

Hugh Macdonald therein mentioned was a brother of the deceased, and had died in April 1887. The money contained in that deposit-receipt admittedly formed part of the estate of the deceased. Besides the money in these two deposit-receipts the deceased left about £35.

Duncan Macdonald and the children of another brother, as the next-of-kin of the deceased, raised this action of count, reckoning, and payment against the executor in the Sheriff Court at Edinburgh, by which they sought to have the sum of £286, 19s. 2d. included in the estate of the deceased.

The defender averred—"The deposit-receipt for £286, 19s. . . . consisted of moneys belonging jointly to the deceased John Macdonald and the

defender. It was the intention of John Macdonald that the whole of the contents of the said deposit-receipt should belong to and be the property of the defender in the event of his survivance. John Macdonald, some time before his death, delivered over to the defender the deposit-receipt as his sole property, and gifted the contents thereof, so far as belonging to him, to the defender, and the same is his sole and exclusive property."

At proof before the Sheriff the only witnesses examined for the defender were himself and his daughter. He deponed:—"My brother John came . . . to my house about the end of October 1887. He was in bad health at that time, and came to reside with me on that account to see if the change would do him good. . . . His health did not improve after he came down to Edinburgh; he got weaker, and died on 22nd December 1887. I recollect his taking an airing in a cab about ten days before his death. When he came into the house after the airing, he said to me that the doctor had told him he was not likely to get rid of his trouble, and he wished to settle matters. He opened his desk and took out a paper which he handed to me, and said, 'That is for you, Sandy; that is for you wholly.' [Shown deposit-receipt for £286, 19s. 2d., by the British Linen Bank, dated 5th May 1887.] That is the paper which my brother handed to me on that occasion. . . . When I got the deposit-receipt from him, I put it into my own trunk. I never gave it back to him again. It remained in my possession in the trunk until the Saturday night after the funeral." The defender further deponed that he had from time to time handed various sums, amounting in all to about £100, to the deceased for deposit in bank. He believed that this money was included in the deposit-receipt in question. In cross-examination the defender repeated substantially his previous account of the alleged donation. He denied that he had expressed surprise to the pursuers that his brother had inserted his name in the deposit-receipt, and that he had displayed to them any other document than the receipt in question. He was charged by the deceased to look after his brother Duncan, who was weak mentally.

His daughter Margaret Macdonald, aged 30, deponed:—"My uncle died on 22nd December 1887. I recollect him going out for an airing in a cab about ten days before his death. When he came back I helped my father to bring him into the house. He said, 'The doctor told me—and I am afraid he is right—that I won't get better.' He then asked for his writing-desk, and went to it, saying, 'As long as I am able, I would like to settle affairs if I can.' He opened his desk and took out a deposit-receipt by the British Linen Bank, and handed it to my father. I am now shown the deposit-receipt. It was handed to me at the time, and I read it. When my uncle handed it to my father, he said, 'Sandy, here take this; I give it to you wholly for yourself, and I hope that you will remember that Duncan has been my care all my life, and that you will always see to him, that he may never want.' My father put the deposit-receipt into his pocket, and afterwards into his own box."

The only witnesses examined for the pursuers were John Macdonald, aged 30, a nephew, and Maggie Macdonald, aged 35, a niece of the deceased.

They had been summoned to Edinburgh by the defender, but found their uncle dead when they arrived. Their evidence related to circumstances in the defender's house after they arrived, and especially after the funeral, and in some particulars their account of what then occurred, while consistent, differed from that given by the defender and his daughter.

On March 18th 1889 the Sheriff-Substitute (RUTHERFURD) found that the defender had failed to prove donation.

His note contained the following statements—"The Sheriff-Substitute thinks it right to say that the witness Margaret Macdonald, who is a woman thirty years of age, gave her evidence in apparently a very truthful manner. . . .

"But, unfortunately for the defender, the case presents some features which are very unfavourable to his claim. It must be kept in view that the deceased died in the defender's house, at a distance from his friends and relatives, other than the family of the defender, who had uncontrolled access after his death to the repository in which he kept his papers. It would have been easy for him to have made an informal will, or to have left some written instructions with reference to the disposal of his property, but it is said that he died intestate, and no legal adviser was called in. Now, the pursuer John Macdonald and his sister have given an account of what passed subsequent to the funeral, which in several respects directly contradicts the statements in evidence of the defender and his daughter. They say that the defender took both the deposit-receipts out of his own box, whereas the defender says that he only had in his possession the one in dispute, and that the other was in the desk of the deceased. The pursuers also say that the defender expressed surprise at his name having been put in the deposit-receipt, and that he did not at first state that it had been given to him by his brother before his death. They also say that the defender told them that he (defender) had given his brother's gold watch to his daughter Mary (Bella), while the defender and his daughter allege that the deceased gave it to Mary as a present for nursing him; but she has not been examined as a witness. . . .

"In the case of *Ross* v. *Mellis*, 1871, 10 Macph. 197, Lord Deas observed that in none of the cases in which effect had been given to the proof of donation was there any room for doubting the evidence. 'Wherever the evidence was at all doubtful we have invariably refused to give effect to the alleged donation. In a case of this kind we must look to the whole circumstances. It is not a question as to the mere balance of evidence where there is no balance either way. The party alleging donation is bound to overcome the presumption against donation.'"

The defender appealed to the Court of Session, and argued—Donation had been proved. The history of the transaction given by the defender was corroborated by his daughter, and was in itself likely. The terms of the deposit-receipt, though they did not *per se* confer a title, indicated some purpose in the deceased's mind associated with his brother Alexander, when he

deposited the money. There had been delivery here which made the case all the stronger—*Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823 (Lord President); *Blyth, &c.* v. *Curle*, February 20, 1885, 12 R. 674; *Connell's Trustees*, July 16, 1886, 13 R. 1175 (Lord Shand, p. 1187). Some of the money at least had come from Alexander. The Sheriff-Substitute had placed too much weight upon the slight discrepancies in the accounts of what occurred after the funeral. To refuse the appeal would be equivalent to saying that the defender and his daughter had concocted the story to defraud the other relations, and had committed perjury.

Argued for the pursuers and respondents—The judgment of the Sheriff-Substitute was right. The deposit-receipt *per se* conferred no title—*Cuthill* v. *Burns*, March 20, 1862, 24 D. 849; *Watt's Trustees* v. *Mackenzie*, July 1, 1869, 7 Macph. 930; *Connell's Trustees, supra.* There had not been sufficient evidence to overcome the strong presumption against donation. The only witnesses were the defender and his daughter, both interested parties, in whose house the deceased had died, and whose evidence, where it was capable of being tested, had been contradicted—*Ross* v. *Mellis*, December 7, 1871, 10 Macph. 197; *Sharp* v. *Paton*, June 21, 1883, 10 R. 1000. If the deposit-receipt was handed over at all, it was in trust for Duncan, and this as a verbal will was invalid—*Thomson, &c.* v. *Dunlop*, January 9, 1884, 11 R. 453. The argument of intention from the terms of the deposit-receipt here lost its force, because another deposit-receipt taken on the same day was in the names of the deceased and of a brother who was then to his knowledge already dead. Probably the bank suggested the two names for convenience in uplifting the money.

At advising—

Lord Justice-Clerk—The late John Macdonald upon 5th May 1887, and from that time onwards until a short time before his death, had in his possession a deposit-receipt of the British Linen Company Bank in these terms—"Received from Mr John Macdonald, Dochfour, and Mr Alexander Macdonald, his brother, to be drawn by them, or either or survivor, £286, 19s. 2d. stg., which is this day placed to the credit of their deposit-account with the British Linen Company."

Now, the question is, whether that deposit-receipt, which remained in the hands of John Macdonald, was or was not delivered by him as a donation to Alexander Macdonald, the person named in the body of the deposit-receipt. First consider the terms of the deposit-receipt itself. These do not in any way settle whose is the money in the deposit-receipt, but they have a bearing upon that question. They bear that the money was received from those two persons, and that it was payable to either of them or the survivor, and it has been decided in the case of *Crosbie's Trustees* that the terms of a deposit-receipt are matter for consideration in determining the question whether there has been donation by one of the parties to the other. In *Crosbie's* case the deposit-receipt differed in terms from this one, and had been altered from time to time, and had been changed into its final form at a particular date. Here the terms do not seem to have been changed, but they are different from those used in the other deposit-receipt in the names of John Macdonald and his brother Hugh. Some purpose must have been intended to be served by the different terms of these two deposit-receipts. The case for the defender is that the sum contained in the British Linen Company Bank's deposit-receipt was made up from money belonging to both of them. He says that when he was visiting his brother it was put together, and put in the bank by his brother. It is said that that is not a likely thing to have happened in the circumstances. It is not more unlikely than that the deceased should take a receipt in the names of himself and Alexander if Alexander contributed nothing, especially as they did not live in the same place. There is no evidence to support the contention of the pursuers' counsel that the terms of the receipt had been suggested by the bank officials, and we must take it that the terms of the receipt were such as were desired by John Macdonald when he made the deposit.

The case of *Crosbie's Trustees* is of great importance, for it has settled that in such an inquiry as the present "the terms of the deposit-receipt are very important elements of evidence, because they indicate some purpose of the deceased when he took the deposit-receipt in these terms."

Now, the deposit-receipt being in those terms, it is said to have been delivered by the one person named in it, and who had it in his possession, to the other person named in it, and that this took place when the former was in the immediate contemplation of death. The defender and his daughter distinctly concur in the account they give of this matter. They repeat on different occasions, not identically but substantially, the same words. True, there was added to the words of donation a desire that the defender should take good care of his brother Duncan, but having carefully looked into this matter I do not think that this was a condition attached to the donation. It was given with a pious request, not in trust for Duncan. The question comes to be, whether the defender's evidence commends itself to our judgment? I may say at once I believe it, and think that the daughter's evidence is confirmatory of it. It is said that there is contradictory evidence, and undoubtedly there is, but not as to what occurred at the time of the alleged donation, only with regard to what took place after the funeral between the defender and the other relatives.

The question in my judgment is, not whether there is contradictory evidence in this proof, but whether the contradictory evidence so shakes our faith in the evidence of the defenders as to produce doubt in our minds with regard to the donation. The donee is not to be put at the mercy of another interested party by mere contradiction on other matters. The contradictions to receive weight must be such as affect the evidence of donation. I believe the evidence of the defenders, and no substantial doubt has been produced in my mind by the evidence of the pursuers. The discrepancies as to what occurred after the funeral are just such as will occur where parties suspicious of each other are giving an account of what took place. They do not affect the *bona fides* of the defender and his daughter, and have

received, I think, too much weight from the Sheriff-Substitute.

I am accordingly for sustaining the appeal.

Lord Young—I am of the same opinion, and generally upon the same grounds. I venture to point out for myself that although donation was in a sense the question involved here, yet the case was peculiar in this respect, because the true question was whether or not the defender was the lawful owner of this document of debt as creditor therein. It is decided—and I say nothing of the decisions here—that the terms of such a document of debt taken payable to either of two persons, and the survivor will not operate as a destination in the same way as they would if contained in a document of debt granted by another than a banker. There is a great deal to be said in support of that view, and there is a great deal to be said against it, but I only venture to indicate that when the proper case arises it might be re-considered whether there is any real difference between an obligation by a banker and by anyone else, and whether a deposit-receipt is distinguishable from a receipt by the borrower in a bond. Upon the question whether the defender is the lawful creditor we have evidence, and upon that evidence the Sheriff-Substitute, whose opinion is entitled to very great weight, has decided that the defender is not entitled to the deposit-receipt as creditor therein.

Now, what would have been the legal view in the absence of any evidence on either side? The defender is in possession and has the custody of the document; he holds it, his name is on it as creditor therein, he is the only creditor therein in the circumstances which have occurred. Is it of any legal significance that his name stands second, and not first? I think that absolutely immaterial. Therefore in the absence of all evidence I think Alexander, being the survivor and in possession, is in the same position as John would have been in if he had survived and kept possession of the receipt. But there is evidence, and the evidence must determine the question. It appears that John paid money into the bank, being accompanied by Alexander at the time, upon a deposit-receipt in the terms quoted, which he kept. Laying aside in the meantime the only evidence of where the money came from—which is that of Alexander, who says he contributed £100, and that the rest was out of John's pocket, and take it that it was John's wholly. He took the deposit-receipt in these terms, he alone was the creditor, and he was under no obligation to his brother Alexander. He might have got the money, he could have uplifted it and re-invested it, changing the terms of the receipt. All that he kept in his own power by keeping possession of the receipt. It is only upon evidence that I know he paid in the money, and how upon evidence does the receipt pass into Alexander's possession, in whose hands we find it now? The only evidence and the whole evidence upon that matter is this, that some days before John died he handed it to his brother saying, "That is for you, Sandy, wholly," meaning thereby that Alexander was to be in lawful possession of it as creditor therein for his own use entirely. The evidence of Alexander and his daughter has every antecedent probability and likelihood, because the terms of the receipt signify an indication of John's to act as these witnesses say he acted. They signify this intention as clearly as if he had said to a friend, "I intend to give this deposit-receipt to Alexander when I feel my end approaching." It was an expression in writing of intention, not binding upon him, but nevertheless a record of intention at the time of taking the deposit-receipt. It is not from law or upon decisions, but because the human mind cannot resist giving more credence to evidence of something having happened, which was likely to happen, and for which there was an antecedent probability, that we are more ready to believe a highly probable story such as this is. John might have changed his mind, but it was highly probable that he would act as he is alleged to have done.

On these grounds I am of opinion that the findings in fact in the Sheriff-Substitute's interlocutor should be altered, and that we should find that the appellant is in the lawful possession of this document as creditor therein on his own account and for his own behoof.

Lord Rutherfurd Clark—I think the question whether this deposit-receipt was given as a donation *mortis causa* to the appellant a difficult one, but on the whole I am of opinion that the donation was made, and I therefore concur in the proposed judgment.

Lord Lee—I always feel a difficulty in altering the judgment of a Sheriff where that judgment proceeds upon evidence led before him, and if the Sheriff-Substitute here had said he disbelieved Alexander Macdonald and his daughter, I should have thought it exceedingly difficult to reverse his decision, but the Sheriff-Substitute does not say that he disbelieves them. Indeed he says the daughter gave her evidence in a favourable manner, and therefore the question is still open as one of evidence. I think it is not necessary to give an opinion upon the defender's right as holder of the deposit-receipt. That right depends upon the title upon which he held it, and that again depends upon evidence. He held it either as absolute owner or as donee under a donation *inter vivos* or under a donation *mortis causa*. Upon which of these titles the document in qestion was held depends entirely upon evidence. It is therefore not possible to decide it upon the terms of the document apart from evidence. It is not proved that any of the contents of the deposit-receipt came from Alexander, and he was therefore bound to prove donation *inter vivos* or donation *mortis causa*. It is not the same case as if the deceased brother had called in a witness and handed over the receipt in his presence to the defender, saying, "That is yours for yourself." If that had been so it would probably have amounted to a donation *inter vivos*. The question here is, whether there was a donation either *inter vivos*, and revocable, or *mortis causa*, and nothing more, and the *onus* of proving donation lies upon the defender Alexander. I think that question is open, and not decided by the Sheriff-Substitute. After examining the evidence I have come to the conclusion that the great weight of it amounts to this, that there was donation here. I would only add that in considering whether there was donation or not I think it legitimate to look at the

fact that the deposit-receipt was in terms showing an antecedent probability of the deceased acting as he is alleged to have done, and therefore making the account given by the defender and his daughter more likely than it might otherwise have been.

The Court pronounced the following interlocutor:—

"Find in fact that the late John Macdonald delivered the deposit-receipt for £286, 19s. 2d., mentioned in the record, to the defender Alexander Macdonald, to be held by him for his the defender's own behoof: Find in law that the defender is in the lawful possession of the same as creditor therein, and that it does not form part of the estate of the said John Macdonald: Therefore recal the judgment of the Sheriff-Substitute appealed against," &c.

Counsel for the Pursuers (Respondents)—A. S. D. Thomson. Agent—Alex. Ross, S.S.C.

Counsel for the Defender (Appellant)—Sym. Agent—David Milne, S.S.C.

Tuesday, June 11.

SECOND DIVISION.

[Sheriff of Stirling.

SEMPLE *v.* WILSON.

Agreement—Condition—Payment.

A merchant who had bought goods from a farmer whose crop and stock had been sequestrated at the instance of his landlord, agreed to pay cash to the landlord's factor on the condition that he should guarantee delivery of the goods, and in sending a cheque for the price he stipulated that such guarantee should be granted. The factor retained and cashed the cheque, but refused to guarantee delivery of the potatoes.

In an action by the merchant against the factor for re-delivery of the cheque, or for the amount thereof, *held* that the defender was not entitled to retain the cheque except on the condition attached by the pursuer, and that he was bound to repay the amount.

On 2nd November 1887 Thomas Semple, grain merchant, Glasgow, bought 60 tons of potatoes from James MacAuslan, Kirkmichael Farm, Helensburgh, at 40s. per ton, for delivery up to 1st March 1888, payment to account to be made in eight days. MacAuslan's crop and stock having in August previously been sequestrated at the instance of his landlords, the trustees of the late Sir James Colquhoun, he applied to their factor James Wilson, Helensburgh, for permission to carry out the sale, who gave his consent on condition that the price was paid to him, to be applied in payment of rent then due. Shortly after the sale MacAuslan informed the pursuer of his position, and at a meeting with Wilson it was agreed that the price should be paid to him by Semple.

Semple received the account, and acting on his understanding of the agreement concluded at the meeting, he sent on 18th November his cheque for the price, £120, and requested the defender to grant a receipt in the following form:—"£120. — Received from Mr Thomas Semple, grain merchant, 57 West Nile Street, Glasgow, the sum of £120 stg., in full payment of sixty tons potatoes—'Champion'—to be delivered free on rail at Helensburgh, in good order and condition, at time specified, from Mr James MacAuslan, farmer, Kirkmichael, which I bind and oblige myself to deliver."

Wilson next day forwarded to the pursuer a receipt for £120, the price of 60 tons of potatoes sold to him by MacAuslan, to be delivered as *per* agreement entered into between the parties. On the same day Semple wrote to Wilson that he would prefer something more definite, and again requested a guarantee of delivery, to which no written answer was made, although Semple was informed by Wilson's clerk, when he called shortly afterwards at the office, that no further guarantee would be granted.

In March and April following Semple would have taken delivery of the potatoes, but this was not given. Finally he repudiated the bargain, and raised this action in the Sheriff Court of Dumbarton against Wilson for re-delivery of the cheque for £120, or failing re-delivery for payment of the amount, with interest from 18th November 1887.

After a proof the Sheriff-Substitute (GEBBIE) assoilzied the defender, and the Sheriff (MUIRHEAD) on appeal adhered.

The pursuer appealed to the Court of Session, and argued—The cheque was given only upon the condition that Wilson should guarantee the delivery. If he did not undertake to carry out that condition, then he ought to have returned the cheque. To keep the cheque after he had received information that there was a condition attached to the bargain was to intimate that he intended to observe the condition—*Dominion Bank of Toronto* v. *Anderson & Company*, February 10, 1888, 25 R. 324; *M'Griger* v. *Alley & M'Lellan*, March 4, 1887, 14 R. 535; Bell's Prin. 1244; Rankine on Leases, 355, and cases cited there.

The defender argued—The pursuer and MacAuslan had entered into a bargain for the sale of a specified quantity of potatoes. After Semple learned that MacAuslan was under sequestration at the instance of his landlord he wished to have a guarantee that the latter would not interfere to prevent the execution of the bargain, but the original bargain between pursuer and MacAuslan still subsisted. There was no assignation by MacAuslan to Wilson, and if the pursuer had applied to MacAuslan at the proper time he would have got delivery of the potatoes without any interference from the landlord. Wilson was therefore entitled to keep the cheque, and apply it to the purpose of reducing MacAuslan's rent.

After the hearing the Court ordered the case to be argued before five Judges.

At advising—

LORD JUSTICE-CLERK—The Court having had the benefit of a re-hearing of this case and the assistance of Lord Wellwood in considering it, we are all of opinion that although the contract between MacAuslan and the pursuer may have continued to subsist, and might, with the consent of the defender, have warranted an

assignation by MacAuslan of the right to demand payment of the price of the potatoes, it is proved that the pursuer in sending his cheque to the defender, understood the arrangement between MacAuslan and the defender to be such as entitled him to attach the condition that the defender was to undertake responsibility for the delivery of the potatoes.

This being so, the Court is further of opinion that the defender, being informed that such was the pursuer's understanding, was not entitled both to reject the condition and to retain the cheque, but was only entitled on discovering the misunderstanding, to withdraw his consent to the sale of the potatoes, and to fall back on his rights under the landlord's sequestration.

The judgment of the Court therefore will be to recal the interlocutors appealed from, and to decern in favour of the pursuer, with expenses.

The Court pronounced this interlocutor :—

"Find in fact (1) that the pursuer purchased the potatoes in question from James MacAuslan, and agreed to pay cash to account, subject to the condition that the defender, as representing the landlord at whose instance MacAuslan had been sequestrated, should guarantee delivery of the same, and in sending the defender a cheque for the price, stipulated that such guarantee should be granted; (2) that the defender retained and cashed the cheque, but refused to guarantee delivery of the potatoes: Find in law that the defender was not entitled to retain the cheque except upon the condition attached by the pursuer, and find accordingly that he is bound to repay to the pursuer the amount of the cheque with interest as concluded for: Therefore sustain the appeal, Recal the judgments of the Sheriff and Sheriff-Substitute appealed against," &c.

Counsel for the Appellant—Murray—Dickson. Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondent—Gloag—Lorimer. Agents—Tawse & Bonar, W.S.

Wednesday, June 12.

SECOND DIVISION.

BANK OF SCOTLAND *v.* LAMONT & CO.

Bill of Exchange—Presentment—Agreement by Drawer not to Enforce Payment against Acceptor—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 46, *sub-sec.* 2 (*c*).

The Bills of Exchange Act 1882, by sec. 46, sub-sec. 2, provides—"Presentment for payment is dispensed with . . . (*c*) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented."

The drawers of a bill by agreement with the acceptors, to which the Bank of Scotland was also a party, were bound not to enforce a debt of which the sum contained in the bill formed a part. When the bill fell due the acceptors declined to renew it, and the bank, who were the discounters and the holders of the bill, without having presented it to the acceptors for payment sued the drawers for the sum contained therein. *Held* that the drawers were not entitled to plead want of presentment as a ground for not retiring the bill.

The Bank of Scotland were the discounters and holders of a bill of exchange in the following terms :— "*Glasgow, 3rd January* 1888.

"£720, 4s. 4d. stg.

"Three months after date pay to our order the sum of seven hundred and twenty pounds four shillings and four pence sterling value received. "Henry Lamont & Co.

"Messrs Ferguson, Lamont & Co.,
Royal Exchange, Glasgow."

Endorsed thus :—

"Pay to the Governor and Compy. of the Bank of Scotland or Order.

"Henry Lamont & Co.

"For the Bank of Scotland,
"D. Henderson."

This bill was crossed—"Accepted—Payable at our office, *P. pro* Ferguson, Lamont, & Co., J. M. Lamont., Archd. Nisbet;" and stamped "8s."

This bill was the last renewal (with interest added) of a bill for £665, 9s. 2d., accepted by Ferguson, Lamont, & Company, which formed part of a debt of £1502 due by them to Henry Lamont & Company as at 12th November 1885. Upon that date an agreement was entered into between (1) Charles Lamont, sole partner of Ferguson, Lamont, & Company; (2) certain clerks of the firm as managers and attorneys; and (3) the principal creditors of the firm, including the Bank of Scotland, and Henry Lamont, the sole partner of Henry Lamont & Company. They agreed that the business and the whole assets of Ferguson, Lamont, & Company should be transferred to a committee of creditors to be liquidated and applied towards gradual payment of the creditors. "*Eighth.* As the object of these presents is to ingather the assets of the foresaid businesses and gradually apply the same towards the reimbursement of the third parties, it is provided and agreed that after paying preferable charges, salaries, allowance to the first party, and other claims as aforesaid, and so soon as the funds received by the second parties as commissions and actual profits shall admit, a rateable division will be made with the concurrence of the said committee of advice to and among the third parties, and from time to time thereafter until their claims are duly paid, the amount of said claims as at the date of these presents being stated in the schedule annexed, and signed as relative hereto."

In the schedule of claims Henry Lamont appeared as a creditor to the extent of £1502.

When the bill fell due on 6th April 1888 the attorneys representing the acceptors intimated to the Bank of Scotland that they did not intend to renew it, and the bank, without presenting it to the acceptors for payment or noting it for non-payment, called upon Henry Lamont & Company to make payment of the sum contained therein.

On Saturday the 7th of April 1888 Henry Lamont called at the bank and promised to pay

on the following Monday, but he afterwards declined to do so, on the ground that the bank had failed duly to protest the bill.

In consequence of this refusal the bank brought an action against Henry Lamont & Company in the Sheriff Court at Glasgow for payment of £720, 4s. 4d.

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), by section 46 provides—" . . . . (2) Presentment for payment is dispensed with . . . . (*c*) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented."

The pursuers pleaded—"(2) The agreements operate as an implied waiver of presentment."

The defenders pleaded—"(1) The pursuers having failed duly to present the bill for payment to the acceptors, and also to note the same for non-payment, the drawers have been discharged. (2) The pursuers by their actings and also by their failure duly to negotiate the bill and to protect the rights of the drawers in accordance with the statutes, have lost recourse against the defenders, and the action ought to be dismissed, with expenses."

The Sheriff-Substitute (SPENS) allowed a proof, which established the facts given above, and on 22nd November 1888 he found that the bill was not properly presented, and that no binding waiver of presentment had been proved. He accordingly sustained the defences.

The pursuers appealed to the Court of Session, and argued—This bill was scheduled as part of the debt due to Henry Lamont, and accordingly the bank could insist upon payment from him. If that were not so, and Henry Lamont was to be let out, the bill would have been scheduled as part of the debt due to the bank. In fact, the debt was due by Ferguson, Lamont, & Company to Henry Lamont, and the bank was the creditor of both. The respondents relied upon a false view of the agreement, viz., that the liquidation committee was bound to go on renewing the bill, and the bank to go on discounting it, and that they were not to be troubled about the debt. Ferguson, Lamont, & Company could not have paid this debt even if the bill had been presented to them without violating the agreement to which both Henry Lamont, the drawer, and the bank were parties. It would accordingly have been an idle proceeding on the bank's part to go through the form of presentment. The respondents were parties to the agreement, which rendered payment impossible, and must therefore be held to have waived their right of objecting to pay because there had been no presentment. The appellants had a right to succeed under sub-section (*c*) of section 46 of the statute, which apart from waiver made presentment unnecessary where "the drawer has no reason to believe that the bill would be paid if presented." The Act had codified previous cases, but these were collected in Thomson on Bills, p. 367, and in Byles on Bills, p. 202.

Argued for the respondents—The Bills of Exchange Act was virtually a code whose provisions must be rigorously complied with by section 46, sub-section 2 (*a*)—A holder must present a bill even where he did not expect payment. The first and second parts of (*c*) must be read together, and showed that presentment was only dispensed with in accommodation bills. The *onus* of proving that this was an accommodation fell on the appellants—sec. 30—and this had not been discharged. The agreement did not excuse non-presentment. Its object was to grant time to the debtors, but this could be done in two ways by the respondents—(1) By retiring the bill and waiting till the liquidation committee could pay the debt. This was the way in which the appellants argued time must be granted; or (2), the course adopted for three years, by taking renewals of the bill. The inference of the drawer from non-renewal was that there was money enough in the acceptor's hands to pay his debt. He could not therefore be said to have had no reason to believe the bill would be paid if presented. The liquidation committee were empowered to pay dividends to the creditors as the funds accumulated. By the bank's failure to present the respondents had lost their right to use summary diligence, which was competent to them if there were sufficient funds in the acceptor's hands, leaving any questions that might arise in consequence of their doing so to be tried in a suspension. The respondents did not know when they promised to pay that presentment had not been made, and therefore, as the appellants now admitted, could not be held to have waived their right to object on the ground of non-presentment.

At advising—

LORD JUSTICE-CLERK—It appears that the main question which was argued in this Court was not argued to any extent before the Sheriff-Substitute, but we have heard full argument on it, and I think we are now ready to dispose of it. The firm of Ferguson, Lamont, & Company parted in 1885 with the entire control of their own business, and also with their power to uplift the debts due to them and to pay those due by them. They assigned their whole estates and assets to a committee of their creditors, to be managed under an agreement by which the committee of management were empowered to transact all the company's business, and collect the debts due to them, and make a rateable distribution of the funds among the creditors. At the date of the agreement there were interested in the firm's estate, among others, the Bank of Scotland and Mr Henry Lamont, both of whom were creditors, and both of whom were also parties to the agreement. The debt due to Henry Lamont was about £1500. In connection with part of it he had drawn a bill upon Ferguson, Lamont, & Company for £700 odds. They accepted that bill, and he then discounted it at the Bank of Scotland and got the proceeds. While that bill, or a renewal of it, was current this agreement was entered into, the bill having been renewed when it fell due, and thereafter from time to time new bills being given to replace it. Then there came a time when Mr John Lamont, the acceptor, declined to grant an acceptance of a renewed bill. The question then came to be, whether the drawer Henry Lamont should be obliged to pay the bill or not.

Henry Lamont's only defence to the demand of the bank for payment of the bill by him as the person who indorsed it for value is, that the bank failed in a duty to him as the drawer and

indorser. That failure is said to be the non-presentation of the bill for payment to Ferguson, Lamont, & Company as acceptors. The question therefore is, whether there was in the circumstances any obligation on the bank to present the bill for payment? The bank was a party to the agreement, and knew that no debt could be paid to individual creditors of the firm, but that, on the contrary, there must be rateable distribution of all sums payable by the firm among the creditors by the committee who were managing the firm's affairs. The bank therefore knew that to present the bill to the firm for payment would be an idle form. Now, we have been referred to section 48 of the Bills of Exchange Act. That section provides that "presentment for payment is dispensed with . . . (*c*) as regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented." Now, I am quite satisfied on the facts brought out in the proof that the acceptor was not bound to pay the bill and that the bank had no reason to expect that the bill would be paid if presented, and if so, the case is within the exception stated in the statute, and the bank must prevail in this action.

Lord Young.—I am of the same opinion, and upon the same grounds. The case hinges on the agreement of 12th November 1885, which was a subsisting agreement when this bill fell due upon 6th April 1888. The agreement was between Ferguson, Lamont, & Company, and their leading creditors, included the defender here, who in the schedule attached to the agreement appears as a creditor to the extent of £1500. The bill on the face of which the defenders' firm are the drawers, and Ferguson, Lamont, & Company the acceptors, was part of that debt of £1500. The bill was kept up for Henry Lamont's own convenience by renewals of the bill which enabled him to obtain money by discounting them. It was just so much of the £1500. Now, by that agreement the creditors obliged themselves to abstain from enforcing their debts against their debtor upon his putting the whole of his estate into certain hands for administration, and for the satisfaction of his creditors. Henry Lamont and others were bound by it from enforcing their debt, or any part of it, and to take payment only through the fair administration introduced by that agreement. It is therefore clear that had that bill, which was only the document of debt for part of that debt, been in his hands when it fell due Henry Lamont could have taken no steps to obtain payment of his debt except by intimating the fact to the liquidation committee for their consideration. He could not have presented the bill to the acceptors for payment. He could only have intimated the fact of its falling due if that was necessary. Indeed, they knew it was part of their debt of £1500, and to say that the respondent could have exacted payment is extravagant, and therefore an untenable position. But the bill in reality was in the hands of the bank, and they acquired all the right to that part of the debt of £1500, viz., £730, that the respondent could give them. Now, they happened to be cognisant of the agreement, because they were parties to it. They were cognisant of the fact that Henry Lamont was under agreement not to exact payment, and when the bill fell due and, there was no renewal of it, they applied to Henry Lamont for payment, and his liability to pay is undoubted unless the bill was rendered non-negotiable. There is no reason to doubt that the bank officials in Glasgow, well accustomed to such transactions, would have negotiated it in the usual way, would have presented it and noted it all in the usual way, but that they were cognisant of the agreement. Instead, they explained the position of matters to Henry Lamont. There seems to have been some unpleasantness with the bank managers, but the respondent agreed to pay, and went to the bank with money for that purpose in his pocket, which was acting only under his plain legal obligation. But before he made the payment someone suggested to him a plea to the effect that the bank was wrong in thinking that the agreement made any difference as to the duty of presentment, although it would have been presentment to the very persons from whom he was bound not to enforce payment. But this comes under the very case provided for by the Act of Parliament, which has been referred to by your Lordships. I am prepared to find that the drawer knew that the acceptors would not pay, and indeed could not, without violation of the agreement to which he was a party, which violation would have been reducible by any of the parties to the agreement,

I would therefore find in law that the acceptors were not liable to pay, and were bound under the agreement in justice to their creditors not to pay, and in fact I would find the drawer knew this, and I would use the very language of the Act of Parliament. He cannot therefore plead want of due presentment as a ground for his liberation from liability to pay. I think the Sheriff-Substitute has misapprehended the case.

Lord Rutherfurd Clark concurred.

Lord Lee—Apart from the agreement it has not been, I think, maintained to us that there was on the part of Henry Lamont any waiver of the right to have performed towards him the duty which the holder of a bill owes to the drawer. The reasoning of the Sheriff-Substitute is therefore inapplicable to the case as it is now presented.

But the question remains, whether, standing the agreement—and it is not disputed that the agreement remained in force—presentment of the bill for payment was not dispensed with in terms of section 46 of the Bills of Exchange Act, sub-section (*c*), which your Lordship has quoted? Upon that question my opinion concurs with those which have been expressed.

The Court pronounced this interlocutor:—

"Find in fact (1) that by the memorandum of agreement mentioned in the record the parties thereto, creditors of Ferguson, Lamont, & Company, undertook to allow the business of that company to be carried on under the management of a committee, which should collect all assets, and distribute the same rateably among the creditors; (2) that the defenders were parties to that agreement as creditors of the said company to the amount

of £1502, 14s. 10d., and previous to its date had drawn a bill on the company for part of the said sum, which bill was accepted by the company, and discounted by the pursuers; (3) that the said bill was renewed from time to time, and discounted by the pursuers, and is now represented by the bill sued for; (4) that when the bill last mentioned fell due, the defenders, being parties to the agreement, knew that the acceptors, being the managers thereby appointed, having no power to pay creditors otherwise than rateably, could not retire it: Find in law that the defenders are not entitled to plead that the bill was not presented to the acceptors for payment: Sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Repel the defences: Ordain the defenders to make payment to the pursuers of the sum of £740, 4s. 4d. sterling, with interest thereon at the rate of £5 per centum from the 6th day of April 1888 till payment: Find the pursuers entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuers (Appellants)—Sol.-Gen. Darling, Q.C.—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders (Respondents)—Low—C. K. Mackenzie. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, June 13.

SECOND DIVISION.

PARR *v.* MACLEAN.

Crofter—Right to Cut Peats—Landlord's Discretion as to Place.

A crofter's right to cut peats does not attach to any particular place. The place is in the landlord's discretion, provided he does not put the crofter to unreasonable inconvenience.

A crofter with a right to peats cut them at first from moss A, but at his own request he was allowed upon sufferance to take them from moss B. He and his son continued to do so for more than twenty years. The landlord then told the son, who had succeeded to the croft, to give up cutting at B, and to go for peats to A. *Held* that the crofter had no right to continue cutting at B, but must comply with the landlord's instructions.

Thomas Philip Parr of Killichronan, Mull, brought an action of interdict in the Sheriff Court of Argyllshire at Oban against Hugh Maclean, crofter, Kellon, one of his tenants, to have him interdicted from taking peat from the moss of Killichronan.

The pursuer pleaded that the defender had no right to enter or be on the farm of Killichronan for any purpose whatever. That a moss at Killiemore had been thirled by usage to the croft, was much nearer and as convenient for the defender, and being now, and having all along been, open to him without let or hindrance, any claim to peats which he had under the Crofters Act or otherways was satisfied.

The defender averred—"The pursuer himself about the year 1865 pointed out to defender's father the place where to cut peats on the farm of Killichronan, and the peats have each year been cut there ever since then by the tenants of Kellon Croft, and occasionally by pursuer himself and the tenants of Killichronan when it was let by pursuer. No objection or complaint was ever made to the exercise of the right of peat cutting until the pursuer's agents wrote the defender on 8th December 1887. . . . Explained that the moss at Killiemore is inaccessible to a cart, although geographically slightly nearer to defender's holding, and that the good peat in that moss has been exhausted. . . . The said right of peat cutting is a pertinent of the holding of the defender from which he is not legally to be debarred, in respect of the provisions of the said Crofters Holdings (Scotland) Act 1886. The defender's said right of peat cutting on Killichronan farm has been continuously exercised for a prescriptive period of time."

The defender pleaded—"(1) The right to cut peats being a pertinent of the defender's holding for time immemorial, he, as a crofter in the sense of the Act, cannot be deprived of the same by the present proceedings."

A proof was allowed, from which it appeared that the defender succeeded to the croft about 1877 on the death of his father Donald Maclean, who had possessed it with right to get peats from 1865. At that date the peats were cut at Killiemore, about one and a half miles off. There was then a mill on the croft, and in 1867 Donald Maclean asked the present pursuer if he might take peats from Killichronan, three miles off, as he was working in that neighbourhood and could fetch them in his cart, and also because the peats from Killiemore were spoiling the meal. Leave was given to take peats from Killichronan during the landlord's pleasure, and no rent was charged for this accommodation. The mill ceased to be worked during the year after Donald Maclean died, and on 8th December 1887 permission to cut peats at Killichronan was withdrawn by letter to the defender. There was a cart road to the moss at Killichronan, but only a horse with creels could be taken to the peats at Killiemore.

The Sheriff-Substitute (MACLACHLAN) on 7th November 1888 found as follows—"(First) that the defender's father Donald Maclean became tenant of a croft at Kellon, on the estate of Killichronan, at that time the property of the pursuer's father, on or about the year 1865; (second) that the holding of which the said Donald Maclean became tenant included the right of cutting peats on a moss on Killiemore Hill, part of said estate; (third) that the said Donald Maclean exercised the said right of cutting peats on said moss for two years or thereby, and thereafter applied to the pursuer, who had then succeeded to said estate, and obtained permission from him to cut peats on a moss at Killichronan, on another part of said estate, but that said permission was granted by the pursuer during his pleasure only, and no rent was exacted therefor, and that said permission has now been withdrawn: Finds that the pursuer was entitled to withdraw said permission, and therefore decerns in terms of the prayer of the petition."

On appeal to the Sheriff (IRVINE) this interlocutor was affirmed.

The defender appealed to the Court of Session, and argued—(1) This was an illegal attempt on the landlord's part to remove a crofter from part of his holding in face of the Crofters Holdings (Scotland) Act 1886. (2) The crofter had a right to peats as an incident of his holding, and the moss at Killichronan had been substituted for that at Killiemore. (3) The holding had been renewed from year to year for twenty years with right to cut peats at Killichronan, and the landlord had no right at mid-term to take away this pertinent of the croft. (4) It was an unreasonable alteration of the enjoyment of this croft. It put the crofter to serious inconvenience. The Killiemore moss being inaccessible with a cart was, although nearer the croft, much more troublesome to work, and contained inferior peats.

Argued for the respondent—The crofter's right to peats was merely to get them without being put to serious inconvenience, not to get them from any particular place. Killichronan moss was given during the landlord's pleasure and because of the mill, which was no longer in existence. There was no attempt here to deprive the crofter of his right to peats. The place assigned him was the ground his father had originally used, and was only half the distance from the croft. There was no hardship in having to go to a place where a horse with creels could be employed.

At advising—

Lord Justice-Clerk—The evidence has satisfied the Sheriffs that the change from Killiemore to Killichronan was a piece of grace on the landlord's part, and not a right of the tenant. There is no evidence to the contrary. It was argued that he had no right to get peats except from Killichronan. Such an argument is quite inconsistent with the universal rule and practice as we know it to exist, and would involve a hardship to crofters in the event of the peat at any particular place becoming exhausted. The privilege of being allowed to cut peats is not attached to any particular place. Crofters have a right to get peats, but the landlord has a right to point out where they are to go for them. If the landlord subjected the crofter to gross injustice by asking him to go to an extremely out-of-the-way place for his peats, we might interfere. Here, the distance he is asked to go is less than the distance he has hitherto gone. That advantage is, no doubt, counter-balanced by the fact that he can only use a horse, and must make more journeys than when he was able to employ a cart, but I think the Sheriffs were right in holding that this was within the landlord's discretion.

Lord Young, Lord Rutherfurd Clark, and Lord Lee concurred.

The Court pronounced the following interlocutor:—

"Find in fact (1) that the pursuer is proprietor of the lands of Killichronan in the Island of Mull, which includes the farm of Killiemore; (2) that the defender is tenant, under the pursuer, of a croft, part of said lands, with right to cut peats on the lands of Killiemore; (3) that in or about the year 1867 the pursuer gave leave to the defender's father, then tenant of the said croft, to cut peats during his, the pursuer's, pleasure, on the home farm of Killichronan instead of the farm of Killiemore, and that the tenants of the croft availed themselves of the privilege from that time till shortly before the institution of the present action, when the pursuer recalled the leave thus conditionally given: Find in law that the pursuer was entitled to recal the permission granted as aforesaid: Therefore dismiss the appeal: Affirm the judgments of the Sheriff and Sheriff-Substitute appealed against: Find and declare, interdict, prohibit and discharge in terms of the prayer of the petition: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer—Sir Charles Pearson—Graham Murray. Agent—F. J. Martin, W.S.

Counsel for the Defender—Dickson—Salvesen. Agents—Gill & Pringle, W.S.

Friday, June 14.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CROUCHER *v.* INGLIS.

(*Ante*, p. 541.)

Reparation — Slander — Privileged Statement—Minister of Parish—Probable Cause.

In an action of damages against the minister of a parish for alleged slanderous statements in two letters written by him to the inspector of poor of a neighbouring parish and the Board of Supervision respectively, and which challenged the pursuer's fitness as guardian of certain children boarded with him by the parochial board of the neighbouring parish, it was *held* that the defender was entitled to an issue of want of probable cause as well as of malice.

Opinion per Lord Shand, that a defender other than the minister of a parish would be entitled in similar circumstances to the protection of a similar issue.

This action was raised by Charles Croucher, general dealer, residing at Kirkton of Auchterhouse, against the Rev. William Mason Inglis, minister of the parish of Auchterhouse, for payment of £500 as reparation and *solatium* for alleged slanders.

The statements complained of were contained in two letters written by the defender to the Inspector of Poor of Dundee and to the Board of Supervision respectively, and which called in question the pursuer's fitness to have the charge of several pauper children boarded with him by the Parochial Board of Dundee.

The letters were in the following terms:—

"*Manse, Auchterhouse,*
"16*th October* 1888.

"Dear Sir,—You are aware of the fact that several children on your parochial board list are boarded out in this village under the guardianship of a man named Croucher, a hawker to trade. I have just seen this man engaged in fighting for a considerable time with another

man belonging to this parish, and such conduct for its brutal and disgusting character I have never witnessed. I leave you to judge as to whether such a man is a proper guardian for these poor children. From enquiries I have made at the local policeman and other respectable people, I am satisfied that the sooner these children are removed to another house the better it will be for them, and the more creditable to the parochial authorities of Dundee.—I am, &c.

"To T. Brown, Esq. "W. Mason Inglis."

"*Manse of Auchterhouse, near Dundee,*
"*20th November* 1888.

"To Members of Board of Supervision.

"Gentlemen,—I beg to call your attention to a matter which I do not hesitate to say demands the immediate consideration of the Board of Supervision.

"Fully a year ago five orphan children were placed by the parochial authorities of Dundee under the guardianship of a man named Croucher and his wife, who reside in the Kirkton of Auchterhouse. This man is a hawker by trade, and occupies what is practically a two-roomed cottar house. He has five of a family, and at the present time there are ten children in this house under the care of his wife. This man came to reside in the village about two years ago, and was engaged in the hawking business. He was, not long afterwards, convicted in the Burgh Court of Dundee for gross cruelty to a horse, and fined for the offence. Not long after this conviction he succeeded in obtaining from the Parochial Board of Dundee five children as boarders. In the course of my visitation of the parish I was led to understand that there was something wrong. My attention was, however, more directly called to the condition of those children by Mr Gibson, police-constable, located in the village, who informed me that Croucher's house was practically a baby-farming establishment, where the children were simply boarded as a matter of business and traffic, and to his knowledge they were very badly treated. He informed me of their dirty, poverty-stricken, half-starved condition, and of their being driven out of the house, and compelled to spend most of the day in an old shed in all kinds of weather. He also expressed to me his astonishment that the children should ever have been placed under such guardians, and compelled to endure such treatment. I investigated the matter for myself, and found that the constable's statement was entirely borne out by what I personally witnessed.

"My attention was again called to their condition by a Mr Cummings, who occupied the adjoining house. He told me that the conduct of Croucher and his wife was disgraceful, and the language of the woman most filthy and disgusting. He also brought under my notice the cruel treatment to which he and his wife had seen the children subjected. My attention was further called to the house by Mr Walker, gamekeeper, and Mrs Walker, most reliable and respectable people, who lived in the adjoining house. They also referred to the disorderly character of the Crouchers, and particularly of the filthy, disgusting language of the woman, and of her cruel treatment of the children. One child, she informed me, went about for days often shrieking with pain from a dislocated arm which had never been attended to. The children were subjected to most cruel treatment by being sworn at and mercilessly beaten. They were also compelled to search midden and manure heaps for rags and bones for Croucher to dispose of. She also informed me that the parishioners wondered very much that I did not take measures to have those children removed. She characterised the house as a disgraceful one, and is quite prepared to testify to that effect before any board. I have also been informed by police-constable Shepherd that he has on several occasions seen Croucher the worse of drink, and that his wife is notorious for her filthy language and quarrelsome brawling disposition. He has had repeatedly complaints lodged with him against her. He also states that the children ought never to have been placed under such guardians, and that his opinion is the one which prevails all over the parish and neighbourhood. Complaints of a similar character have reached me from other parishioners. Personally I have repeatedly seen Croucher drunk, and quite recently I came upon him engaged in a hand-to-hand fight with a man belonging to the parish, and told him he was a disgrace to the district. I have reported the condition of the house, the character of the occupants, and the general treatment to which the children have been subjected to the parochial authorities of Dundee, but nothing has been done to remove the scandal. Mr Brown, the Inspector of Poor, whose letter I enclose, informed me that he had already received complaints, and his own opinion was that the children should be instantly removed. It appears, however, that his opinion has been overruled by certain influences brought to bear by friends of Croucher upon certain members of the Board Committee, so that the children still remain under their care.

"In such circumstances I have been compelled to direct your attention to this scandalous case, and trust that you will order a thorough investigation as early as convenient.—I am, &c.,

"W. Mason Inglis,
"*Minister of Auchterhouse.*"

On 23rd May 1889 the Lord Ordinary (Kyllachy) approved of the following issues for the trial of the cause—"(1) Whether the defender on 16th October 1888 wrote and sent to Mr Thomas Brown, inspector of poor, Dundee, a letter in the terms contained in the schedule No. 1 hereto annexed; and whether the said letter is of and concerning the pursuer, and falsely and calumniously and maliciously represents him to be a man of such brutal character as to be unfit to have charge of children boarded out by the parochial authorities of Dundee under his guardianship, and that it was the duty of the Parochial Board forthwith to remove them, to the loss, injury, and damage of the pursuer? (2) Whether the defender on 20th November 1888 wrote and sent to the Board of Supervision a letter in the terms contained in the schedule No. 2 hereto annexed; and whether the said letter is of and concerning the pursuer, and falsely and calumniously and maliciously represents him as keeping a baby farming establishment, and as being a man unfit for the guardianship of parochial children, as systematically ill-treating and starving them, and as being a drunkard and a worthless character, and as being

a disgrace to the district, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The defender reclaimed, and argued—The defender was not bound to take an issue in justification, but was entitled to have the words "without probable cause" inserted in the issues. Statements made in discharge of a duty, if made with "probable cause," were not a good ground for damages. The duty of ministers in this respect had been recognised in the case of *Forbes*, and by the pursuer's own statement complaints had here been made to the minister—*Forbes* v. *Gibson*, December 18, 1850, 13 D. 341; *Lightbody* v. *Gordon*, June 15, 1882, 9 R. 934; *Kinnes* v. *Adam & Sons*, March 8, 1882, 9 R. 698; *Craig* v. *Peebles*, February 16, 1876, 3 R. 441; *Shaw* v. *Morgan*, July 11, 1888, 15 R. 865; *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057; *Gibb* v. *Barron*, July 1, 1859, 21 D. 1099.

Argued for the pursuer and respondent—There was no case of ordinary slander where both "maliciously" and "without probable cause" had been put in issue. In all cases where the latter words had been thought necessary in addition to the former the defender had had a title to set in motion some judicial proceedings. The rule was that if a man was in a privileged position, "maliciously" must be put in issue; if he was exercising a legal right, "without probable cause" must be added—*Davies* v. *Brown & Lyell*, June 8, 1867, 5 Macph. 842; *Craig* v. *Peebles*, *supra*; *Wolthekker* v. *The Northern Agricultural Company*, December 20, 1862, 1 Macph. 197; *Rae* v. *Linton*, *&c.*, March 20, 1875, 2 R. 669.

At advising—

Lord President—The pursuer of this action is resident in the parish of Auchterhouse, and he calls himself a general dealer, which I suppose is the equivalent of hawker. The defender is the minister of the parish. The pursuer's complaint is that the minister wrote two letters, one to the Inspector of Poor at Dundee, and the other to the members of the Board of Supervision, containing very slanderous statements concerning the pursuer with regard to the condition of certain children boarded with him by the Dundee Parochial Board. The statements are certainly very strong, and are *prima facie* libellous. As put in issue they impute to the defender that he represented the pursuer to be "of such brutal character as to be unfit to have charge of children;" and again, that he represented him "as keeping a baby-farming establishment, and as being a man unfit for the guardianship of parochial children, as systematically ill-treating and starving them, and as being a drunkard and a worthless character." These issues in substance must go to a jury. The Lord Ordinary, however, has determined that "malice" must be inserted in the issues, and accordingly it has been so inserted. The defender contends that he is also entitled to have "without probable cause" put in issue, and that is the point which is now to be determined.

Now, it appears to me that the sort of privilege which entitles the defender to have these words inserted in a case like the present depends very much upon the character in which the defender acted. The ordinary cases of a malicious prosecution or of giving information to the police are not exactly parallel to the present case, but it is, I think, to be ruled by the same principles. There is a duty incumbent on every citizen who has reason to believe that a crime has been committed to give information to the police, and in such cases he is surrounded by the protection of having these words put in issue. In the present case the defender is a public official, and as such he is charged with the duty of seeing after the well-being of the people of his parish, and if in that capacity he gave information to the proper authority, he is quite entitled to the same protection as surrounds every person who gives information to the police of the commission of a criminal offence.

Again, the Parochial Board of Dundee was the body under whose jurisdiction these children were. They boarded them out with the pursuer. If intimation was to be given of improper conduct on the part of the pursuer the Parochial Board of Dundee was the proper authority, and, failing their interfering, the Board of Supervision was the proper tribunal to resort to for the same purpose, and therefore the defender resorted to the proper authorities to give information to. It seems to me in doing this he is entitled to the same protection as a party giving information to the police of the commission of a crime, or instituting a prosecution for an alleged offence. The circumstance that the person charged turns out to be altogether innocent will not deprive the party of the protection referred to. It is not therefore necessary for the defender to take an issue in justification. He may be justified in giving the information he did though the pursuer may be innocent of the conduct alleged against him. The defender is therefore, I think, entitled to have the words "without probable cause" put in issue.

It was urged in argument that if the minister of a parish was entitled to this protection, anyone else would be in similar circumstances. On that question I do not intend to offer any opinion; its solution depends on different considerations from the question with regard to the official duty of a minister. If such a duty lies on members of the public it rests on a different foundation. That is a question which it is not necessary to solve in order to decide the question before us. The ground on which I desire to rest my decision is that a duty attaches to the office of the minister of a parish to communicate with the proper authorities in such cases as the present.

Lord Shand—In the case of *Lightbody* v. *Gordon*, 9 R. 934, the Court had occasion to deal with the principles to be applied in cases where criminal information has been lodged with the police, and an action of damages has followed, and it was there held that where a person is seeking damages for such information where no conviction has followed, "without probable cause" must be inserted in the issue as well as "maliciously." The ground taken for that decision was that there is a public duty to give information to the police of the commission of a crime, and if a person *prima facie* in exercise of that duty moves by giving information against anyone, or by causing the apprehension of anyone, he has the protection of it being assumed that he acts in *bona fide*. Obviously if that were not so the ends of justice must be frustrated, and serious consequences might follow, and accordingly the pur-

suer in such cases has to prove that the defender acted not only "maliciously," but also "without probable cause."

I think the principles of that case are applicable here. If in the case of giving criminal information a person has reason to believe that a crime has been committed, it is his duty and right to inform the police. Also if in the present case defender having reason to believe that children out of the custody of the parish were being cruelly used, gave information to the Parochial Board, and failing their interference complained to the Board of Supervision. I think a minister of a parish so doing acts most certainly in the exercise of a duty and a right. For my own part, however, I am not prepared to say that I would draw any distinction between the minister of a parish and anybody else. I am not aware of anything in the office of a parish minister to make a valid distinction between his case and the case of a minister of any other denomination, or a neighbour. I put my opinion on the broad ground that there is a duty or a right to give information in such cases. A person giving information must be assumed to be acting *bona fide* for the protection of the children, and if an action of damages is brought against him he is entitled to have both malice and want of probable cause put in issue. If the complaint were made to some other party than the parochial board or the guardian of the children it would be a different matter, but where it is made to the person entitled to interfere protection is to be given to the person who gives the information. I am accordingly for holding that the principles of *Lightbody's* case apply to anyone else giving information as well as to the minister of a parish.

Lord Adam—I think the words "without probable cause" are proper and appropriate words to be inserted in the issues, where the person complained of had a right or duty to do the act complained of, as to give information to the police and to make use of lawful diligence, and in similar cases where there is a right or a duty to do the act complained of. Here the defender, who was the minister of the parish, had not only a right, but a duty was laid upon him, if he saw or had good reason to believe that pauper children were being ill-used to give information to the proper authority. If he had a duty laid upon him, he is entitled to have want of probable cause put in issue.

I agree with your Lordship as to the question with regard to other people that it does not arise. I confess during the discussion I inclined to the opinion now expressed by Lord Shand, but I desire entirely to reserve my opinion upon that point.

Lord Mure was absent at the hearing.

The Court varied the issues by the insertion of the words "without probable cause," approved of them as now adjusted, and remitted to the Lord Ordinary to fix a day for the trial.

Counsel for the Pursuer—M'Kechnie—Hay. Agent—Jas. Skinner, S.S.C.

Counsel for the Defender—C. S. Dickson. Agents—Guild & Shepherd, W.S.

Monday, June 24.

SECOND DIVISION.

(Before Seven Judges.)

M'NEE AND OTHERS *v.* BROWNLIE'S TRUSTEES.

Reparation—Landlord's Liability for Defective Drainage—Relevancy.

In an action of damages against a landlord, a tenant averred that the drainage in a house let to him was defective, as the drains were old and not properly jointed; that he had complained to the defender, who had taken unsuitable or insufficient, or at any rate unsuccessful steps to remedy the nuisance; that his wife and child had suffered in health in consequence; and that he had incurred considerable expense in medical attendance, and by removal to other premises, and in loss of profit on the sale of goods in the premises for the unexpired period of the let. The landlord pleaded that the action was irrelevant. The Sheriff-Substitute allowed a proof before answer.

Held that the Sheriff-Substitute had acted rightly in allowing such a proof.

Question by Lord Young—Whether a landlord is liable to his tenant for loss arising from defective drainage apart from any special averment of fault on his part.

Mrs Jeanie Fowler M'Culloch or M'Nee, 21 Seymour Street, Glasgow, with consent of her husband James M'Nee junior, and James M'Nee junior for himself, and as tutor for his pupil child Jeanie Fowler M'Culloch M'Nee, brought an action in the Sheriff Court at Glasgow against the testamentary trustees of the late William Brownlie, 30 M'Culloch Street, Pollokshields, Glasgow, for £200 damages on account of loss sustained by them owing to the defective condition of the drains of a house rented by them from the defenders.

The following were the material averments of the pursuer:—The premises, consisting of a shop and house behind, No. 78 North Woodside Road, Glasgow, were let by the defenders to James M'Nee for the year from Whitsunday 1886 till Whitsunday 1887. M'Nee and his family entered into possession about the beginning of May 1886, and remained therein until October 1888, the let being renewed from year to year by missive, or otherwise by tacit relocation. In October the pursuers were compelled to remove from said premises owing to the insanitary condition thereof, the same having become dangerous to health, and the defenders' attempts to remedy the evil having proved ineffectual. In March 1888 the pursuers discovered disagreeable smells in said house and shop, arising as they averred from the defective condition of the sewage pipes and the drains, which were old, not properly jointed, and allowed the sewage and sewage gas to escape therefrom, and which were generally insufficient for the purpose for which they were being used. M'Nee in March, and on several occasions between then and October following, and in particular in the months of April, May, and September,

made complaints to the defenders' factor in regard thereto, and the factor by himself or his clerk on such occasions promised to attend to the matter, and have the nuisance complained of removed, and did on certain occasions during said period instruct tradesmen to take steps ostensibly for that purpose, which were, however, unsuitable or insufficient for the purpose in view, or at any rate they were unsuccessful. In August 1888, and while the defenders were still professing to be able to have the evil complained of remedied, and were taking or causing to be taken unsuitable or insufficient steps in connection therewith, Mrs M'Nee was taken suddenly ill, and it was averred had been under medical treatment down to the date of the action. M'Nee and the child had also suffered, and in all cases the illness was produced by the insanitary condition of the house. The illness had caused M'Nee considerable expense. He had incurred a large account for medical attendance on his wife, and for her residence at the coast, and he had been compelled to engage a woman to discharge the duties, previously discharged by her, of attending to the shop. He had further been put to the expense of removing from the premises, and had also lost the profit on the sale of his goods in the shop for the unexpired period of the let.

The defenders denied that complaints had been made until September 1888, when they overhauled the pipes and drains, and put them in order where necessary.

The pursuers pleaded—"(1) It being an implied condition of the let by the defenders' factor to the male pursuer that defenders would keep the premises so let in a habitable and tenantable condition, and the pursuers and their said child having suffered in their health in consequence of their failure so to do, they are entitled to reparation from defenders therefor. (2) The male pursuer having incurred accounts and suffered loss as within condescended on, in respect of the insanitary and uninhabitable condition of the premises let, he is entitled to reimbursement and reparation from defenders therefor."

The defenders pleaded—"(1) The action is irrelevant. (2) The pursuers having remained in the house for months after they believed the house to be in an insanitary condition, and the illness and others of which they complain having supervened after that event, they are not entitled to insist in the action. (3) The defenders, having so soon as possible after complaint was made to them that the house was in an insanitary condition, caused the sewage pipes and drains to be overhauled and put into proper order where necessary, are entitled to be assoilzied, with expenses."

The Sheriff-Substitute (Spens) on 28th February 1889 allowed a proof before answer.

"*Note.*—I was referred to the case of *Munn* v. *Henderson*, 15 R. 859, and specially a *dictum* of Lord Young to the effect that there could be no claim of damages for an insanitary house against a landlord when the tenant had lived on in the knowledge that there was something sanitarily wrong. On the other hand, I have had before me the record in a case which was before the First Division" [*Gourlay* v. *Ferguson*, decided 2nd November 1887], "although it is not reported, when (affirming a judgment of Sheriff Lees) damages were awarded to a tenant for damages caused by living in an insanitary house which the landlord had failed to put in proper order, although apparently all along the tenant was complaining of the house being in an insanitary and improper state. In view of this case I prefer to hear the facts of the case before pronouncing any final judgment."

The defenders appealed to the Second Division of the Court of Session, and argued—There was here no issuable matter. The statements were irrelevant and insufficient to found a claim of damages. There was no fault on the part of the landlord competently alleged here. The pursuers relied on the unreported case of *Gourlay* v. *Ferguson*, but in that case the statements were much more specific, and there was no question of relevancy, and the matter came before the Court after a proof. This case was ruled by the more recent case of *Munn* v. *Henderson*, July 7, 1888, 15 R. 859. The pursuers' proper course was to leave the house, and decline to pay the rent — *Scottish Heritable Security Company (Limited)* v. *Granger*, January 28, 1881, 8 R. 459.

Argued for respondents—The statements were relevant. They were more specific than in the case of *Munn*. The particular defect in the drains complained of was here averred, viz., improper jointing. Notice had been given to the landlord, which was not done in the case of *Munn*. There was no acquiescence here, which Lord Young thought there had been in that case. In the case of *Gourlay* v. *Ferguson*, unreported, but decided upon 2nd November 1887, damages were awarded to a tenant in practically similar circumstances. That case ruled the present. [Lord Young—Is a landlord liable for the sickness or death of his tenants caused by defective drainage in a house let by him, although there is no specific allegation of fault on his part?] He might be, and therefore the Sheriff-Substitute was right in allowing a proof—*Kippen* v. *Oppenheim* (beetles), December 13, 1847, 10 D. 242; *Cleghorn* v. *Spittal's Trustees* (chimney can), February 27, 1856, 18 D. 664; *Reid* v. *Baird* (defective roof), December 13, 1876, 4 R. 234; *Moffat & Company* v. *Park* (bursting of pipe), October 16, 1877, 5 R. 13; *M'Monagle* v. *Baird & Company*, December 17, 1881, 9 R. 364.

The Judges of the Second Division, in respect of the difficulty and importance of the question submitted for determination, appointed the case to be argued before them and three Judges of First Division.

The appellants argued as above.

Counsel for the respondents were not called upon.

At advising—

Lord President—I think there must be a proof here.

Lord Adam and Lord Rutherfurd Clark concurred.

Lord Young—I am content that that course should be taken, but my own impression was that the case came before seven Judges on the general and to my mind interesting question of law whether a landlord, when he lets a house,

insures the health and the lives of the inmates against the consequence of bad drainage in the ordinary case and without any special averment of fault. I can understand that if the drainage is so bad or becomes so bad that the tenant has to leave and seek a residence elsewhere, he may refuse to pay the rent because a well drained house has not been supplied to him. Assume that, but does the liability of the landlord extend to health and life? If it does, it appears to me, at least at first sight, to add a liability and a terror to house-letters of which we have no example in the reports.

We were referred to a case, not reported, in the First Division, and to a case in the Second Division which to a certain extent had been decided differently and adversely to the view that, apart from averment of special *culpa*, the liability of the landlord extended to sickness or death due to defective drainage. We were told that there was no reported instance in the English Courts of such liability having been enforced, and there are certainly no cases in our own reports. The only cases bearing on the point are those I have referred to in the First and Second Division respectively in which the matter was considered differently. I was not anxious that this case should be sent to seven Judges, and I certainly thought the question, and the only question worthy of being argued, was the question of the landlord's liability where there is no special averment of *culpa* but only of a general duty to keep his drains in order. But on the only case now argued before us we may, as your Lordship suggests, send the case back to the Sheriff for proof without deciding anything.

Lord Shand—It has been stated that there is here an absence of any averment of fault, but I am not surprised at that, seeing that it is admitted on record that there was an obligation upon the landlord to keep the house in a sanitary condition.

Lord Justice-Clerk—A good deal was said before us upon the principle of the landlord's liability which has not been pressed to-day. We were told that two previous cases had been differently decided, so we thought the question should be argued before seven Judges. As the case has been presented, I agree with the course suggested by your Lordship.

Lord Lee—I also concur. On the question which was supposed to be sent here, I may say there was a difference of opinion as to the sufficiency of the allegation—the one side maintaining that unless there were averment of special fault, which was not here, there could be no claim of damages against the landlord; the other side arguing the averment was sufficient to support such a claim.

The Court refused the appeal, and sent the case back to the Sheriff-Substitute for proof.

Counsel for the Pursuers—Baxter—A. S. D. Thomson — Anderson. Agent — Wm. Officer, S.S.C.

Counsel for the Defenders—Sir Charles Pearson —Dundas. Agents—Mackenzie & Black, W.S.

Wednesday, April 27.

OUTER HOUSE.

[Lord Kinnear.

THE ASSETS COMPANY (LIMITED) *v.* JACKSON (S. & R. G. MACLEOD'S TRUSTEE).

Bankruptcy—Sale—Personal Bond for Price of Property Unconveyed—Rights of Seller.

The purchasers of a plot of ground arranged with the sellers in September 1887 to pay a portion of the price then, the sellers agreeing to postpone the date of payment of the balance till Whitsunday 1889 upon receiving from the purchasers a personal bond for the amount, with interest. The purchasers' estates were sequestrated in 1888. The subjects had not been conveyed to the bankrupts, and the bond remained unpaid. The sellers claimed in the sequestration upon their bond. The trustee called upon them to deduct from their claim, as a security held by them over the estate of the bankrupt, the value of the property held by them, and upon their refusal rejected the claim. The Sheriff sustained the trustee's deliverance. On an appeal the Lord Ordinary *recalled* the trustee's deliverance, on the ground that the sellers were not creditors of the bankrupts, holding a security for their debt over the bankrupts' estate, but were undivested owners of the property subject to a contract of sale which must be performed according to its terms, and remitted to the trustee to reject the claim, reserving the sellers' right to claim implement of their contract or damages.

In the beginning of 1886 the Assets Company (Limited) sold to S. & R. G. Macleod, manufacturers, Glasgow, a piece of land at Maryhill for £900, payable at Whitsunday 1886. The money not being then forthcoming, the parties agreed in September 1887 that £300, with the interest on the £900 from Whitsunday 1886 to 20th September 1887, should be then paid, and that the sellers should postpone the date of payment of the balance till Whitsunday 1889 on consideration that a personal bond for the amount should be granted by the purchasers, with interest at 5 per cent. The money was paid accordingly, and a bond was granted on 25th October 1887. The subjects were not formally conveyed to Messrs Macleod but were held, as far as titles were concerned, by the company as a security for the balance of the price. By arrangement, however, Messrs Macleod entered into possession of the subjects. On 17th March 1888 the estates of the purchasers were sequestrated, and Thomas Jackson, chartered accountant, Glasgow, was appointed trustee.

The Assets Company (Limited) claimed in the sequestration the amount contained in their bond, £600, *minus* £34, 17s., being interest from the date of sequestration to the due date of their bond, but *plus* £14, 14s. 3d., being interest to the date of sequestration, the amount of their claim being in all £579, 17s. 3d. The trustee called upon them to value the subjects as a security held by them for payment of their debt, and to deduct the value from their claim. They

refused to do so, and the trustee rejected their claim. They appealed to the Sheriff-Substitute of Lanarkshire.

A proof was led, and on 26th March 1889 the Sheriff-Substitute (ERSKINE MURRAY) pronounced the following interlocutor:—[*After stating the facts*] "Finds in law (1) that the appellants' right over the property in question is a security over the estate of the bankrupts for the balance of £600 of the price thereof, for payment of which the bond on which they now claim was granted; (2) that the appellants are bound to value and deduct the same before they can be ranked on their claim; &c.

"*Note.*—The test principle by which all such questions must be ruled is clearly laid down in the case of *The University of Glasgow* v. *Yuill's Trustees*, February 10, 1882, 9 R. 643. There the Lord President, quoting and adopting the opinion of Lord Curriehill in the earlier case of *M'Clelland*, February 27, 1857, 19 D. 574, lays down 'that the meaning of the 65th section of the Bankruptcy Act of 1856 is that a creditor on a bankrupt estate, who in virtue of a preferable security over one portion of that estate is entitled to appropriate the same to himself exclusively towards satisfying the debt so secured, shall not likewise get a dividend on the portion of the debt so to be satisfied out of the estate, and that it matters not whether a bankrupt's title may have been feudalised, or whether his right to the subjects may have been real or personal; also, that to solve the question it must be ascertained whether or not the subjects of the securities referred to, if they were free from these and similar burdens, would be a part of the sequestrated estate, and as such part of the fund for division among the creditors.' Lord Curriehill's views thus quoted and adopted were also held by the other Judges in *M'Clelland*, though in the circumstances of that case he came to a different result from the majority of the Judges. Following the Lord President, the other Judges in the case of *The University of Glasgow* adopted the same view.

"Applying these rules to the present case, it is clear that if the £600 remaining due of the balance of the price, payment of which was deferred till Whitsunday 1889, were to be made, thus freeing the property from its burden, the respondent would be entitled to demand the property in question as an asset for division among the creditors. The appellants' right over it is therefore a security over the estate of the bankrupt. The appellants try to maintain that a distinction must be drawn from the fact that they have never been divested of the property in question. But the Lord President, as above, specially adopts Lord Curriehill's view that it matters not whether or not the bankrupt's title has been feudalised. Practically it is just the same here as if, after the bankrupts' title to the property had been feudally completed, they had re-disponed to the Assets Company in security for the unpaid balance. It must be remembered also that the bond on which the claim is made is really itself nothing more than a security for that balance."

The appellants appealed to the Court of Session, and argued — At common law a creditor was entitled to rank for his full debt without deducting the value of any security he might hold. The limitation of this right where the security was over the property of the bankrupt was statutory, and must be strictly confined to the case provided for. The property in this case was not the property of the bankrupts. It had never been conveyed to them, and they had no right to have it conveyed except upon payment of the full price.

Argued for the respondent—The appellants' right over the property in question was a right of security over the estate of the bankrupt. It was the same as if the bankrupts had been feudally vested in the property, and had reconveyed it to the appellants in security of the price. The bankrupts had a right to a conveyance on payment of the balance of the price. They had therefore the beneficial interest in the property subject to that burden, although in a question of title they were not vested in it.

The case was heard in the spring vacation before the Lord Ordinary officiating on the bills (KINNEAR), who on 27th April 1889 pronounced the following interlocutor:—"Sustains the appeal: Recals the interlocutor of the Sheriff-Substitute appealed against, and also the deliverance of the trustee, and decerns: Remits to the trustee to reject the claim for the appellants, reserving to the appellants their right to enforce the contract of sale between them and the bankrupts, or to claim for damages in the event of non-performance, and reserving to the trustee his answers to such claim: Finds no expenses due to or by either party.

"*Note.*—The parties are agreed that the facts are correctly stated in the first and second findings of the Sheriff's interlocutor" [these findings contained a statement of the facts above narrated], "and that the third finding is also correct in so far as it states that the subjects have not been conveyed by the appellants to the bankrupts. It follows that at the date of the sequestration the appellants were undivested owners of the property in question. By the contract of sale they were under obligation to convey to the purchasers on full payment of the price. But the purchasers had no real right in the land, and no right to demand a conveyance except in return for full payment of the price. The bond upon which the appellants claim does not alter the conditions upon which the purchasers are entitled to demand and are bound to accept a conveyance in any material effect. It postpones the term of payment, so that apart from the bankruptcy the purchasers could not be treated as in breach of contract until Whitsunday 1889. It fixes the rate of interest, and it gives the seller a document of debt which but for the sequestration might have been used as the foundation for diligence. But the sole consideration for the bond is admitted to be the purchasers' obligation to pay the price, and it follows that payment could not be enforced under the bond any more than under the contract except in return for a valid conveyance of the subjects sold.

"The sequestration appears to me to make no difference upon these rights. On the one hand the sellers do not become entitled to recover payment without conveying the land, and on the other hand the trustee cannot demand a conveyance in return for a ranking or on any other condition than full payment of the price with interest as stipulated in the bond.

"It follows that the subjects which the appellants have been required to value is not part of the sequestrated estate, but is still the property of the appellants themselves. The claim as stated by the appellants cannot be sustained, because it treats the obligation in the bond as a separate debt irrespective of the contract of sale, and on that footing the appellants claim a ranking for the price without undertaking to give delivery of the subjects sold. On the other hand, the interlocutor appears to me to be erroneous inasmuch as it assumes the contract to have been already rejected, and the sellers to have obtained a security for the unpaid price over property belonging to the purchasers. If this were so, the trustee could not enforce the contract, supposing that he desired to do so, or recover the property for the benefit of the creditors, except for payment of its present value with 20 per cent. in addition. It may or may not be for the interest of the creditors to execute the contract, but if it is for their interest they are entitled to obtain a conveyance for the balance of the contract price, and they cannot obtain it upon other terms. The rights of parties therefore cannot be explicated in the manner proposed. The appellants are undivested owners of the property, but subject to a contract of purchase and sale, which must be performed according to its terms, and not otherwise."

Counsel for the Appellants—Graham Murray. Agent—J. Smith Clark, S.S.C.

Counsel for the Respondent—G. W. Burnet. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, June 14.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

JENKINS (MACDOUGALL & COMPANY'S TRUSTEE) *v.* STEPHEN (STEPHEN'S TRUSTEE).

Partnership—Liability of New Firm for Debts of Old.

A firm and the two individual partners thereof, in security of a loan, granted a bond and disposition over heritable property belonging to the firm. Three years later they assumed another partner under a new contract of copartnery, under which the old firm was to be wound up, and the new firm did not take over the heritable property or any liabilities of the old, and only took over the stock at a valuation. Five years thereafter the estates of the firm and of the three individual partners were sequestrated, and the disponee under the bond and disposition in security lodged a claim for the sum therein contained, alleging that the new firm was a mere continuation of the old.

Held, on a proof, that the title and the right to the heritable property over which the bond had been granted remained with the old firm; that the stipulations of the contract had been observed in the actings of the parties; that the debt under the bond had not been adopted by the new firm; and that the claim accordingly fell to be *rejected*.

In 1879 the firm of Macdougall & Company, royal tartan warehouse, Inverness and London, consisted of two partners, Mr Robert Grant and Mr Alexander Maclennan.

In 1879 Macdougall & Company borrowed from Mrs Anne Mary Stephen, the trustee of the late Rev. Thomas Stephen of Kinloss, Morayshire, the sum of £3500, and in security thereof granted a bond and disposition of certain heritable property in Lombard Street, Inverness, the title to which stood in the names of Grant and Maclennan as sole partners of the firm. The bond was granted by Macdougall & Company and by "Robert Grant and Alexander Maclennan, the individual partners of the firm, both as partners thereof and as individuals."

In 1882 Donald Macbain, 42 Sackville Street, London, was assumed as a partner of the firm under a new contract of copartnery, whereby it was, *inter alia*, agreed that Grant and Maclennan should grant a lease to the new firm of the warehouse and premises in Inverness occupied by the old firm for ten years from June 1882 at the rent of £450. Grant and Maclennan assigned to the new firm the lease of the shop and premises in Sackville Street, London, occupied by the old firm. The new firm undertook to pay the future rents and assume the whole burden of the lease. The capital of the company was fixed at £10,000, of which Grant and Maclennan contributed £3750, and Macbain £2500. The new firm agreed to take over the whole stock and warehouse fittings and furniture in Inverness and London of the old firm, and pay for goodwill and the London lease. The value of the warehouse fittings and furniture was agreed to be £2000, of the London lease £2000, and of the goodwill of the business £2500. The sum of £6500 was therefore to be added to the value of the stock in ascertaining the sum payable by the new firm to the members of the old firm. Macbain was bound to pay to the new firm a sum of £1500 in addition to his share of the capital, on which sum he was to receive from the new firm interest at the rate of five per cent. The new firm should have no concern with the debts due to or by the old firm. No commission or charge should be made by the new firm for the collection and payment of the said debts, which would be done in the firm's premises.

In March 1887 Macdougall & Company presented a petition in the Sheriff Court of Inverness, under section 16 of the Bankruptcy Act 1856, for the sequestration of their estates and for the appointment of a judicial factor thereon.

On 25th March 1887 the Sheriff-Substitute (BLAIR) appointed Robert Palmer Jenkins, solicitor, Inverness, judicial factor on the sequestrated estate, and he was subsequently elected trustee.

On 16th November 1887 a claim was lodged by Mrs Anne Mary Stephen for the sum of £3500 in the bond and disposition of Macdougall & Company and Grant and Maclennan. The trustee rejected the claim, finding—"(3) That the heritable property in question over which the claimant holds security was never transferred by the said Mr Grant and Mr Maclennan and the old firm of

Macdougall & Company to the firm of Macdougall & Company as in existence at the date of the sequestration, and the three partners thereof, and that further no bond of corroboration was ever granted to the claimant by the firm of Macdougall & Company as existing at the date of the sequestration, or the partners thereof. (4) That in the books of Macdougall & Company, from the date of the formation of the new firm till the date of sequestration, the said Robert Grant and Alexander Maclennan, and the old firm of Macdougall & Company, as in existence prior to 1882, were treated as proprietors of the whole block of property, including the portion over which the claimant holds security, and that the firm of Macdougall & Company, as sequestrated, was charged annually by the old firm £450 as the rent of the premises occupied by them. (5) That in the claim lodged it is set forth that the property belongs to Mr Grant and Mr Maclennan. (6) That the claimant holds no personal obligation from and has therefore no claim against the firm of Macdougall & Company as sequestrated on 25th March 1887, but has a claim against the private estates of the said Robert Grant and Alexander Maclennan."

Mrs Stephen appealed against the deliverance, and a record by minutes was made up in the Sheriff Court.

Mrs Stephen averred—"The money lent by the appellant was paid to and received by the firm of Macdougall & Company, and was mixed up with their general funds, and used for the general purpose of their business. . . . The assumption of Mr Macbain as a partner was not notified to the public in any way, and in point of fact was practically kept a secret so far as Inverness was concerned. He appeared to be an assistant in the London business, but in truth the bondholders did not even know of his existence. It is said that he contributed towards the capital of the company, but the money which he is said to have contributed was advanced upon bills signed Macdougall & Company, and which have been ranked in the sequestration upon appeals to this Court, because they were in reality and truth loans to Macdougall & Company. The firm, it now appears, was hopelessly insolvent before 1882, and it is believed and averred that there never was any real alteration in the firm, and that the so-called assumption of Mr Macbain as a partner was simply a device for procuring money from persons outside the business. . . . Notwithstanding the alleged change of firm the debts owing by the firm at the date of the alleged change were paid by the alleged new firm out of the proceeds of their business, and the debts due to the old firm were collected and discharged by the alleged new firm. There was an absolute and entire continuity in the firm's affairs."

She pleaded—"(1) The bond and disposition in security founded on having been granted by Macdougall & Company as a firm the appeal ought to be sustained. (2) The firm having been carried on after the alleged assumption of Macbain as a partner without any winding-up, or any notification to the appellant or the public of a change, and with the same stock and generally the same assets and liabilities, the firm, even if altered, assumed or continued to be liable for the obligations of the old firm."

In the proof allowed by the Sheriff-Substitute the following additional facts were established:—

That the money lent by the appellant was expended by Macdougall & Company in buildings erected by them on their property in Inverness, and used by them for the purposes of their business. The total heritable debt on the property of the firm was £14,500, and the heritable property was sold on 1st May 1888 for £11,600, leaving a deficit of £2900, whereof the appellant's share was £700, to which amount she restricted her claim. The property over which the appellant held her security was never transferred by the old firm to the new, nor was any bond of corroboration granted by the new firm or its partners in the appellant's favour. It was intimated in the firm's trade advertisements that Macbain had been assumed as a partner, and a notice to this effect was advertised in the *Inverness Courier* and *Northern Chronicle*, and a copy of the advertisement was sent out to the customers. It further appeared that from the commencement of the new copartnery two sets of books were kept referring respectively to the old and new firms. A separate bank account was also kept for the old firm until October 1883, at which date that account ceased to be operated on, up till which time the debts of the old firm were paid out of both accounts. A number of the debts due to the old firm proved to be bad, and the new firm made advances beyond their receipts to the old firm.

The result of the proof will be found summarised in the opinion of Lord Shand, who delivered the judgment of the Court.

In the affidavit and claim lodged in the sequestration of the new firm of Macdougall & Company by Stephen's trustees the alleged debtors in the foresaid sum of £3500 were Macdougall & Company, and Robert Grant and Alexander Maclennan, the individual partners thereof, the partners of the old firm. It was arranged, however, in order that the merits of the claim might be decided, that no objection of a technical kind should be taken to the affidavit.

The Sheriff-Substitute found that the new company "having taken over at 1st June 1882 the whole business and assets of the going business of the firm of Macdougall & Company, did thereby also assume the liabilities of the said firm, and among others the debt due to the appellant Mrs Anne Mary Stephen, as a creditor of the said firm. . . . Therefore sustains the appeal against the trustee's deliverance."

The trustee appealed to the Court of Session, and argued—The respondent was not entitled to claim on the sequestrated estate of the new firm for the balance due under her bond. There was no transference of the property of the old firm to the new, and the new firm in such circumstances could not be held responsible for the old firm's debts—*Heddle* v. *Marwick*, June 1, 1888, 15 R. 698. It was specially stipulated in the deed of copartnery that the new firm was not to be responsible for the old firm's debts, and this was a debt of the old firm; with the exception of the name there was no connection between the old firm and the new, and the new firm derived no benefit whatever from this money. This was not an ordinary trade debt of the new company, nor was it ever taken over by them from the old company—Lindley on Partnership, p. 208, and cases there cited. It

was a heritable debt of the old company neither adopted by the new firm nor by any of its partners—*Nelmes* v. *Montgomery*, June 15, 1883, 10 R. 974.

Argued for respondent—Though the terms of the deed of copartnery declared that the debts of the old firm were not to be taken over, the actings of parties showed that this arrangement had not been carried out. The old firm and the new were for all purposes one continuing copartnery; a London manager obtained a share of the business, but no notification of this was given to the public, nor was anything done to intimate the change which it was now said took place at that time. The new firm took over the old firm's debts just as it did its stock-in-trade and furnishings, and it was impossible now to repudiate this liability—*M'Keand* v. *Laird*, 30th March 1860, 23 D. 846. The actings of the new firm rendered them liable to the respondent. They continued to pay the interest on this bond from 1882, and by so doing adopted it. Had the new firm repudiated the bond and not so dealt with it the respondent would have been on her guard, and would have pressed for payment at the time when the old firm came to an end. At that time the old firm had assets, and the respondent by sequestrating it would have obtained payment of her bond, but as by the actings of the new firm these assets had disappeared the new firm ought to be held liable to the respondent—*Ridgeway* v. *Brock*, December 6, 1831, 10 Sh. 105; *Miller* v. *Thorburn*, January 22, 1861, 23 D. 359; *Heddle* v. *M'Laren*, June 1, 1888, 25 S.L.R. 553.

At advising—

Lord Shand—At the term of Whitsunday 1879 Mrs Mary Ann Stephen, the respondent in this appeal, who claims to be ranked in the sequestration, lent a sum of £3500 to Messrs Macdougall & Company and to Robert Grant and Alexander Maclennan, the individual partners of that firm, obtaining in return a bond and disposition in security in her favour, by which the firm and its two partners bound themselves for payment of the debt, and Grant and Maclennan being themselves infeft in certain heritable property belonging to them for behoof of their firm, of which they were the sole partners, conveyed the property in security in ordinary terms for payment of the debt. The sum advanced was to a large extent laid out in the erection of buildings on the ground embraced in the security, and according to the estimated value of the property at the time the heritable security was ample for the payment of the respondent's debt.

Down to 1st June 1882 Grant and Maclennan continued to carry on their business of Macdougall & Company, which had existed for a number of years both in Inverness and London, and they paid half-yearly the interest on the respondent's security, as well as the interest on other similar securities which they had granted in return for loans on adjoining properties held by them in the same way, and some of which were occupied by them for the purposes of their business down to that time. At that date they agreed to take into partnership Mr Macbain, who had been for about twenty years an assistant in the London business. A regular contract of copartnership was entered into, and from that date the business of Macdougall & Company, carried on under the same name or firm, belonged to the three partners, Grant, Maclennan, and Macbain. This new company continued to carry on business for five years, but in March of 1887 the estates of the company and of the three individual partners were sequestrated.

The respondent claims to be ranked as a creditor of this later company for the debt constituted by the bond and disposition in security of 1879 in her favour, and the Sheriff-Substitute, reversing the deliverance of the trustee in the sequestration, has sustained the claim to be ranked. After consideration of a full argument, I have come to the conclusion without difficulty that the judgment complained of should be reversed, and that the respondent's claim to be ranked should be refused.

The bond and disposition in security founded on was not granted by the company which came into existence in 1882, or by the partners of that firm, and of course it is incumbent on the respondent to aver and prove either an express undertaking by the later firm and its partners of liability for the debt, or facts and circumstances in the course of dealing of the parties which show that this firm and its partners undertook such liability. The respondent's affidavit and claim sets forth no ground of liability, for it merely proceeds on the bond and disposition in security, which of course could contain no obligation by a company which only came into existence three years after that deed was granted. The claim as stated was one which the trustee in the sequestration would have been quite warranted in rejecting *simpliciter*, because it disclosed no ground of liability of the bankrupt company. But an appeal having been taken against the trustee's deliverance, a record by minutes was made up in the Sheriff Court, from which it appears that the claimant maintained that the bankrupt company "assumed or continued to be liable for the obligations of the old firm," and were therefore liable in payment of her debt. The facts mainly relied on, as averred by the respondent, were that the money lent by her was received by the firm in 1879 and mixed up with their general funds, and used for the general purpose of their business; that the assumption of Mr Macbain as a partner was not published to the world; that the money which he was said to have put into the business was really got by loans obtained by the firm from third parties; that "there never was any real alteration in the firm, and that there was a mere continuity of the old firm's business," the new firm taking over the assets of the old firm on the one hand, and assuming liability for debts and obligations on the other. And the authorities on which the claim was maintained were cases of which the most recent and important were the cases of *Heddle*, 15 R. 698, and *M'Keand*, 23 D. 845, in both of which the judgments proceeded on the view that there had been no real change in the copartnery beyond the assumption of a partner who obtained a small share of a going business without putting in new capital; and where the new firm went on to trade with the stock and assets of the old firm, taking these over without any arrangement for the winding-up of the old company's affairs, or for an accounting with the old firm or

its partners, but undertaking liability for all the old company's debts and obligations.

It appears to me to be clear, on a consideration of the proof adduced by both parties, that the respondent has entirely failed to prove her material averments, and that the facts proved are in striking contrast with the facts held to be established in the class of cases to which I have alluded, and which in these cases were the ground of judgment.

1. In the first place the nature of the debt and obligation are of considerable importance. There was no doubt an obligation for repayment of the loan granted by the old firm and by Grant and Maclennan. But the transaction was substantially the taking of a heritable security on a permanent loan, and the lender looked mainly to the value of the property conveyed as the means of payment. As to the proceeds of the loan, Mr Grant, the claimant's witness, says—"The bulk of it was paid to the contractors for the buildings as they proceeded." The debt cannot be regarded as in any sense a proper trade debt like debts due to merchants supplying stock, or to bankers on a firm's banking transactions, and so is not one of a class which it is at all probable that a new firm or company would undertake liability for.

2. It is quite clear that not only the title to the heritable property, which is the subject of the security, but the right to the property itself all along remained with Grant and Maclennan and the old company of which they were the sole partners. Although immediately after the sequestration there seems to have been some confusion in the minds of certain of the bankrupts, and even of the trustee, or rather, perhaps, I should say in the minds of their advisers, as to the rights of proprietorship of the heritable properties which truly belonged to the old firm and its partners, and part of which was occupied by the new firm, there can be no doubt that the right to these properties never was transferred to the new firm or its partners. It would be remarkable in these circumstances if the new firm were found to have accepted or adopted liability for a number of bonds over subjects in which they had no right of property or other interest. In any view, the case is not one in which, as in the other leading cases which have occurred, the new firm took over the whole property of the old firm and its partners for these heritable properties, valued at upwards of £20,000, were not so taken over.

3. But perhaps of more importance still are the provisions of the contract of copartnery of 1882, which distinctly show that the old company was to be wound up, and was to subsist for the purpose of being wound up, and that the new company was to be started on an entirely new basis, and was not to undertake any liability for the debts of the old company. Mr Macbain, the new partner, undertook to put £2500 into the business, as against £3750, the estimated capital of each of the other partners, and was to have a corresponding share of the profits. It is true that in order to enable him to raise the money his partners assisted him with their credit, but he became the principal obligant for the repayment of the loans, for which they were cautioners only. Then, the new company took a lease of their premises from the old firm for the endurance of the partnership, being ten years at a rent of £450, an arrangement which in the most distinct manner showed how complete was the separation between the interests of the two firms, and that this separation was to be continuing and permanent. Finally and conclusively, the stock of the old firm was only taken over at a valuation made at the time, for the amount of which the new firm became liable to pay to the partners of the old firm interest on the amount to be charged against the new firm until it could conveniently repay the capital, and the contract expressly bore that "the new firm shall have no concern with the debts due to or by the old firm," a stipulation which is of course in its very terms and substance directly opposed to the whole idea on which the present action is based. It is unnecessary to notice the other provisions of the contract of copartnery further than to say that there are subsidiary clauses provided for the keeping of books to be regularly balanced, that the new firm should make no charge of commission for the collection and payment of the old firm's debts, and that as to the London business that the new firm should take over the lease of the London premises, and in that instance undertake the responsibility of the future rents. Taking the contract as a whole, I have only to observe that I could scarcely conceive of a deed being more carefully framed for the purposes of distinguishing between the business and interests of an old company and a new one formed to take up the old business, or in which it was made more clear that the new company did not take over the whole assets of the old, and only took over the stock at a price agreed on, and that the new company did not adopt or undertake liability for the debts of the old company.

4. All this, however, might have been stipulated in writing only. The parties might in carrying on their business have disregarded their arrangement so carefully recorded, and have so acted in some way dealing with all the creditors so as to accept universal liability for the old company's debts. But I find nothing in the proof to countenance such a suggestion. The contract was carried out, so far as I can see, in all its stipulations. From the formation of the new company in 1882 down to the sequestration there were two sets of books kept, one for the old firm and another for the new firm. Of course it was in the books of the latter that the cash transactions, receipts, and payments were all in the first instance made, but in every case where money was received or paid on account of debts due to or by the old firm the amount was transferred to the books of the old firm, to the credit or debit of that firm as the case might be. In short, the old firm was treated as in liquidation of its trade debts and obligations, as a company being wound up, and which when the debts due to and by the firm were paid would remain possessed only of their heritable property subject to the bond over it, the new firm acting as their agents in the winding-up. Mr Grant, the claimant's leading witness, says on this point—"Messrs Stewart, Rule, & Burns were also my own agents, and they prepared the contract between Mr Macbain, Mr Maclennan, and myself. That contract provides that a new firm should be constituted, and it also expressly provides that the firm should have no concern with the debts due to or by the

old firm. It was also provided by the contract that the new firm should collect the debts of the old firm without commission. Those provisions in the contract, so far as keeping our books are concerned, were carried out by us. We kept correct books from the date of the contract until the sequestration, and whatever the books show is, so far as I know, and to the best of my knowledge and belief, correct, and they exhibit a true state of the affairs of both firms from time to time. Although the new firm was started in 1882 the old firm still existed so far as the collecting of the debts and so far also as the paying of the debts was concerned. (Q) Is it the case that the heritable subjects in High Street and Lombard Street continue to be the property of the old firm?—(A) I believe so." The rents of the heritable properties collected by the new firm or due by them to the old firm were credited to the old firm, and the interests paid and outgoings for the properties were put to the old firm's debit, and these books were balanced annually by Mr Meston, an accountant from Aberdeen, who went periodically to Inverness for the purpose. It is needless to pursue this subject further than to say that the evidence of Mr Cameron, accountant, including his report on the books, shows that the provisions of the contract were carried out in every particular. It is true that in the end a very large amount of the debts due to the old firm proved bad and were not paid, and so the new firm made large advances beyond their receipts for the old firm, but this result, as far as I can see, was not anticipated, and in any case does not detract from the fact that the contract was acted on.

All this being so, I have really great difficulty in seeing on what grounds the claimant can say that the debt due to her was adopted by the new company, *i.e.*, that the new company in the face of the agreement to the contrary between the firms undertook liability for that debt. The claimant and the new company had no dealings or communication relating to any such liability. It is said the firm undertook responsibility for other debts, for the balance due to the bank, and for the ordinary trade debts, which were indeed paid off by the new firm. As to the debt to the bank, the mode in which that was dealt with is a very good illustration of what alone will generally give a creditor a legal right or obligation against a new firm. The bank's agent having learned that a new partner had been assumed and a new company started, became alive to the necessity of having an obligation granted by the new firm for the bank's debt, and having pressed for this—intimating no doubt that a refusal would result in a stoppage of the bank account—he obtained the obligation he desired. The claimant has nothing of the kind in any transactions with her. Then, as to the ordinary trade creditors, most of them had furnished goods to the old firm, and the new firm continued to deal with them. In the course of such dealing the old and new accounts as in a question with the creditors were treated as one continuous series of accounts (though the payments made in so far as made for the old firm were placed to their debit), and in this way, as also in the case of bills current when the new firm began and afterwards renewed by them, the new firm by their mode of dealing in each case undertook liability for the old debt. In the result, the new firm not only expressly undertook liability for these debts, but generally speaking paid them off, incurring new debts which have been ranked on the sequestration, and in the end none of the old firm's trade debts were outstanding unpaid. But in the claimant's case no such dealings occurred.

The only remaining point to which the claimant's counsel attached importance in the argument was that the new firm after 1882 regularly paid the interest on the claimant's bond, generally by the firm's cheques or bills, and the claimant had no notice of the change of partnership, and no knowledge of any change. But as regards the interest so paid—the amount was in fact at once carried to the debit of the old firm by the new firm, who merely acted as their agents in making the payments. It is said that nevertheless the claimant is entitled to hold that the new firm became their obligants in the capital sum. I know of no legal principle which can support that view. The failure to intimate to a creditor of the old firm that a new company had been formed cannot infer an undertaking of liability by the new company for the old firm's debts, and the creditor who knew nothing of the change of partnership cannot on any principle of law which admits of being stated say that she acquired as a new debtor a partnership of which she knew nothing, because that new partnership paid the interest falling due on her bond under the arrangement between the two firms already fully stated. With such a contract of copartnery acted on, as I have stated, nothing short of a direct undertaking by deed or by dealing unequivocal in its character with the individual creditor, could infer an undertaking of liability for a debt of the old firm. There was no such undertaking or dealing here, and therefore no such liability undertaken; and so I am clearly of opinion that the judgment of the Sheriff-Substitute must be recalled, and her claim to rank must be rejected.

The Lord President, Lord Mure, and Lord Adam concurred.

The Court recalled the interlocutor appealed against, and reaffirmed the deliverance of the trustee.

Counsel for the Appellant — Gloag — Low. Agents—J. & A. F. Adam, W.S.

Counsel for the Respondent—Murray—Dickson. Agents—John C. Brodie & Sons, W.S.

Friday, June 21.

SECOND DIVISION.

[Sheriff of Caithness, &c.

CORMACK *v.* THE SCHOOL BOARD OF THE BURGH OF WICK AND PULTENEYTOWN.

Reparation—Personal Injury—Boy Injured by Fall of Gate—School Board—Fault—Contributory Negligence.

The entrance to the playground of a board school was closed by a heavy iron gate in two halves. The iron stop in the ground upon which the two halves of the gate should have shut was worn, and permitted the gate to open outwards as well as inwards. While some school children were swinging on one half of the gate, it swung violently outwards, was wrenched from its hinges, and fell upon and injured a schoolboy aged seven years. There was a conflict of evidence as to whether or not he was swinging on the gate at the time of the accident.

In an action for damages by his father against the School Board—*held* that the accident was caused by the want of a proper stop for the gate, that the defenders were to blame for neglecting to renew the stop, and that even if the boy had been swinging upon the gate at the time of the accident, he was not guilty of contributory negligence.

This was an action for damages in the Sheriff Court of Wick by Alexander Cormack, shoemaker in Wick, against the School Board of the Burgh of Wick and Pulteneytown, for injuries sustained by his pupil son Robert Cormack.

It appeared that Cormack, who was seven years of age, was a scholar at Pulteneytown Academy. At the entrance to the playground of this school there was a large iron gate made in two halves, each half weighing about 1½ cwt. Both halves opened inwards, and there was an iron stop in the ground which was intended to prevent them from opening outwards. This stop was worn, and the two halves of the gate could be swung both outwards and inwards. While some school boys were swinging on one of the halves of the gate, it was driven with violence against the pillar supporting it, and wrenched from the hinges. It fell upon Cormack and injured him severely. There was a conflict of evidence as to whether Cormack was swinging on the gate when it fell.

The defenders pleaded that they were not in fault, and that the boy had contributed by his negligence to the accident.

The Sheriff-Substitute (HARPER) found that the accident had occurred by the fault of the defenders, and assessed the damages at £40. The result of the proof before the Sheriff-Substitute appears from the following passage in his note:—"On the evidence of Bruce, Sutherland, and Shepherd—all skilled men—it appears that the gate was not sufficiently hung, that the stop was in a useless condition, and that the accident was caused by the gate swinging outwards, past where a stop would have checked it, and coming against the pillar, which, acting as a fulcrum, so told upon the insufficient hanging as to bring the gate down. The evidence of Mr Brims, too, is of great importance. He is a member of the School Board, and the Board's architect. He does not speak to the gate being insufficiently hung, but he says, 'My opinion is that from the want of the stop the gate was in a dangerous condition;' and further, 'My opinion is that it was the leverage caused by the swinging of the gate against the pillar that broke the hinge.' The evidence of the three Swansons—father and two sons, the sons being examined for the pursuer, and the father for the defenders—is also important, as it was they who last hung the gate before it fell. They admit that the cover was not screwed closely up; and although they all say, as was to be expected, that the gate was in their judgment sufficiently hung, yet the father admits that it would have been better if the bolts had been screwed up tight, as the gate would then have stood more violence."

On appeal the Sheriff (THOMS) recalled the interlocutor of the Sheriff-Substitute, and assoilzied the defenders.

The pursuer appealed and argued—The gate was in a dangerous state, and the defenders were in fault in allowing this. It was no defence that the boy had swung upon it. The defenders should have expected this, and provided against it.

Appellant's authorities—*Beveridge* v. *Kinnear & Company*, December 21, 1883, 11 R. 387; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Lynch* v. *Mudin*, 1841, 1 Adolp. & Ellis, 29; *Marshall* v. *School Board of Ardrossan*, December 10, 1879, 7 R. 359; *Virtue* v. *The Police Commissioners of Alloa*, December 12, 1873, 1 R. 285; *Mersey Dock Trustees* v. *Gibbs and Others*, *Mersey Dock Trustees* v. *Penhallon and Others*, June 5, 1866, 1 L.R. (H. of L.) 93; *Brady* v. *Parker*, June 7, 1887, 14 R. 783; School Board Act; The Education (Scotland) Act 1872, sec. 36 (35 and 36 Vict. cap. 62).

The respondent argued—The School Board could not be responsible in damages for such an accident as this. They were a statutory body appointed for a special purpose. Any damages to the pursuer must be paid out of the rates, and the School Board had only a strictly defined sum out of the rates, which was all applied to strictly defined objects. The gate was safe so long as it was not interfered with. Competent tradesmen had been employed shortly before to put the gate in order, and they had taken what they thought were the proper steps, therefore the School Board were freed from blame—*Fraser* v. *Edinburgh Street Tramway Company*, December 2, 1882, 10 R. 264; *Hughes* v. *Macfie and Others*, December 7, 1863, 2 Hurl. & Colt. 745.

At advising—

LORD JUSTICE-CLERK—In this case the pursuer sues for damages for injuries done to his son, a boy of 7 or 8 years old, who was hurt by the fall of the outer gate of the school-yard. The boy was either close to the gate when it fell, or he was swinging upon it, but in my opinion it does not matter whether he was swinging upon it or not as regards the result of this case.

The gate was certainly not a very satisfactory gate, and the fact appears to be that for sometime previous to the accident there had been no stop to catch the gate when it was pushed out-

wards, but it could be swung round so as to act as a lever having as its fulcrum the corner of the gate-post. Thus when it was swung outwards with the weight of several boys upon it, it had a strong tendency to wrench the bolt out of its fastening. That indeed was what happened. It was said that the fastening of the gate was defective owing to the screws which held it to the gate-post not being sufficiently tightly screwed up, and that may have been so, but the really important fact is that the bolts could be taken off by being wrenched out when the gate swung round, and that was what was done here.

In my opinion the defenders are responsible for this deficiency. If the gate had been kept reasonably safe then the accident would not have happened. It is no answer to say that if the children had not swung upon it the gate was safe. It is so natural for children to swing on a gate that I think the School Board should have anticipated it. I think that we must reverse the Sheriff's judgment, and revert to that of the Sheriff-Substitute.

Lord Young, Lord Rutherfurd Clark, and Lord Lee concurred.

The Court pronounced this judgment:—

"Find in fact (1) that the pursuer's son, while a pupil at the Pulteneytown Academy, a school belonging to the defenders, was injured by the falling of part of the gate at the entrance to the school; (2) find that the gate was insufficiently hung, was not provided with a stop, and consequently on the occasion libelled swung outwards against a pillar, thereby breaking the hinge and causing part of the gate to fall on the boy; (3) find he did not by negligence on his part contribute to the accident: Find in law that it was the duty of the defenders to keep the gate in a safe condition, and that they are liable in damages to the pursuer as guardian of his son for the injury done to him: Therefore sustain the appeal: Recal the judgment of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new assess the damages at forty pounds sterling," &c.

Counsel for the Appellant—Low—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Respondents—Comrie Thomson—Watt. Agent—William Gunn, S.S.C.

Wednesday, June 26.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

ROSS *v.* MACKENZIE.

Process—Jury Trial - Abandonment of Action—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 10—*Act of Sederunt*, 16*th Feb.* 1841, *sec.* 46.

The Judicature Act 1825, sec. 10, provides, *inter alia*—"... The pursuer has it in his power to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." ...

The Act of Sederunt, 16th February 1841, sec. 46, provides—"If it shall be made to appear to the Court that a party has abandoned his suit, ... the Court shall proceed therein as in cases in which parties are held as confessed." ...

The pursuer of an action lodged a minute in process abandoning "the cause in terms of the statute," but he failed from poverty to pay the taxed amount of the defender's account of expenses. On the motion of the defender, and on the pursuer's consent, the Court *assoilzied* the defender from the conclusions of the action.

In an action of damages by Hugh Ross, Balchaggan, Ross-shire, against John Mackenzie, innkeeper, Milltown, Ross-shire, an issue was settled by Lord Wellwood on 25th January 1889, and the case was set down for trial at the jury sittings in March 1889. Shortly before the date of the trial the pursuer lodged a minute in the following terms:—"Forsyth, for the pursuer, hereby abandons the cause in terms of the statute." Thereafter the Court, on the motion of the defender, allowed the defender to lodge an account of his expenses, and remitted the account to the Auditor for taxation. It was not stated that the pursuer had failed to pay the defender's expenses as taxed, and that his agent had advised the defender's agent by letter that the pursuer was unable to pay the expenses, and did not object to decree passing therefor, and to the defender being assoilzied. The defender moved for the amount of the expenses, and for absolvitor.

Reference was made to the Judicature Act (6 Geo. IV. cap. 120), sec. 10; the Court of Session Act 1868, sec. 39; the Act of Sederunt, 16th February 1841; and to *Lawson* v. *Low*, July 1, 1845, 7 D. 960.

The Court assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer—Forsyth. Agent—David Barclay, Solicitor.

Counsel for the Defender—Wilson. Agent—Robert Cunningham, S.S.C.

Friday, June 28.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TENNENT *v.* WELCH.

Husband and Wife—Foreign—Wife's Heritable Estate—Effect of Sale—Surrogatum—Donation.

The wife of a domiciled Scotsman after her marriage, with concurrence of her husband, sold a heritable estate belonging to her in England. She duly acknowledged the conveyance thereof before two of the commissioners appointed under the Act for the Abolition of Fines and Recoveries (3 and 4 Will. c. 74), and "declared that she did intend to give up her interest in the said estate without having any provision made for her in lieu thereof." Part of the price

was received and retained by the husband, and part was vested in certain trustees to indemnify the purchasers against an annuity charged on the estate.

The result of this conveyance by the law of England was that the husband "became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by the said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti*." The husband and wife having subsequently separated by mutual consent, the latter executed a deed of revocation by which she revoked and cancelled all donations and provisions made by her in favour of her husband.

In an action by the wife against the executor of her husband—*held* that the pursuer was entitled to repayment of the sum received by her husband, and to payment of the rest of the price on the annuity ceasing to be chargeable, in respect that (1) the rights of the spouses in the price of the estate were to be decided by Scots law, and (2) that by Scots law the price was *surrogatum* for the estate.

Husband and Wife—Donation.

Opinion that if there had been a presumption that the wife intended to give her husband the price of the estate it would have been a revocable donation.

Husband and Wife—Separate Estate of Wife—Liferent of Husband—Actuarial Value.

A married woman having, with the concurrence of her husband, sold a heritable estate belonging to her in England, in which by the law of England her husband had a freehold or liferent interest, subsequently brought an action against the executor of her husband to recover the purchase money which her husband had received and retained in his own hands, but without claiming interest thereon. The Court *decerned* against the defender for the sum sued for, and refused to have the life interest of the husband calculated as at the date of the sale, and deducted from the said sum, in respect that it had been fully satisfied by his having had possession of the purchase money till his death, and having appropriated the interest to his own uses.

Charles Welch Tennent and Mrs Hamilton Dunbar Tennent were married at St Mark, St Marylebone, in the county of Middlesex, on 24th March 1877. At the date of the marriage Mr Tennent was a domiciled Scotsman, and continued to be so till his death. No contract of marriage was entered into between the spouses.

At the date of the marriage Mrs Tennent was possessed of a large amount of property, both heritable and moveable, and, *inter alia*, of the estate of Overton in the county of Salop. By deed of conveyance, dated 24th July 1877, Mrs Tennent, with concurrence of her husband, conveyed the estate of Overton to the marriage-contract trustees of Lord Boyne at the price of £23,500, and on the same day she acknowledged the said conveyance before two of the commissioners in terms of the Act 3 and 4 Will. IV. c. 74, for the abolition of fines and recoveries.

The certificate of the commissioners was to this effect—"And we do hereby certify that the said Hamilton Dunbar was at the time of her acknowledging the said deed of full age and competent understanding, and that she was examined by us apart from her husband touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same."

The affidavit required to be made by one of the commissioners bore—"That previous to the said Hamilton Dunbar Tennent making the said acknowledgment, I inquired of her the said Hamilton Dunbar Tennent whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate, and that in answer to such inquiry the said Hamilton Dunbar Tennent declared that she did intend to give up her interest in the said estate without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said Hamilton Dunbar Tennent I have no reason to doubt the truth, and I verily believe the same to be true."

Of the price of the estate the sum of £18,000, after deduction of the charges connected with the sale, was paid over, and passed into the hands of Mr Tennent. By deed of declaration of trust dated 24th July 1877 the remainder of the purchase money—£5500—was vested in Lord Boyne and Mr E. G. Marshall, on the part of the purchasers, and Mr Ralph Dalzell Welch, on the part of the vendors, as trustees, for the purpose of indemnifying the purchasers against a charge of £200 per annum charged on the estate of Overton; and further trusts were declared by the said indenture of the said sum of £5500, after the determination of the annuity mentioned, for the benefit of Mr and Mrs Tennent.

Mr and Mrs Tennent lived together as husband and wife till June 1881, when they separated by mutual consent. There was no issue of the marriage.

By deed of revocation dated 20th December 1882 Mrs Tennent revoked and cancelled all donations, provisions, deeds, writings, and things whatsoever made or executed by her in favour of her husband Charles Welch Tennent.

The present action was raised by Mrs Tennent against her husband on 1st June 1883. The conclusions of the summons were that it should be found and declared "that the defender is in possession of and holds the sum of £18,000 sterling as *surrogatum* for the heritable estate of the pursuer, free from and unaffected by the *jus mariti* of the defender, or otherwise that the said sum possessed and held by the defender constituted a donation from the pursuer to the defender which has been validly recalled by the pursuer; and the defender ought and should be decerned and ordained by decree foresaid to make payment of the said sum to the pursuer: And further, it ought and should be found and declared by decree foresaid that a sum of £5500 sterling, which was part of the price of the heritable estate of Overton, formerly belonging to the pursuer, and which is presently consigned or invested in the names of the defender, or some person on his behalf, and certain other persons, to meet a liferent annuity chargeable

on the said heritable estate is *surrogatum pro tanto* of the said estate under burden of the liferent annuity aforesaid, and that the said sum of £5500 and interest thereon, subject to the burden of the said liferent annuity, is the property of the pursuer, or otherwise it ought and should be found and declared by decree foresaid that the right to the said sum of £5500 is vested in the pursuer, or that the same constituted a donation by her in favour of the defender which has been validly recalled by the pursuer, and that on the foresaid liferent annuity ceasing to be chargeable the pursuer is entitled to payment of the said sum and all interest accruing thereon, or income derivable therefrom, after payment of the said annuity."

The defender died on 8th October 1884, leaving a trust-disposition and settlement whereby he appointed his brother Ralph Dalzell Welch his executor and general disponee, and in terms of a joint minute for the parties the cause was transferred against the latter as executor and general disponee of the original defender.

It was averred in a statement of facts for the defender as follows:—"(Stat. 1) Prior to the marriage of the pursuer and the original defender, the pursuer by her agents, W. K. J. Langridge, solicitor, Lewes, Sussex, and Charles J. Skitt, land agent, Charlton, Wellington, Salop, lawfully authorised on that behalf, or by one or other of them, had entered into a contract of sale in writing duly signed by the said agents, or one or other of them, of her manor of Overton and other hereditaments in the parish of Stottesden and county of Salop, to Viscount Boyne, but the said sale had not been carried into effect by actual conveyance. After their marriage the said defender concurred, as he was bound to do, with the pursuer in fulfilling her contract of sale by granting the necessary conveyance. The price of the said estate contracted to be paid to the pursuer by Viscount Boyne was by the law of England personalty at the date of their marriage, and passed to the said defender *jure mariti* as his own absolute property upon the marriage taking place. (Stat. 2) At least if the said contract of sale was not complete and binding on the pursuer prior to her marriage, or if the original defender was not bound to fulfil or to join with her in fulfilling it after their marriage, then the pursuer being at the date of her marriage with the said defender seized of the said manor of Overton and other hereditaments for an estate of inheritance in fee-simple in possession, and no settlement of the pursuer's estate having been executed prior to the pursuer's marriage to the said defender, by the law of England the said defender on his marriage with the pursuer *ipso facto* acquired a freehold interest in the said manor of Overton and hereditaments foresaid, which entitled him to the rents and profits thereof during the joint lives of himself and wife, and which, in the event of there being issue of the marriage who could inherit, entitled him to such rents and profits during the remainder of his life. This freehold interest it was competent for him to alienate at pleasure. The pursuer retained the property or fee-simple subject to her husband's right therein, but without power to dispose of the same by will or (except as hereinafter mentioned) by deed. (Stat. 3) The pursuer was entitled to dispose of her said fee-simple estate by deed, provided only her husband concurred therein, and such deed was duly executed and acknowledged by the pursuer before two commissioners, in terms of law according to the Act for the Abolition of Fines and Recoveries, 3 and 4 Will. IV., c. 74. In the event of her duly acknowledging the deed of conveyance in terms of law, the whole purchase price of the fee-simple, and not merely of his own freehold interest therein, passed by the law of England to her husband, the original defender, as his own absolute property *jure mariti*. (Stat. 8) *Separatim*, the deed of revocation founded on by the pursuer is ineffectual so far as the sale of the said property of Overton, and leasehold property at Grove End, London, and the prices thereof (other than the £5500 placed in trust as aforesaid) are concerned, in respect that the said prices (other than as above mentioned) received by the said defender were not invested by him or otherwise applied to his own purposes. They were lodged in bank and afterwards entirely spent by the pursuer and the said defender, or by the said defender with the knowledge and consent of the pursuer, upon their joint establishment, and for their joint uses and purposes. The said prices form no part of the said defender's executry estate."

The pursuer pleaded—"(1) The said sum of £18,000 being *surrogatum* for the heritable property of the pursuer, did not fall under the *jus mariti* of the said Charles Welch Tennent, and the defender is bound to make payment thereof to the pursuer. (2) The said sum of £5500 being *surrogatum* for the heritable property of the pursuer, did not fall within the *jus mariti* of the said Charles Welch Tennent. (3) The pursuer is not barred from claiming right to the said sums of £18,000 and £5500 by the acknowledgment of the deed of conveyance executed by her in respect, 1st, that the said acknowledgment did not affect the rights of the pursuer and the said Charles Welch Tennent *inter se;* and 2nd, that their rights in the premises fell to be determined by the law of Scotland. (4) At all events the said sum of £5500 not having been reduced into the possession of the said defender, the right thereto remained vested in the pursuer as the owner of the said estate, and she is entitled to payment thereof, on the foresaid annuity ceasing to be chargeable, as concluded for. (5) Assuming the said defender to have acquired right to the foresaid several sums, the same formed a donation by the pursuer to him, which was revoked by the pursuer, and she is entitled to decree therefor in terms of the conclusions of the summons."

The defender pleaded—"(2) The pursuer having entered into a contract of sale of the said estate of Overton prior to her marriage, and the price stipulated to be paid therefor being personalty at the date of her marriage, fell to the original defender *jure mariti* as his absolute property on the marriage taking place. (4) By the law of England the manor and estate of Overton having been sold, and the conveyance thereof executed and acknowledged, all as set forth in the second and two following statements of facts for the present defender, the whole price thereof belonged to the original defender as his own absolute property *jure mariti*. (5) The rights of parties in the said manor and estate of Overton.

and the price thereof, falling to be determined by the law of England, which does not confer upon the pursuer any right to insist that the said price, or any part thereof, shall be paid to her, the defender should be assoilzied. (6) The said sum of £5500 being part of the price of the said manor and estate of Overton, belonged, by the law of England, to the original defender, and now belongs to the present defender, as his executor, absolutely, subject to the purposes for which it is held in trust, and the pursuer is therefore not entitled to decree as concluded for thereanent. (7) The Scots law of donation *inter virum et uxorem* does not apply, and the deed of revocation alleged to have been executed by the pursuer on 20th December 1882 cannot affect the conveyance of the Overton estate, and Grove End Road property, and their consequences, which are regulated by the law of England. (8) Also *separatim*. The defender ought to be assoilzied from the conclusions of the summons, in respect that, assuming the Scots law of donation to apply, the money sought now to be recovered as a donation was spent during the subsistence of the marriage by the spouses, or with the knowledge and consent of the pursuer, for the joint uses and purposes of the spouses."

On 16th July the Lord Ordinary (Fraser) allowed the defender a proof of his averments contained in the first article of the statement of facts for him, and on 21st January 1887 the Lord Ordinary having heard counsel on the proof already led, of new allowed the defender a proof of his averments contained in the first article of the statement of facts by him, and also a proof of his other averments.

Against this interlocutor the defender reclaimed to the First Division, and after hearing parties their Lordships allowed the reclaimer to put in a draft case with a view to ascertaining the English law applicable to the facts ascertained by the proof. The case was thereafter adjusted, and remitted to the Chancery Division of the High Court of Justice in England for its opinion on the questions of law stated in the case in terms of the Law Ascertainment Act (22 and 23 Vict. cap. 63).

These questions were as follows—"(1) Whether at the date of her marriage to the original defender, viz., 24th March 1877, a valid and binding contract of sale of Overton had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers, enforceable by an action for specific performance at the suit of Lord Boyne or his trustees as purchasers, or of the pursuer as vendor, or of either of them? (2) Whether such contract operated as a conversion of said estate of Overton into personalty in the person of the pursuer, so as to vest the proceeds in her husband absolutely at the date of the said marriage? (3) Whether such contract was by English law a chose in action, and consequently did not become the property of her husband until the reduction of the same into his possession? In the event of the Court deciding that no valid and binding contract for the sale of Overton had been entered into before the marriage of the pursuer, and that the original defender took no interest in the price thereof, (4) What, after their marriage, were the respective rights or interests of the pursuer and the original defender, as the husband of the pursuer, by the law of England, in the estate of Overton; and were these rights or interests, or either of them, saleable by them or either of them, and on what conditions? (5) On the conveyance of the estate, as set forth in par. 14 herein, what were the original defender's right and interest by the law of England in the price thereof; and did such right and interest in the price pass to the original defender by the said conveyance or by his *jus mariti*? (6) Whether under the trusts of the indenture set out in par. 15 herein the pursuer is entitled absolutely to the said sum of £5500, she having survived her husband, or whether she is otherwise entitled to it as a chose in action not reduced into possession by the husband during his coverture?"

The opinion of the consulted Court was given by Mr Justice Kay, and was to this effect—"This Court is of opinion that at the date of the marriage of the pursuer to the original defender, namely, the 24th March 1877, no valid or binding contract of sale of Overton in the said special case mentioned had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers; and that after the said marriage the said estate of Overton belonged to the pursuer in fee-simple, subject to a freehold estate of the original defender therein during the continuance of the coverture, and that those rights and interests were saleable by them, as to the original defender's estate, without the concurrence of the pursuer, and as to the pursuer's estate, only with the concurrence of the original defender in an acknowledged deed, and under the conditions imposed by the Statute 3 and 4 Will. IV. cap. 74, and the rules thereunder: And that on the conveyance of the estate, as set forth in paragraph 14 of the said special case, the original defender by the law of England became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by the said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti*; and that under the trusts of the indenture, set forth in paragraph 15 of the said special case, the pursuer is not entitled by the law of England to the sum of five thousand five hundred pounds therein also mentioned, either as having survived the original defender, or as a chose in action not reduced into possession by the original defender during his coverture." [*Note.*—To this "Opinion" there was appended an "Advising," in which Mr Justice Kay stated his views at greater length; and certain passages from the "Advising" are quoted by Lord Fraser in his opinion as from the "Opinion" of Justice Kay, but in the Inner House the Judges considered that they should confine their attention strictly to the "Opinion."]

The case having been remitted to the Outer House, the Lord Ordinary on 20th October 1888 pronounced the following interlocutor:—"Finds that the domicile of the deceased Charles Welch Tennent was at the date of his marriage on 24th March 1877, and continued to be till his death, in Scotland: Finds that the pursuer his wife acquired on her marriage the domicile of her husband: Finds that the rights of parties as to the price of the Overton estate, so far as paid to the husband, and of the £5500 now held in trust, must be de-

termined according to the law of Scotland: Further, allows to the defender a proof of the averment contained in the 8th statement of facts by him, and to the pursuer a conjunct probation: Appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed.

"*Opinion.*—The law of England was invoked in this action in order to ascertain what was the character, as heritable or moveable, of certain English property which at the date of the marriage belonged to the pursuer.

"By a series of decisions it has been determined that the character of the subject, as heritable or moveable, shall be ascertained according to the law of the place where it is situated—*Egerton* v. *Forbes*, 27th November 1812, F.C.; *Newlands* v. *Chalmers' Trustees*, 22nd November 1832, 11 S. 65; *Clarke* v. *Newmarsh*, 16th February 1836, 14 S. 488; *Downie* v. *Christie and Others*, 14th July 1866, 4 Macph. 1067. It was upon this footing that the case was sent for the opinion of the Court of Chancery, and that has now been returned. Mr Justice Kay has held that the Overton estate was converted into personalty.

"Then comes the question what law shall determine as to the right to such personal estate. The late Charles Welch Tennent and the pursuer of this action were domiciled in Scotland, and the contention on the part of the pursuer is that her rights must be determined according to Scots law. If the English property had remained unconverted, then the interests of the husband and wife in it would have been determined by the law of the *situs;* but as soon as it is changed into personalty the law of the domicile steps in and declares the rights of the spouses in it. Mr Justice Kay in his opinion assumes this doctrine as correct. 'Supposing the parties to have been domiciled in England, it would follow from the mere fact of such conversion that the husband by his marital rights would become entitled at once to whatever interest the wife might have in such personal property.' With regard to the £5500 held in trust he expresses himself as follows:—'I am of opinion that under the circumstances in this case the £5500 cannot be treated as a chose in action to which the wife is entitled, but that if the domicile of the husband and wife had been English the whole would now belong to the executor of the husband.' But if the domicile of the husband and wife were not English but Scottish, then the opinion of the learned Judge evidently is that resort must be had to the Scots law to ascertain the rights of the parties. There can be no doubt that the operation of the *jus mariti* is regulated by the law of the domicile. Lord Glenlee in the case of *Newlands* v. *Chalmers' Trustees*, November 22, 1832, 11 S. 65, stated the rule as follows:—'The English lawyers having given an opinion that the right was vested by the law of England, then we held that it transmitted *jure mariti* by the law of Scotland. As to the effects of the *jus mariti* therefore that judgment—*Egerton* v. *Forbes*, November 27, 1812, F.C.—settles that it is the law of Scotland which rules between husband and wife if there domiciled. But again, on the other hand, it is the law of the country where the subject is situated that must regulate the character of the subject as heritable or moveable. . . . By the law of Scotland bonds bearing interest are held to to be heritable, and this has only been relaxed as to succession by positive statute; but by the law of Jamaica they are held strictly moveable. Although therefore the law of Scotland regulates the *jus mariti*, yet we must go to the *lex rei sitæ* to ascertain what is heritable and what is moveable.' And again, Lord Mackenzie, in *Clarke* v. *Newmarsh*, February 16, 1836, 14 S. 488, said—'It is enough for the law of Scotland if the subject be moveable and vests as such in the wife. That being the case, the law of Scotland immediately applies to the effect of bringing it under the *jus mariti*. I decided the case of *Newlands* on this principle, and I perceive that it was on this precise ground that Lord Glenlee gave his opinion when concurring with the Inner House in adhering to my judgment. The English law is to be referred to for the purpose of determining whether the character of a particular subject was heritable or moveable, but so soon as that is fixed, the law of Scotland decides what is the right of a husband under a Scottish contract of marriage in moveable effects which have accrued during the marriage to his wife.' In a subsequent case these principles were held settled. The property in dispute was English mortgages, which if secured over property in Scotland would have been considered heritable, but being by the English law moveable, it was decided that they were in all respects to be regulated according to the law applicable to moveables in settling the rights of widow, heir, and executor in this country—*Downie* v. *Christie and Others*, July 14, 1866, 4 Macph. 1067.

"Therefore, dealing with this case as one to which the Scottish law applies, then the husband's *jus mariti* carried the price of the Overton property, including the £5500. But granting that the pursuer, the widow, maintains two propositions—first, that a wife who converts her heritable estate into moveable is not presumed thereby to intend anything more than to perform an act of administration, and is assumed to be waiting for another investment of a heritable character; far less is she presumed to convert it into moveables so as to fall under the *jus mariti*. The money is regarded as the legal surrogate of the heritable estate, even although the husband has manipulated it and embarked it in his business. To this effect there are many decisions, the whole of which will be found collected in Fraser on Husband and Wife, i. p. 703, *et seq.*, and *Cuthill* v. *Burns*, March 20, 1862, 24 D. 849. But these decisions must be taken with a qualification which is thus stated by Erskine, ii. 2, 16—'Thus also a sum belonging to the wife not falling under the *jus mariti*, *e.g.*, a bond bearing interest, continues heritable as to the husband, notwithstanding a demand of payment from the debtor. Nay, though the wife should not only demand but actually recover payment, there is no alteration in the heritable nature of the bond *quoad maritum*, unless a presumption shall arise from her allowing the husband to apply the sum to his own use, or from other circumstances, that she truly intended a donation to him.' The defender has a special averment upon record that the price of the Overton estate, and of the leasehold property at Grove End Road, St John's Wood, London, were not invested by the husband, 'or otherwise applied to his own purposes.

They were lodged in bank and afterwards entirely spent by the pursuer and the said defender, or by the said defender with the knowledge and consent of the pursuer, upon their joint establishment and for their joint uses and purposes. The said prices form no part of the said defender's executry estate.' If this be true then it would bring the case within the qualification stated by Erskine.

"Then there arises, secondly, another point. Erskine says that in such circumstances it would be considered a donation. If so, is it a donation revocable, and has it been revoked by the deed of revocation mentioned in the fifth article of the condescendence? Now it has been determined that if a wife allow the rents and profits of her separate estate to be employed in maintaining the family she is debarred from insisting for repayment. Such a claim was made after the husband's death, and the judgment of the Court met it in a very specific manner. It was found that, as to any portions of the annual proceeds and profits of the wife's separate estate invested for her separate use in her own name, which the husband was from time to time allowed by her to draw, it was incumbent on the wife, by whom no demand was proved to have been made against the husband himself, to prove that the same or corresponding sums were applied by him to increase his own estates and funds, or to some specific purposes of his own, and were not applied and consumed, from time to time as they were drawn, in the expenses of the family or other occasional purposes, and that in the event of the wife failing in such proof the legal presumption as to portions of the annual proceeds of her estate so received by the husband was that they were used and consumed by the husband, with the wife's sanction and concurrence, for objects and purposes of the spouses known to her, and that she obtained the benefit or enjoyment of such use and consumption during the marriage; and that in the event of the wife failing to prove all this there was no ground in law on which she could insist in her action against the representatives of her husband—*Allan or Hutchison* v. *Hutchison's Trustees*, February 1, 1843, 5 D. 469; and see *Williams* v. *Williams*, November 15, 1844, 7 D. 112, opinion of Lord Cuninghame.

"The wife did not go on with her proof in the case of *Allan or Hutchison*, and the case must be taken as deciding the general point, that where a wife's money has been applied in family expenditure in the benefit of which she has participated, it must be held to have been so done with her sanction and concurrence, and all right of revocation on the ground of donation is barred. This view of the decision was accepted in the House of Lords in the subsequent case of *Edward* v. *Cheyne*, L.R., 13 App. Cas. 393, in which Lord Watson is found expressing himself as follows—'The Second Division decided that it was incumbent upon the widow to prove that the money was applied by the husband to increase his own funds, and was not used for family expenditure. Their Lordships also decided that if the widow failed in such proof effect must be given to the presumption that all sums received by him had been used and consumed with her sanction and concurrence.' This case of *Edward* v. *Cheyne* (reported in 13 R. p. 1209, under the name of *Baxter's Executor* v. *Baxter's Trustees*, and in the House of Lords under the name of *Edward* v. *Cheyne*, L.R., 13 App. Cas. 385, and in 25 S.L.R. 424) was a case which presented not two questions but only one, and in this respect it differs from the present case. The claim for accounting was made not by the wife against the husband's representatives but by the wife's executor, and the only question there was one of fact, viz., whether or not the wife did gift or donate her separate estate to her husband. By the law of Scotland she is entitled to deal with that separate estate as she thinks fit, and she may give the whole of it to a stranger on the streets or to her husband without consideration, and that gift will remain irrevocable by her representatives. The only person who can revoke it from the husband (though not from a stranger donee) is herself, and if she dies without doing so her representatives have no ground of complaint and no right of action as against the stranger donee or the husband, and they cannot exercise any right of revocation. Accordingly, the case was treated in the Court of Session as one of fact—as to whether she did donate. There was no second question as to whether, supposing there was a donation, there was a revocation. In the House of Lords the learned Judges, besides so treating the case, also referred largely to the English law as to the propriety of upholding such gifts, which law, however, is widely distinguishable from the law of Scotland, inasmuch as a gift once granted is not by English law subject to revocation by the donor. For example, the statement by Lord Macnaghten of the English law cannot be accepted as the law of Scotland when he says that 'where the circumstances are such that the wife's consent or acquiescence may fairly be presumed, the presumption arises immediately on each receipt' [of the wife's income] 'by the husband, and bars all claim on the part of the wife or her representatives. To displace the rule it is not sufficient to show that the wife's separate income has accumulated in the husband's hands and remains unspent.' On the other hand, the law of Scotland is, that if the wife's money can be traced and earmarked, and has not been spent in carrying on the household, it still may be reclaimed by her—though not by her representatives—as a donation. The last illustration of this doctrine by decision was *Cuthill* v. *Burns*, already referred to. This rule bears very materially on the right as to the £5500 now held in trust, and which was the price of the wife's real estate.

"It is necessary, before any operative judgment can be given, to ascertain the facts as to how the money was spent, for it is admitted that it was received by the late Charles Welch Tennent. The £5500 is still extant, and judgment could now be given in regard to it, finding that it was or was not a donation revocable and revoked. But it is desirable to keep the whole case together so that one interlocutor will suffice."

The defender having stated that he did not intend to lead any proof as allowed by the above interlocutor, the Lord Ordinary (Fraser) on 10th November 1888 pronounced the following interlocutor:—"First, Decerns against the defender for payment of the sum of £18,000

sterling; and secondly, finds that the sum of £5500 sterling, which was part of the price of the heritable estate of Overton, formerly belonging to the pursuer, and which is now held in trust to meet a liferent annuity chargeable on the said heritable estate, is, subject to the burden of said annuity, the property of the pursuer, and upon the said annuity ceasing to be chargeable, the pursuer is entitled to payment of the said sum, and all interest accruing thereon or income derivable therefrom, from the 8th day of October 1884, being the date of the death of the pursuer's husband Charles Welch Tennent, after payment of the said annuity, and decerns: Finds the defender liable in expenses subsequent to 16th December 1885, &c.

"*Opinion.*—The Lord Ordinary has explained, in the opinion which he delivered on 20th October 1888, the grounds upon which he holds that the rights of the parties in this cause as to the £18,000 and £5500 concluded for must be determined according to the law of Scotland. A proof was allowed, however, to the defender to show that the £18,000, of which repetition was asked, was spent in household and family expenditure, and if this had been established the Lord Ordinary was prepared to find that that £18,000 could not be claimed by the pursuer. It has, however, been intimated to the Lord Ordinary by the defender that he is unable to undertake such a proof. It is admitted upon the record that the original defender Charles Welch Tennent did receive the said sum of £18,000, part of the price of the estate of Overton, which belonged to the pursuer, but it is denied that that sum was retained by him and forms part of his estate; and it is averred that that sum never was invested by said defender, but was lodged in bank, and afterwards spent by the spouses, or by Welch Tennent, with the knowledge and consent of the pursuer, on their joint establishment. It was this latter averment that was sent to proof, and which the defender now admits he cannot prove. The admission that the money was received by Charles Welch Tennent, the husband, throws the *onus* of proof upon him so as to show to the Court in what way he disposed of the money.

"The £18,000 being thus traced into the husband's possession, and the right to that money being to be determined by the law of Scotland according to the interlocutor already pronounced, the question comes to be, whether it fell under the *jus mariti*? It is quite settled, according to Scottish law, that the transmutation of the wife's heritage into money does not transfer to the husband *jure mariti* the price into which the heritage has been transmuted; and further, if such were the legal result of such a change from heritage to personality, the wife was entitled to revoke the gift so made in favour of the husband, and this revocation she has in the present case done by express deed.

"There is thus, therefore, no defence against the wife's demand for payment of this £18,000. But, according to Mr Justice Kay, it is the law of England that 'after the marriage the estate of Overton belonged to Mrs Tennent in fee-simple, subject to a freehold estate of the husband therein during the continuance of the coverture. Those rights and interests were saleable by them, as to the husband's estate without the concurrence of the wife, as to the wife's estate only with the concurrence of the husband in an acknowledged deed.' This legal right of the husband, called a 'freehold estate,' is more clearly explained in the record by the defender in these words—'The pursuer being, at the date of her marriage with the said defender, seized of the said manor of Overton and other hereditaments for an estate of inheritance in fee-simple in possession, and no settlement of the pursuer's estate having been executed prior to the pursuer's marriage to the said defender, by the law of England the said defender, on his marriage with the pursuer, *ipso facto* acquired a freehold interest in the said manor of Overton and hereditaments foresaid which entitled him to the rents and profits thereof during the joint lives of himself and wife, and which, in the event of there being issue of the marriage who could inherit, entitled him to such rents and profits during the remainder of his life. This freehold interest it was competent for him to alienate at pleasure.' This is a kind of right similar to the courtesy of the law of Scotland, with this difference, that instead of commencing at the wife's death it commences at the date of the marriage; and this right the Lord Ordinary is of opinion must be given effect to, and it is given effect to by the interlocutor which he has pronounced whereby no interest is made payable to the pursuer upon the £18,000. Charles Welch Tennent obtained the money and used it for his own purposes, in consequence of his freehold right thus explained, and apparently upon this ground no interest is asked upon the £18,000. If he was entitled to the rents and profits of the estate before it was sold, he was entitled to the interest upon the price during his life. No interest has been asked by the pursuer upon this money since Charles Welch Tennent's death in 1884, and the Lord Ordinary is therefore not called upon to pronounce any judgment as to whether such a claim could be effectually made.

"The next point has reference to the sum of £5500 which has been set apart and is now held in trust to answer an annuity payable out of the estate of Overton. Mr Justice Kay says in regard to this sum—'The trusts of this were declared by a deed dated 24th July 1877 to be out of the income to pay the annuity of £200 and meet the costs of the trustees, and the residue of the income to Mr and Mrs Tennent, or their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time, and for the time being determined or regulated; and after the death of the annuitant the capital was to be applied in payment of succession duty and costs, and the residue was to be in trust for Mr and Mrs Tennent, their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time, and for the time being determined or regulated. Mrs Tennent having survived her husband, and the annuitant having also survived him, the question is, whether she is entitled to this amount, either under the provisions of this deed, or as a chose in action, not reduced into possession by the husband in his lifetime?' He examines this question with reference to the law of England, and he states his opinion—'That under the circumstances in this case the £5500 cannot be treated as a chose in action to which the wife is entitled, but that if

the domicile of the husband and wife had been English, the whole would now belong to the executor of the husband.'

"The domicile of the husband and the wife being, however, Scotland, and the law of the domicile being that which must be applied here, this sum of £5500 must be held for the pursuer. It never was mingled amongst the husband's funds, but was set apart and earmarked, and was part of the price of her heritable estate, and was therefore, according to the authorities referred to by the Lord Ordinary in his former opinion, the property of the wife."

The defender reclaimed, and argued—1. The doctrine of surrogation did not apply to the circumstances of this case. Formerly a wife could not sell heritage in England, and now she could only sell it under certain conditions to which the sale was subject. The result was that the price of the estate of Overton never became moveable so as to be affected by the *jus mariti*, but passed to the original defender by the law of England, and in accordance with the opinion of the consulted Court. The decision of the Lord Ordinary was not justified by the cases on which it rested, for in *Clarke*, *Newlands*, &c., it was laid down that it was the *lex rei sitæ* which decided whether property was moveable or heritable. The decision in *Hall's* case was not of great authority. It seemed to be repugnant to the above-mentioned cases, and had been criticised by Lord Fraser in one or two passages of his book on Husband and Wife—Fraser on Husband and Wife, i. 703, 743. The argument of the pursuer landed her in this dilemma—If the price of Overton was *surrogatum*, it was heritable, and passed to the husband under the English law; if it was not *surrogatum* it passed to the husband *jure mariti*. The doctrine of surrogation was based on the presumption that where a married woman disposed of her heritage she did it, not with the intention of parting with the property, but as a change of investment. The intention to convert might be gathered from facts and circumstances—*Rollo* v. *Forrest*, 1685, M. 5795. Here that presumption was overcome by the terms of the affidavit taken by the pursuer before the commissioners, which showed that the pursuer did intend to convert. 2. There was no donation here. The property was heritable, and the right of parties thus fell to be determined by the law of England, by which such a donation was not revocable—Fraser on Husband and Wife, 1322; Burge's Comm. i. 639. Suppose the case were to be decided by the Scots law, donation was not to be implied from the fact of a spouse selling her heritage. If it were, the rule would apply to sales by husband as well as by the wife, because such a sale increased the goods in communion; but such a view was opposed to the decision in the case of *Lees* v. *Wilson*, February 17, 1808, Hume, 191. 3. Suppose the Court to be against the defender on the main argument, the value of the freehold estate of the husband in the estate of Overton should be calculated as at the date of the sale, and should along with the expenses of the sale be deducted from sum sued for. The interlocutor of the Lord Ordinary should also be altered so far as directed against the present defender personally.

Argued for the pursuer and respondent—1. The estate of Overton was converted into money, and the rights of parties with regard to it were to be governed by Scots law, being the law of the domicile—see cases quoted in Lord Ordinary's note. By Scots law the price of the estate was set aside as a *surrogatum* for the wife in place of the estate which could be revoked as a donation even if it passed into the hands of the husband—Fraser on Husband and Wife, i. 703; *M'Lennan* v. *Hathorn*, 1758, M. 6098; *Hall's Trustees* v. *Hall*, July 18, 1854, 16 D. 1057; *Cuthill* v. *Burns*, March 20, 1862, 24 D. 849. The answers of the English Court to questions 4 and 5 were not obligatory on the Scotch Court, as they proceeded on the assumption that the English law applied, which it did not. The effect of the sale was clearly separable from the transaction of sale itself, and was to be decided by Scots law. The transaction of sale was complete when the deed was executed and delivered. The defender argued that if the price was *surrogatum* it was heritable, and therefore must be dealt with according to English law. That is, he first employed the law of the domicile to attach a certain character to the fund, and then applied the *lex rei sitæ* as the law applying in consequence of that character. The doctrine of surrogation was based on the presumption that a wife by selling heritage did not intend to convert. That presumption was not rebutted here. The certificate founded on by the defender did not go far enough, because the pursuer may quite well have relied on her rights under Scots law. 2. Further, if it was established that the wife intended to convert, that implied a donation, which might be and had been revoked. The only answer of the defender on this branch of the argument was an appeal to the doubtful law as to donations *inter virum et uxorem* in immovable subjects. It was difficult to see how English law could bear in any way upon the capacity of Scotch spouses to donate—Barr's International Law (Gillespie), 404, sec. 97. 3. The value of the freehold estate of the original defender had been ascertained by his death, and it would be absurd to enter upon an actuarial calculation of what it was at the date of the sale; besides, the valuation would have depended on such circumstances as the health of the defender, which were not ascertainable now. He had elected to keep the fund in his hands, and pay himself the interest thereon, and his interest had thereby been satisfied. The pursuer did not object to the expenses of the sale being deducted from the sum sued for, nor that the interlocutor should be altered so far as directed against the present defender personally.

At advising—

Lord Adam—The pursuer Mrs Tennent was married to the late Mr Welch Tennent on the 24th March 1877.

At the date of the marriage Mr Welch Tennent was a domiciled Scotsman. No marriage-contract was entered into between the spouses.

At the date of the marriage Mrs Tennent was possessed of a large amount of property, both heritable and moveable, the heritable property being situated partly in England and partly in Scotland. In particular, she was possessed of the estate of Overton in the county of Salop, in England.

On the 24th July 1877 Mrs Tennent, with concurrence of her husband, conveyed this estate to the marriage-contract trustees of Lord Boyne. The price was £23,500, and of this sum £18,000 was received by Mr Tennent, and the balance of £5500 was vested in trustees to meet a liferent annuity charged on the estate. This sum still remains in the hands of the trustees.

On the 21st December 1882 Mrs Tennent executed a deed of revocation, by which she revoked all donations, provisions, deeds, writings, or things whatsoever made, executed, or done by her in favour of her husband.

On 1st June 1883 she raised this action against her husband, by which, in so far as now insisted in, she seeks (1) to recover payment of the said sum of £18,000; and (2) as regards the said sum of £5500, to have it found and declared that it is her property, and that, on the foresaid liferent annuity ceasing, she is entitled to payment of it.

Mr Welch Tennent died on 8th October 1884, but the action has been transferred against the present defender, who is his executor and general disponee.

It appears that prior to the conveyance of the estate of Overton, as before mentioned, and prior to the marriage of Mr and Mrs Tennent, certain negotiations had been going on with Lord Boyne as to the purchase by him of the estate, and it was pleaded by the defender, in answer to the pursuer's claims, that these negotiations had resulted in a binding contract of sale, and that—although the sale had not been carried into effect by actual conveyance—the effect of this contract was to convert the heritable estate into moveable—that accordingly the price being personalty at the date of the marriage by the law of England passed *jure mariti* to her husband. This and various other questions as to the respective rights of the parties according to the law of England in the estate of Overton and the price thereof having thus arisen, a case for the opinion of the High Court of Justice in England was prepared, and laid before that Court in terms of the Law Ascertainment Act (22 and 23 Vict. cap. 23), for the determination of these questions. We have now that opinion before us, which is conclusive on all questions of English law at issue between the parties.

That opinion is short, and I may read it—"This Court is of opinion that at the date of the marriage of the pursuer to the original defender, namely, the 24th March 1877, no valid or binding contract of sale of Overton in the said special case mentioned had been entered into by or on behalf of the pursuer as vendor, and Lord Boyne or his trustees as purchasers, and that after the said marriage the said estate of Overton belonged to the pursuer in fee-simple, subject to a freehold estate of the original defender therein during the continuance of the coverture, and that those rights and interests were saleable by them, as to the original defender's estate, without the concurrence of the pursuer, and as to the pursuer's estate, only with the concurrence of the original defender in an acknowledged deed, and under the conditions imposed by the Statute 3 and 4 Will. IV., cap. 74, and the rules thereunder: And that on the conveyance of the estate, as set forth in paragraph 14 of the said special case, the original defender by the law of England became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti*; and that under the trusts of the indenture, set forth in paragraph 15 of the said special case, the pursuer is not entitled by the law of England to the sum of five thousand five hundred pounds therein also mentioned, either as having survived the original defender, or as a chose in action not reduced into possession by the original defender during his coverture."

The first thing accordingly which this opinion establishes is, that the estate of Overton had not been converted into personalty at the date of the marriage, but that it then belonged to Mrs Tennent in fee-simple, subject to a freehold estate of the husband therein during the continuance of the coverture—that is, as we should say, that the husband was entitled to the rents during the subsistence of the marriage. Had the estate been personalty at the date of the marriage there would seem to be no room for doubt that, whether by the law of Scotland or of England, the price would have belonged to Mr Welch Tennent.

But that not being so, and the estate being heritable estate in the person of the wife at the date of the marriage, the question arises, whether the price of the estate on its sale after the marriage belonged to the husband or the wife, and that question appears to me to depend for its solution entirely upon this other question, whether the answer is to be sought in the law of England or in the law of Scotland. If the question is to be ruled by the law of England, there can be no doubt as to the answer, because, in the opinion of the High Court of Justice, by the conveyance of the estate Mr Welch Tennent became by the law of England absolutely entitled to the price.

On the other hand, if the law of Scotland is to determine the matter, I think that it is conclusively settled by the authorities referred to by the Lord Ordinary that where a wife sells her heritable estate the price received is regarded as the *surrogatum* of the heritable estate, and does not fall within the *jus mariti* of the husband, but remains the property of the wife, and indeed I did not understand that this was seriously disputed by the defender.

The question therefore is, whether the rights of the husband and wife in this fund are to be regulated by the law of Scotland or by the law of England. That the fund is personal estate by the laws of both countries I do not think is disputed, because, as I understand the opinion, it is because it is personal estate that the High Court of Justice holds that by the law of England it belongs to the defender. But if it is personal estate, then it is the law of the domicile of the spouses which rules the matter. I think that this is quite settled by the authorities to which the Lord Ordinary refers, and which I need not again quote.

The domicile of the spouses in this case being Scotch, the result is that as soon as this moveable fund came into existence the right to it fell to be regulated by the law of Scotland, and it being the *surrogatum* of the wife's heritable estate did not go to her husband, but remained her own property.

Nor do I see anything in the circumstances attending the sale to take the case out of the ordinary rule. The sale was simply a sale by a married woman of her heritable estate, with concurrence of her husband, under the authority of the Act 3 and 4 Will. IV. c. 74. No doubt there are provisions in that Act by means of which Mrs Tennent might, had she chosen, have protected herself to a greater or less extent from the operation of the law of England, by which the price of the estate, as a moveable fund, would become the property of her husband. She did not avail herself of these provisions, and had there been any question in this case as to whether she intended that the price should go to her husband that circumstance no doubt might have been material. But as all gifts between husband and wife are revocable by the law of Scotland, it is of no materiality whether she intended to give the price to her husband or not seeing that she has competently revoked all gifts.

The defender further pleaded that the £18,000, which it is admitted that Mr Welch Tennent had received, had not been applied to Mr Welch Tennent's own uses and purposes, but had been applied, with the pursuer's consent, to the joint uses and purposes of himself and his wife; but the defender intimated that he was not prepared to undertake the proof thus allowed. That being so, it must be held that the money was applied to Mr Welch Tennent's own uses and purposes.

But the defender further pleaded that it appeared from the opinion of the High Court that the sale of the estate was a sale of the joint rights of husband and wife in the estate, and that Mr Welch Tennent would have been entitled to have the price received for it apportioned according to the value of their respective rights, and I understand that he proposes that an inquiry should now be made as to what would or might have been the actuarial value put upon Mr Welch Tennent's rights as at the date of the sale, and to retain this sum out of the price as his share thereof.

Had this claim been made at the time I think it probably would have been difficult to resist it. But I think that such an inquiry now is quite out of the question. Mr Welch Tennent's right was a right to the rents of the estate during the subsistence of the marriage. He received the whole available price of the estate, and appropriated the whole interest or income of it to his own uses during the subsistence of the marriage.

The defender is not asked to repay any part of that interest or income. I agree with the Lord Ordinary in thinking that the price of the estate must be considered as coming in place of the estate itself, and that the interest or income of the price which Mr Welch Tennent received must be held as equivalent to the rents to which he was previously entitled.

I am of opinion therefore that the interlocutor of the Lord Ordinary should be in substance adhered to. There is, however, a small matter apparently not brought under his Lordship's notice, in respect to which I think it should be slightly altered. He has decerned against the defender for the full sum of £18,000, but I think that there should be deducted from this sum the expenses of the sale, and any other charges of a similar kind which formed proper deductions from the price received by him.

The Lord President, Lord Mure, and Lord Shand concurred.

The Court varied the first finding of the Lord Ordinary in so far as he had decerned against the defender for the full sum of £18,000, and both findings in so far as directed against the defender personally; decerned against the defender as executor and general disponee of Charles Welch Tennent for payment of £18,000, subject to a deduction of the sums which had been paid by the said Charles Welch Tennent in connection with the sale of Overton; *quoad ultra* adhered.

Counsel for the Pursuer and Respondent—Asher, Q.C.—Low. Agent—Peter Douglas, S.S.C.

Counsel for the Defender and Reclaimer—Gloag—H. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Friday, June 28.

FIRST DIVISION.

HOGARTH AND ANOTHER (FOTHERINGHAM'S TRUSTEES) *v.* FOTHERINGHAM.

Husband and Wife—Antenuptial Contract—Exclusion of Jus Mariti—Succession—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 6.

The Married Women's Property (Scotland) Act, by its 6th section, gives to the husband of any woman who may die domiciled in Scotland the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland.

By antenuptial contract a woman conveyed her whole estate to trustees for behoof of herself, whom failing for behoof of her own representatives, or other parties that might be thereafter named by her, excluding her husband's *jus mariti* and right of administration, which were also expressly renounced by the husband in the deed. Some years after the marriage she died, domiciled in Scotland, survived by her husband and certain issue of the marriage, and possessed of certain moveable estate. *Held*—following *Poë* v. *Paterson*, 10 R. (H. of L.) 73—that the husband was entitled to one-third of the said moveable estate.

On 20th March 1877 John Fotheringham, farmer, Orrock, was married to Isabella Hogarth, Kirkcaldy. In contemplation of the marriage an antenuptial marriage-contract was executed between the intended spouses, which dealt solely with the wife's estate. By this deed she conveyed her whole estate, *acquisita* and *acquirenda*, to trustees, and she directed them to hold the same for behoof (1) of herself, whom failing (2) of her own representatives, or other parties that might be thereafter named by her. The husband's *jus mariti* and

right of administration were excluded by the deed, which also contained an express renunciation by him of these rights.

Mrs Fotheringham died on 7th February 1888, domiciled in Scotland, and without having executed any writing disposing of her estate except the said contract. She was survived by her husband and five children.

She left no heritage, but her moveable estate in the hands of the trustees above referred to amounted to £5000. Her husband claimed one-third of this amount under the provisions of the Married Women's Property (Scotland) Act 1881.

As Mrs Fotheringham's trustees did not feel justified in meeting this claim without judicial authority, the present special case was presented to the Court, the first parties to which were the trustees above mentioned, and the second party was the said John Fotheringham.

The second party based his claim upon the alternative grounds—(1) That he was a creditor of his wife under the provisions of the Married Women's Property (Scotland) Act; or (2) that he was one of his late wife's legal representatives, and therefore that he was entitled to succeed to the said portion of her estate as one of her "representatives" within the meaning of the destination in the said antenuptial contract.

The first parties maintained that the second party had by his antenuptial contract discharged all his rights in or to his wife's estate, which they were bound to hold for the children of the marriage, who were the truster's own representatives.

The following question was submitted for the opinion of the Court—"Is the second party entitled to receive, and are the first parties bound to pay to him, one-third of the free moveable means and estate of the late Mrs Isabella Hogarth or Fotheringham?

By the 6th section of the Married Women's Property (Scotland) Act 1881 it is provided as follows:—"After the passing of this Act the husband of any woman who may die domiciled in Scotland, shall take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

Argued for the second party—The case of *Poë* v. *Paterson*, July 19, 1883, 10 R. (H. of L.) 77, practically determined the present case, as it was there decided that section 6 of the Married Women's Property (Scotland) Act applied to marriages contracted before the passing of the Act. All that the second party renounced in the marriage-contract was his *jus mariti*, which only existed during and terminated with the marriage. The language of section 6 was of the widest application, and there was no reason, as the second party had in no way contracted himself out of the Act, why its provisions should not apply. The object of the deed was to protect the wife's estate from the husband or his creditors *stante matrimonio*, and there was nothing to have prevented the second party accepting a legacy from his wife. His true position was that of a statutory creditor on her estate to the extent of one-third of the moveables—*Poë* v. *Paterson*, *supra*; *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120.

Argued for the first parties—Whatever rights the second party might have had under the Married Women's Property (Scotland) Act were renounced by him when he signed the marriage-contract. By so doing he gave up all right in his wife's moveable estate—*Hume* v. *Watson*, 5 Brown's Supp. 330. At the date of her death Mrs Fotheringham was not divested in favour of her trustees. The money was destined by the wife to her representatives, and these were her children, to the exclusion of the second party.

At advising—

Lord President—It is important to observe that we have already decided in the case of *Poë* v. *Paterson* that the provisions of the 6th section of the Married Women's Property (Scotland) Act 1881 are applicable to marriages contracted before, as well as to those contracted after, the passing of that statute, and we accordingly in that case gave a husband one-half of his wife's moveable estate, the division being bipartite, as there were no children of the marriage.

Now, it follows from what we then decided that the 6th section of the Act can never operate except in cases in which the *jus mariti* of the husband had been excluded, because if this had not been effectually done then the wife could not have any moveable estate.

In the present case the position of Mrs Fotheringham during the subsistence of the marriage was simply this, she was absolute owner of her moveable estate, free of all liferents or burdens whatsoever. She could therefore have disponed of it as she chose. So standing matters, she died. Is her husband not entitled in these circumstances, under the provisions of the 6th section of the statute, to one-third of her moveable estate? It is of course incumbent upon the second party to establish (1) that there is moveable estate to which his right applies, and (2) that he has done nothing to discharge the right which he derives under the statute.

It appears to me that he has made out both these points. All that the second party renounced was his *jus mariti* and right of administration, but such a renunciation cannot exclude the operation of the 6th section of the statute.

I think therefore that the second party is entitled to prevail.

Lord Mure—I am entirely of the same opinion. The scheme and purpose of this antenuptial marriage-contract was, that this lady was to have the entire management of her own estates, and further, that she was to have power to deal with her property in any way that seemed good to her. She died in 1888, and the purpose for which the deed was executed was fully realised, as she left separate moveable estate amounting to about £5000.

The Married Women's Property (Scotland) Act was passed some time after this antenuptial contract was executed, and the opening words of its 6th section are exceedingly comprehensive and quite clear. It provides that "after the passing of this Act, the husband of any woman, who may die domiciled in Scotland, shall take, by operation of law," the benefits therein set forth. I think that the Act applies in all cases where a married woman

dies leaving moveable estate, and I therefore agree in the result arrived at by your Lordship.

LORD ADAM—I agree with the construction of this marriage-contract, whereby the husband's rights over his wife's moveable estate are held to be excluded *stante matrimonio*. The wife's power over her estate during the subsistence of the marriage was absolute, and she could dispose of it as she chose. I also agree that the 6th section of the Married Women's Property (Scotland) Act applies to the present case, unless it can be shown that its provisions are excluded by the husband's renunciation. Now, the only exclusion mentioned in the deed is the husband's *jus mariti*, which only lasts during and terminates with the marriage. I therefore think with your Lordships that the provisions of section 6 of the Married Women's Property (Scotland) Act apply to the present case.

LORD SHAND was absent.

The Court answered the question in the affirmative.

Counsel for the First Party—Jameson—Hay. Agent—James Skinner, S.S.C.

Counsel for Second Party — Low — Cook. Agents—Wishart & Macnaughton, W.S.

Wednesday, July 3.

SECOND DIVISION.

CHRISTIE'S TRUSTEES AND OTHERS.

Succession—Vesting—Trust—Direction to Trustees to Retain.

A testator appointed trustees, and left his property to be divided equally among his three children—two daughters and a son. He directed that any share his daughter M might receive was "to go direct to her and her children." His daughter H's share he "settled in like manner," but provided, "also my trustees shall retain charge of her share. It is not to go into her hands." He further directed, "the same with reference to my son C, his share to remain in the hands of my trustees for his behoof."

Held that the property vested at the testator's death in his three children, but that, whereas the trustees were bound to pay over M's share to her at once, they were to retain the shares of H and C for their behoof.

Major-General Hugh Lindsay Christie died on 20th September 1888 leaving a holograph will or general settlement dated 14th March 1887, whereby he appointed trustees, and made provision for his wife. He further provided—"To my three children I leave all the rest of my property, consisting of stocks and shares, or whatever belongs to me at my death. To be divided equally. My money being principally in stocks and shares, I do not wish these to be uplifted unless it should be advisable so to do. My trustees are to invest my money or leave it invested in any fairly good security without limitation. Any share that my daughter Mary Agnes may receive, to go direct to her and her children Failing the above mentioned, her share to return to her nearest of kin, except her husband shall have the liferent. My daughter Hughina Margaret's share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin. Also my trustees shall retain charge of her share. It is not to go into her hands. The same with reference to my son Charles, his share to remain in the hands of my trustees for his behoof. In the event of his demise, his share to return to his nearest of kin."

The testator was survived by his wife, his two daughters, and his son. His daughter Mrs Mary Agnes Christie or Murray had one child, and by her antenuptial contract of marriage she was bound to pay over to her marriage-contract trustees all *acquirenda* excepting sums not exceeding £100 each. His daughter Mrs Hughina Margaret Christie or Rowland had no marriage-contract, and there were no children of the marriage. His son Charles Robert Christie was under curatory, and had been since 1884 an inmate of the Dundee Royal Lunatic Asylum.

Various questions having arisen in regard to the rights of parties under the said settlement, a special case was submitted to the Court for their opinion by (1) the testator's testamentary trustees, (2) Mrs Murray's marriage-contract trustees, (3) Anthony Hugh Murray, Mrs Murray's only child, and his father, as his administrator-in-law, (4) Mrs Murray, (5) Mrs Rowland, and (6) Charles Robert Christie's *curator bonis*.

The questions of law were as follows:—"1 (*a*) Did the fee of the share of testator's estate bequeathed to his daughter Mrs Mary Agnes Christie or Murray vest in her *a morte testatoris*, and is the capital of it now payable by the first parties, General Christie's trustees, to the second parties as her marriage-contract trustees? 2 (*a*) Did the fee of the share bequeathed to the testator's daughter Mrs Hughina Margaret Christie or Rowland vest in her *a morte testatoris*, and are the first parties bound to pay the capital now to her? or (*b*) Are the first parties bound to hold the fee of this share? 3 (*a*) Did the fee of the share bequeathed to the testator's son Charles Robert Christie vest in him *a morte testatoris?* (*b*) Are the first parties bound to pay the capital thereof now to the party of the sixth part as his *curator bonis?* or (*c*) Are the first parties bound to retain the capital?"

Argued for the first parties—It was evidently the intention of the truster that there should be a continuing trust. There was no direction to realise and pay. On the contrary, the money invested was not to be uplifted, but was to be left invested. The widow was to pay a rent for the use of certain premises, and Mrs Murray's husband was to have the liferent of his wife's share in the event of her predecease. The case might be regarded as falling either under the principle of *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858, in which case the children of the testator would have only a liferent, the fee being in their issue, or under that of *Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173, in which case, although the fee would be held to vest *a morte* in the testator's children, their issue would have a protected right of succession. The Lord Justice-Clerk (Moncreiff)

pointed out in the case of *Duthie's Trustees* that the case of *Lady Massy*, and the subsequent case of *Gibson's Trustees*, only applied where the testator had failed to provide a machinery for protecting the succession. Here there were trustees. Even if Mrs Murray were entitled to receive her share, the position of Mrs Rowland and Charles Robert Christie was very different. The testator had declared that the trustees should "retain" their shares, and therefore they could not demand immediate payment.

Argued for the second and fourth parties—Whatever might be said as to Mrs Rowland's share, there was no doubt that Mrs Murray's came to herself in fee, and therefore fell to be paid over to her marriage-contract trustees. There was no protected succession. It was "to go direct to her and to her children." The destination to herself and her children was just a destination to herself. The clause beginning "failing the above mentioned" meant failing her without children in the testator's lifetime. Mrs Murray was in a more favourable position than Lady Massy, because there the money was "to be settled by my said trustees on herself and her issue," and yet even there the Court said the trust was not to be kept up—*Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173, followed in *Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1038; *Ferguson's Trustees* v. *Hamilton and Others*, July 13, 1860, 22 D. 1442; *Allan's Trustees* v. *Allan and Others*, December 12, 1872, 11 Macph. 216; *Houston or Mitchell* v. *Mitchell*, November 17, 1877, 5 R. 154; *Beveridges* v. *Beveridge's Trustees*, July 20, 1878, 5 R. 1116.

Argued for the third party—His mother Mrs Murray had only a liferent. The fee had vested in him as representative of a class. The trustees were bound to invest the money and pay the income to his mother in liferent, and to divide it among the children at her death—*Keating and Others*, June 17, 1870, 7 S.L.R. 548; *Duthie's Trustees*, *supra*.

Argued for the fifth party—There were no words used depriving Mrs Rowland of the absolute fee. Her share was settled in like manner to that of Mary Agnes, who undoubtedly got a fee. Alternatively she got the fee, but the trustees were to see she did not dispose of the money except for onerous causes.

Argued for the sixth party—He was in the same position as the fifth party whose argument he adopted.

At advising—

Lord Justice-Clerk—The important part of this will is where the testator gives this direction to his trustees, to whom he leaves his estate:—"To my three children I leave all the rest of my property, consisting of stocks and shares, or whatever belongs to me at my death. To be divided equally." Now, there are three children—two daughters and a son—and in reference to each of these, after this general bequest, he makes a separate settlement. He proceeds—"Any share that my daughter Mary Agnes may receive to go direct to her and her children. Failing the above mentioned her share to return to her nearest of kin, except her husband shall have the liferent." The question is, whether that bequest amounts to giving her the fee of her share? I am of opinion that it does. "Failing the above mentioned," I take it means failing herself and her children while he is alive; but whether that be so or not, the direction is a distinct direction that any share that his daughter Mary Agnes receives is to go direct to her and her children. The subsequent words do not to my mind in any way qualify the right in her to the fee of that share.

But in the cases of the other daughter and also of the son the directions are different. He says—"My daughter Hughina Margaret's share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin." It is the testator's purpose to exclude the husband in that case. Then he says—"My trustees shall retain charge of her share. It is not to go into her hands."

The first question is, whether that direction prevents the fee of that share from vesting in her? I am of opinion that it does not. But can the trustees retain what is given to this daughter in fee? Is that a direction which, on the footing that the fee is in her, can receive effect? I have had great difficulty upon that matter, which I understand some of your Lordships have shared. Some of the cases which have been quoted to us indicate that such a direction cannot be given effect to. But I think in almost all of these cases it appeared that in order to retain the charge of the capital, and prevent the actual money going into the hands of the person to whom the fee was given, it was practically necessary that the Court should set up a trust, and this was held to be without the power of the Court. But that is not the case here. A trust is already created. The testator directs that his trustees are to retain the charge of these two shares. In my opinion that is a direction which they can obey.

I have arrived at that opinion with difficulty, but I have come to the conclusion that the bequest of the fee to Hughina and Charles is not inconsistent with the direction that the trustees should take charge of the shares, and not hand over the *corpora* of the shares to Hughina or Charles.

Lord Young—I am of the same opinion. The only point of interest is that concerning the direction to the trustees to retain in their hands what is given to another in property. It is quite certain that you cannot give the property of money or anything else upon the condition that it is not to be spent, or that only so much be spent and the remainder saved. That is a repugnancy. If you make a person proprietor he must act as proprietor. But I think we have a different case here. I think the donor of money or anything else is entitled to appoint a trust for the protection of the donee. We are not called upon here to determine the exact effect or the scope of the powers of the trustees, or their duty as to retaining charge of these shares, and not allowing them to go into the beneficiaries' hands. We are merely determining that it is their duty to retain these shares in their own hands, and not to allow them to go into the hands of the beneficiaries. And I think that under that, very substantial protection may be given to them, just such as the testator thought was required. I do not speak of creditors, or what may be done,

possibly, in order to frustrate the testator's view, but I think it desirable that the protection contemplated by the testator should at least be started, and, for my part, I should think that the law would be efficacious, if appealed to, to prevent the testator's wish being frustrated. The shares are their property, but they are in the hands of the trustees, to be managed by them, and withheld from them for their protection. They are not limited to giving them the interest merely. They may deal with them in the course of their administration and management as trustees—capital and interest—as they may think best for their interest as the proprietors. Their interest as proprietors is, I think, committed to the charge of the trustees by these words, although we are determining no more at this moment except that it is according to the true meaning of the deed, and the duty of the trustees under it, to retain these shares, and not allow either to pass into the hands of the proprietors.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court pronounced the following interlocutor:—

"Answer the questions therein stated as follows, viz.—1 (*a*) That the fee of the share of the testator's estate bequeathed to his daughter Mrs Mary Agnes Christie or Murray vested in her *a morte testatoris*, and that the capital thereof is now payable by the first parties, General Christie's trustees, to the second parties, her marriage-contract trustees; 2 (*a*) that the fee of the share bequeathed to the testator's daughter Mrs Hughina Margaret Christie or Rowland vested in her *a morte testatoris*, but that the first parties are not bound to pay the capital to her now; and (*b*) are bound to hold it; 3 (*a*) that the fee of the share bequeathed to Charles Robert Christie vested in him *a morte testatoris*; (*b*) that the first parties are not bound to pay the capital thereof now to the party of the sixth part as his *curator bonis*; but (*c*) are bound to retain it," &c.

Counsel for the First Parties—Low—C. K. Mackenzie. Agents—Melville & Lindesay, W.S.

Counsel for the Second Parties—Don Wauchope. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Third Party—Sir C. Pearson—Dundas. Agents—Murray & Falconer, W.S.

Counsel for the Fourth Party—Don Wauchope. Agents—J. S. & J. W. Fraser Tytler, W.S.

Counsel for the Fifth Party—A. G. Pearson. Agents—Scott-Moncrieff & Trail, W.S.

Counsel for the Sixth Party—Wood. Agents—Gill & Pringle, W.S.

Wednesday, July 3.

SECOND DIVISION.

NELSON *v.* ASSETS COMPANY (LIMITED).

Sale—Offer and Acceptance—Qualified Acceptance.

A by letter offered to buy from B certain property which he described. B replied—"I hereby accept your offer as copied on the other side . . . for our interest in the property." It was the fact that B's right of property in the premises did not correspond exactly with the description in the offer. *Held* that this was a qualified acceptance, and that there was no completed contract of sale.

James Nelson, Greenock, as in right of William Logan, house factor, Glasgow, by virtue of an assignation dated 22nd May 1888, brought an action against the Assets Company (Limited), 4 York Place, Edinburgh, to have them decerned and ordained to implement and fulfil their part of a contract entered into between them and William Logan contained in a letter of offer by Logan to Mr W. D. Husband, the manager of the defenders' company, dated 6th December 1886, and an acceptance by Husband on the defenders' behalf addressed to Logan, and dated 9th December 1886, and to deliver to the pursuer a valid disposition to the subjects.

The letter referred to was in the following terms:—

"Dear Sir,—I hereby offer to purchase the following parts of the tenement at the south-west corner of the entrance from Argyle Street to St Enoch Square, known as 'His Lordship's Larder,' namely, the top storey, with all the garret storey, except (*a*) garret room, 10 feet square, in middle or nepos of storey; and (*b*) middle garret room with skylight; also four cellars north of Hunter's, except the eastmost back sunk cellar, with free ish and entry by the common close on the north to Argyle Street, and with a common right along with the other proprietors to the court behind, with entry from Adam's Court Lane. The price to be £3000 sterling, and to be paid at Whitsunday next, 1887, when I am to have entry, free of leases, with the exception of Costigane Brothers, as to which I am to have possession six months after the date of your acceptance hereof. You are to allow £2000 of the price to lie on bond at 4½ per cent. for five years from date of entry. Your acceptance will oblige.—Yours truly, "William Logan."

And the answer was as follows:—

"Dear Sir,—As authorised by the directors, and on behalf of this company, I hereby accept your offer, as copied on the other side, dated 6th instant, of £3000 (three thousand pounds) for our interest in the property known as 'His Lordship's Larder,' St Enoch Square, and in accordance with your stipulation as to the close, 179 Argyle Street, leased to Messrs Costigane Brothers, I have given notice to the lessees that possession is required in terms of articles 1st and 3rd of the relative minute of agreement and lease.—I am, yours faithfully, "W. D. Husband,
"*Sub-Mgr.*"

The pursuer pleaded—"(1) The defenders having contracted to sell to the pursuer's cedent the subjects enumerated in the contract of sale, they are bound to grant in the pursuer's favour a valid disposition thereof."

The defenders pleaded—"(2) In terms of said acceptance, the defenders were only bound to convey the property as it stood in their persons, and having offered a conveyance in said terms, they should be assoilzied. (3) *Separatim*—There having been no *consensus in idem placitum et conventio*, the defenders are entitled to absolvitor."

The Lord Ordinary (KINNEAR) upon 14th December 1888 pronounced this interlocutor:—"Finds that the letters specified in the condescendence do not constitute a completed contract for the purchase and sale of the subjects described in the conclusions of the summons: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—This action is brought to enforce performance of a contract for the purchase and sale of a portion of a house or tenement of houses in Glasgow, and the question is, whether letters passing between the parties constitute a concluded contract to that effect?

"The pursuer is not a party to the correspondence, but the assignee of William Logan, house factor in Glasgow, who writes to the defenders' manager a letter dated 6th December 1886 containing the offer which is said to have been accepted. The pursuer alleges that at that date the writer of the letter had not examined the title-deeds of the property in question, but, without reference to the titles, his letter contains a sufficiently clear and specific description of the subjects which he proposes to buy. 'I hereby offer to purchase the following parts of the tenement at the south-west corner of the entrance from Argyle Street to St Enoch Square, known as His Lordship's Larder, namely, the top storey, with all the garret storey, except (*a*) garret room, 10 feet square, in middle or nepos of storey; and (*b*) middle garret room with skylight; also four cellars north of Hunter's, except the eastmost back sunk cellar, with free ish and entry by the common close on the north to Argyle Street, and with a common right along with the other proprietors to the court behind, with entry from Adam's Court Lane. The price to be £3000 sterling, and to be paid at Whitsunday next, 1887, when I am to have entry, free of leases, with the exception of Costigane Brothers, as to which I am to have possession six months after the date of your acceptance hereof. You are to allow £2000 of the price to lie on bond at 4½ per cent. for five years from date of entry. Your acceptance will oblige.' On the 9th of December Mr Husband, the defenders' manager, answers in these terms:—'As authorised by the directors, and on behalf of this company, I hereby accept your offer, as copied on the other side, dated 6th instant, of £3000 for our interest in the property known as "His Lordship's Larder," St Enoch Square, and in accordance with your stipulation as to the close 179 Argyle Street, leased to Messrs Costigane Brothers, I have given notice to the lessees that possession is required in terms of articles 1st and 3rd of the relative minute of agreement and lease.'

"Now if the defenders' right of property in the tenement known as 'His Lordship's Larder' had corresponded exactly with the description in Mr Logan's offer, there would probably have been no question as to the meaning and effect of these missives. But it turns out, according to the pursuer's averment, that they have no title, and by their own admission that they have no clear and undisputed title to certain portions of the subjects, viz.—one of the cellars, the court behind the subjects, and the rights to ish and entry specially described. The defenders cannot convey to the pursuer rights which they do not themselves possess. But on the other hand, it is clear enough, first, that the pursuer cannot be required to accept a conveyance which will be ineffectual to carry any part of the subjects specifically described in the offer; and secondly, that if the defenders have in fact contracted to sell and convey the whole of these subjects, they will not be excused from the consequences of wilful non-performance by reason of any defect in their own right or title. But I am of opinion that they have made no such contract. The defenders' manager does not accept the offer in the exact terms in which it is made, but accepts it as an offer 'for our interest' in the property described, and that appears to me to introduce into the acceptance a qualification which was not in the offer. It is a qualification which it was very natural to make in the circumstances, because the state of possession was such as to render it not improbable that questions might arise as to the exact import and bearing of the title. It was very natural, therefore, that the defenders should introduce a term into their acceptance which would serve to exclude from the bargain, if the purchaser agreed to it, any part of the property which did not belong to them, or in which they had no interest. I think the words they have used are sufficient for that purpose, and it follows that their letter is not an absolute and unequivocal acceptance which would make the contract complete, but a counter proposal which the maker of the offer was not bound to accept, and which he has not in fact accepted. There is therefore no contract, because it is very clear in law that no contract can be constituted by missive letters, unless the letters contain an absolute and unqualified acceptance on the one part, and of the exact terms proposed on the other part.

"It is said that, inasmuch as it refers to the offer as 'copied on the other side,' the defenders' letter must be held to import an absolute agreement to sell the subjects specifically described, irrespective of any question as to their own right or title. I cannot assent to that construction, because it makes the words 'for our interest' unmeaning. The reference to the offer makes it clear enough that the parties were substantially at one as to the subject-matter of the proposed contract; but it does not, in my judgment, import a guarantee that every part of the description is exactly accurate, and the qualifying words which immediately follow are sufficient to shew that no such guarantee was intended. But assuming that the construction of the defenders' letter is not so clear as they suppose, it is at least ambiguous, and the pursuer's understanding of its terms is different from that of the defenders. But if that be so, there is no contract, because there is no *consensus in idem*.

"The cases of *Robertson* v. *Rutherford*, July 18, 1840, 2 D. 1494, and *Whyte* v. *Lee*, February 22, 1879, 6 R. 699, on which the pursuer relies, do not appear to me to support his argument. But they are not directly in point, because the only question in this case is whether the language employed by the defenders in their letter imports an unqualified acceptance of the terms proposed to them; and that is a mere question of construction, upon which there is no light to be derived from decisions as to the interpretation of other documents in different terms."

The pursuer reclaimed, and argued—There was here a completed contract. The offer was unambiguous. The acceptance corresponded with the offer. The words "our interest" made no material alteration on the offer; they meant the acceptors' interest as described in the offer, which the acceptors copied out that there might be no mistake—*Proprietors of the English and Foreign Credit Company (Limited)* v. *Arduin and Others*, March 13, 1871, L.R., 5 Eng. & Ir. App. 64. The Lord Ordinary's view that the acceptance was so qualified as to amount to a new offer was erroneous. There was no room for a new bargain, because the sale was completed. That the acceptors regarded it as such was shown by the fact that they stated they had taken steps to carry it into effect.

Argued for the defenders—There was no completed contract. The acceptance did not correspond with the offer. It contained a material qualification. If it was not a qualified acceptance, the words "for our interest" were meaningless and unnecessary. In the *English and Foreign Credit Company* there was no adjection of a new term as there was here.

At advising—

Lord Justice-Clerk—The pursuer seeks to have the defenders ordained to deliver to him a valid disposition of the subjects described in the summons, and the demand is made in these circumstances:—Mr Logan, a house factor, in whose right the pursuer is, wrote a letter on 6th December 1886 to the Assets Company, in which he offered to purchase certain parts of the tenement at the south-west corner of the entrance from Argyle Street to St Enoch Square, Glasgow, these parts being described in detail. He named a price, and there were certain other stipulations in the offer which are of no importance in the consideration of this case. The answer to this offer was in these terms, and was written by the sub-manager of the company—"As authorised by the directors, and on behalf of this company, I hereby accept your offer, as copied on the other side, dated 6th instant, of £3000 for our interest in the property known as 'His Lordship's Larder,' St Enoch's Square."

Now, the pursuer asks that this acceptance should be read as if it had run thus—"We accept your offer for our interest as described by you," for unless the acceptance is exactly for the subjects the pursuer offered for there can be no valid acceptance. I am unable to adopt this reading. I read the letter of the company as it has been read by the Lord Ordinary. I think the acceptance was one simply for the defenders' interest in the property whatever that might be. I cannot read it as an acceptance by the Assets Company by which they accepted the pursuer's offer to purchase all the subjects described in the letter of 6th December.

There was no completed sale, the acceptance not corresponding with the offer. Further writing would have been necessary to complete a bargain.

I am therefore of opinion that the interlocutor of the Lord Ordinary is right.

Lord Young and Lord Rutherfurd Clark concurred.

Lord Lee—I agree with the opinion of the Lord Ordinary, and upon the same grounds.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Pursuer—Sir Charles Pearson—Low. Agents—Dove & Lockhart, S.S.C.

Counsel for the Defenders—Graham Murray—Salvesen. Agent—J. Smith Clark, S.S.C.

Wednesday, July 3.

SECOND DIVISION.

MACINTYRE AND OTHERS (MRS MITCHELL'S TRUSTEES).

Succession—Ademption of Legacy—Shares—Mortgage.

By the Paisley Corporation Gas Act 1870 the shares of the Paisley Gas Company were extinguished, and the Corporation was required to substitute therefor to the shareholders annuities which were declared to represent shares of the company.

In 1886 the Corporation, under the powers of their Act, redeemed these annuities, and by arrangement granted to the annuitants mortgages over the gas undertaking for the amounts due to them.

A mortgagee, who was originally a shareholder of the Gas Company, died in 1888, leaving a settlement dated 1884, whereby she directed her trustees to assign and transfer to her niece "the shares standing in my name in the Paisley Gas Company."

Held (Lord Rutherfurd Clark *diss.*) that the legacy had not been adeemed, and that the legatee, in the absence of any indication of intention to the contrary, was entitled to claim the testator's interest in the mortgage.

By the Paisley Corporation Gas Act 1870 the gas supply was placed in the hands of the Corporation. Section 20 of the Act provided—"In lieu of the dividend which the Board of Commissioners are by the Act of 1845 required to pay to the Paisley Gaslight Company, the Corporation shall pay to the several holders of shares in the company at the commencement of this Act . . . annuities . . . upon the amount paid up on each share of the company held by such shareholders respectively, and all the shares of the company shall, from and after the commencement of this Act, be held to be extinguished." . . . Section 23 enacted that "the annuities shall in all respects be substituted for and represent shares in the capital of the company; . . . and the annuities

shall be conveyed or affected by any deed, will, or other instrument disposing of or affecting such shares. Section 44 provided that the Corporation might from time to time, on the third Thursday of January or the third Thursday of July in any year, redeem any portion of the annuities.

At the date of the Act of 1870 John Mitchell held shares in the Gas Company to the nominal value of £150, and his wife Mary Barbour or Mitchell held shares therein to the nominal value of £50, and thereafter they held annuities corresponding to the said respective amounts. On the death of John Mitchell his wife was decerned his executrix, and on 17th September 1879 transferred the annuities held by her deceased husband to herself as an individual. This she was entitled to do.

In the beginning of 1885 the Corporation, acting under the Act of 1870, gave notice of their intention to redeem the gas annuities upon the third Thursday of January 1886, and advised Mrs Mitchell that the amount to which she was entitled in terms of the statute was £320. They further intimated that they were prepared to receive proposals for loans to replace a portion of the annuities, to bear interest at 3¾ per cent. Mrs Mitchell elected to lend the said sum of £320, and her proposal was accepted by the Corporation. No correspondence took place between the truster or her agent and the Corporation. The loan was arranged verbally between her then agent Mr James Gardner, writer, Paisley, and the Corporation. The latter drew a mortgage for the amount, and this was revised on behalf of the truster by her agent. The mortgage assigned to Mrs Mitchell "and her executors, administrators, and assignees, such proportion of the several rents, charges, and revenues (except the gas guarantee rate) accruing to the Corporation from the lands, property, and works vested in them under the authority of the said Act, and which have been or may be constructed and acquired by them for the purposes of that Act, and from the sale of gas and of residual products, as the said sum of £320 sterling doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said rents, charges, and revenues."

Mrs Mitchell died on 19th February 1888, leaving a trust-disposition and settlement dated 2nd August 1884. By the fourth purpose of the settlement the trustees were directed, *inter alia*, "to assign and transfer to my niece Anne Jane Barbour the shares standing in my name in the Paisley Gas Company."

A special case was presented by (1) Mrs Mitchell's trustees, and (2) Anne Jane Barbour or Fergus to obtain the opinion of the Court on this question—"Is the party of the second part entitled to demand, and are the parties of the first part bound to assign and transfer to the second party the said mortgage for £320, or has the said legacy in favour of the said second party been adeemed, and does the amount thereof fall into residue?"

The trustees contended that the bequest was a special bequest of shares in the Gas Company; that it was therefore liable to be adeemed. Although it was possible that the change from shares to annuities might not have rendered this bequest null, when the security was changed into a loan to the company that could only be held as a new contract with the Corporation, and a consequent ademption of the legacy.

Mrs Fergus contended—There was no real change in the subject of the bequest. All that Mrs Mitchell knew she possessed was an interest in the society which provided gas to Paisley. When she had originally acquired that interest it was in the form of shares, and as such she always considered them. She desired to leave her niece her interest in the gas undertaking, and although she used the term shares, when no shares existed, that did not make the legacy abortive or adeemed. It was quite plain what she intended to do, and the Court should carry out her intentions.

Authorities—*Anderson* v. *Thomson, &c.*, July 17, 1877, 4 R. 1101; *Pagan* v. *Pagan*, January 26, 1838, 16 S. 383; *Harrison* v. *Jackson*, November 26, 1877, L.R., 7 C.D. 339; *Luard* v. *Lane*, June 8, 1880, L.R., 14 C.D. 856; *Chalmers* v. *Chalmers*, November 19, 1851, 14 D. 57; Roper's Law of Legacies, i. 331; *Stanley* v. *Potter*, July 16, 1789, Cox's Cases in Equity, 180; *Barker* v. *Rayner*, December 6, 1820, 5 Maddock's Rep. 208; *Gardner* v. *Hutton*, April 2, 1833, 6 Simon's Rep. 93; *Oakes* v. *Oakes*, March 11, 1852, 9 Hare's Chan. Rep. 666.

At advising—

Lord Justice-Clerk—The late Mrs Mitchell in 1879 was possessed of annuities representing certain shares of the Paisley Gas Company. On 2nd August 1884 she executed a trust-disposition and settlement, by the fourth purpose of which she directed her trustees "to assign and transfer to my niece Anne Jane Barbour the shares standing in my name in the Paisley Gas Company." Now, at that time—in 1884—she had no shares in the Paisley Gas Company, and no Paisley Gas Company existed, because the Corporation had converted the shares into annuities.

But a further complication took place between the date of the settlement in 1884 and the death of Mrs Mitchell in 1888. In 1885 the Corporation under the powers contained in the Paisley Corporation Gas Act resolved to redeem the annuities formerly granted, and these then ceased to exist as the shares had formerly done. The Gas Corporation was, however, willing that the sums to be paid for redemption of the annuities should remain with them as loans to the Gas Corporation at 3¾ per cent. interest. In Mrs Mitchell's case this sum was £320; she elected to lend this sum, the Corporation accepted the offer, and her interest in the gasworks was converted into a loan to the Gas Corporation. She very probably knew nothing about the change except that the form and not the substance of her security was being changed, the whole matter being verbally arranged by her agent.

She seems at the date of her will in 1884 to have had no idea that the shares had been changed into annuities, and there is no reason to suppose that after 1884 she knew that the annuities had been changed into a loan. She probably received her return, whether of dividend, annuity, or interest, without troubling herself as to the form of her security.

When we come to the deed we find it requires construction. She leaves certain shares to her niece, but she had no shares to leave; we must therefore look at her estate to see whether we

can arrive at what she intended to leave. We there find this loan to a gas undertaking in Paisley in substitution of the annuities which had been previously substituted for shares, and there can be no doubt that the sum in the loan is the sum which at the time the bequest was made was sunk in the annuity in substitution for the shares. This is not a case of the usual kind where a specific thing is knowingly dealt with by a testator so as to destroy or give away the subject of a bequest. There was no action on the part of this lady indicating any intention to get rid of this money in any way or to deal with the bequest so as to nullify it. The money remains invested where it was although the form of investment is changed. The essential features of ademption are lacking. There is no conversion of the subject so as to indicate an intention to depart from the previously evinced desire that the particular thing should go to a particular individual. It must be observed that none of the changes in form of this investment were voluntary changes. They were all forced upon her by the exercise of the powers given to the Corporation under the Act of Parliament, in the first place to bring the Gas Company to an end and turn its shares into annuities, and in the second place to change these annuities into loans to the Corporation, and it is plain that but for the exercise of these powers no change would have been made upon the investment at all. She knew that she had money invested with the Gas Corporation. The formal shape which her transactions with the Corporation took evidently did not influence her mind at all. She made up her mind that the money so invested was to go to her niece. There is no difficulty in identifying the sum. It is the only sum she can have referred to when she used the expression gas shares in her trust-disposition. Therefore at the date of the deed it is plain that she intended to give this money to her niece.

Now, the question is, does the conversion of the annuity into a loan in these circumstances extinguish the bequest. I am of opinion that it does not. I think we are entitled to consider the whole circumstances, and these, to my mind, indicate that the testatrix intended that the sum invested in her name with the Gas Corporation should go to her niece, and that the changes forced upon her by the resolution of the Corporation to redeem the annuities and borrow the money did not influence her mind at all.

I am therefore of opinion that we ought to find that the trustees must transfer to the niece the mortgage for £320.

Lord Young—I am of the same opinion. The legacy which this lady left to her niece was of "the shares standing in my name in the Paisley Gas Company." Now, that was certainly inaccurate language to describe her investment in the Gas Corporation's business at the time of the will. There is, however, no doubt as to what she intended to leave, or that the will would have been sufficient to carry out her intention so expressed. The language is still more inaccurate when we look at what she had to leave at the time of her death, but I think that her intention is still sufficiently indicated to compel her trustees to give effect to the bequest. She regarded the loan of £320 to the Gas Corporation as the same as the shares in the Gas Company which she had originally held, and which she had never parted with, although the form of the investment was changed, and she meant the sum invested in the gas-works to go to her niece.

On the facts of the case, and without departing from the principle of ademption at all, my opinion is that in this case the legacy was not adeemed, and that the legatee is entitled to it.

Lord Rutherfurd Clark—I regret that I cannot concur in the judgment which your Lordship proposes. It is very likely that the testator intended that the party of the second part should take the money which is in question. But I do not think that we are entitled to proceed on any such conjecture, however probable.

The trustees are directed to transfer to Anne Jane Barbour the shares standing in the testator's name in the Paisley Gas Company. At her death the testator had no shares in that company which under an Act passed in 1870 had been acquired by the Corporation of Paisley. But she was creditor in a mortgage for £320 over the undertaking belonging to the Corporation. The money so invested was the proceeds of an annuity which she had previously held from the Corporation, being the statutory equivalent which she received and was bound to receive for her shares in the Gas Company.

The 23rd section of the Act, by which the shares were converted into annuities, declares that "the annuities shall in all respects be substituted for and represent shares in the capital of the company . . . and the annuities shall be conveyed or affected by any deed, will, or other instrument disposing of or affecting such shares."

The testator's will was made after her shares had been converted into an annuity. I am willing to assume that the direction to transfer the shares would have been sufficient to dispose of the annuity. But to my mind this does not furnish a solution of the question before us. The annuity represents the shares, but there is no similar statutory declaration applicable to the mortgage.

The Corporation of Paisley had a statutory power to redeem the annuities which they had granted under the act of 1870, and they exercised that power. It was in the option of the testator to require payment of the redemption money or to take a mortgage over the undertaking. She chose the latter alternative. If she had taken payment, I conceive it to be clear that the legacy would have been adeemed, because the subject of it had ceased to exist. I see no reason to doubt that the same result would have followed if she had invested the money in another security. The fact that the money so invested could be shown to be the produce of the gas shares or of the gas annuity would not avail to preserve the legacy, for the simple reason that a bequest of the testator's gas shares could pass nothing but the shares themselves or their statutory equivalent. In my opinion a legacy of the shares will not pass the produce of the shares or any security on which that produce may be invested until there be some statutory enactment applicable to such produce or security similar to that which I have quoted regarding the annuity. For the same reason, I think that the bequest which we are now considering cannot transfer

the mortgage held by the testator over the undertaking belonging to the Paisley Corporation. That mortgage is neither gas shares nor has it been declared to be a statutory representative or equivalent for gas shares. It is nothing more than a security which the testator chose to take.

When she parted with her shares, or rather with the annuity which was the equivalent of these shares, the subject of the legacy perished, and therefore in my opinion the legacy is adeemed.

LORD LEE—The question in this case arises upon a direction in the trust settlement of the late Mrs Mary Barbour or Mitchell "to assign and transfer to my niece Anne Jane Barbour the shares standing in my name in the Paisley Gas Company."

It appears that at the date of her settlement (2nd August 1884) there were no "shares" in the Gas Company standing in the testator's name. The Act of 1870 narrated in the case had extinguished the shares, and substituted certain annuities. These were declared to be conveyed or affected by any deed or will disposing of or affecting such shares. But strictly speaking there was nothing standing in the name of shares in Mrs Mitchell's name. She was merely a creditor in a gas annuity due by the Corporation.

The question is, whether the subsequent redemption of this annuity in January 1886 under another clause of the same statute, and in terms of a circular issued by the Corporation proposing to allow the redemption money to be invested as a loan secured upon "the several rents, charges, and revenues (except the gas guarantee rate) accruing to the Corporation from the lands, property, and works vested in them under the authority of the said Act"—viz., the Act under which the Corporation acquired the gas works and gas undertaking—together with the testator's acceptance of that proposal, so completely extinguished the subject of the bequest that the legacy must be held to have been adeemed.

There is no doubt of the general rule of law that if the subject of the bequest ceases to exist the legacy is at an end by ademption. This may occur even without evidence of intention.

I think that in this case the question of ademption depends upon the intention of the testator. For unless it can be made clear that the subject of the bequest, as viewed by her, was brought to an end there is no ademption.

The testator's position at the time of her bequest was that of a creditor of the Corporation for an annuity security upon the gas undertaking, and that the only change which was effected was that she became in respect of her right to the redemption money a creditor in a loan for the capital value of the annuity secured in the same way.

It was not a change from the position of shareholder into that of creditor. Nor was it from the position of creditor to that of shareholder. And on the whole I think that the continuity of the subject of the bequest was sufficiently preserved to entitle the legatee, in the absence of any indication of intention to the contrary, to claim the testator's interest in the Gas Corporation loan as representing the annuity which was declared to be affectable by any deed or will disposing of the original shares.

I am of opinion therefore that the legacy was not adeemed, and that the Court should answer the first part of the question stated in the case in the affirmative.

The Court pronounced this interlocutor:—

"The Lords are of opinion that the party of the second part is entitled, and that the parties of the first part are bound to assign and transfer to the second party the mortgage for £320."

Counsel for the First Parties—Deas. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Second Party—Young. Agents—Winchester & Nicolson, S.S.C.

Wednesday, July 3.

SECOND DIVISION.

WYLIE & LOCHHEAD *v.* HORNSBY.

Cautionary Obligation — Guarantee — Signature upon Blank Sheet of Paper — Proof — New Firm.

A received a blank sheet of paper with a sixpenny stamp upon it from his son, with the request to sign across the stamp. He did so on the understanding that his son was to fill in simply a guarantee for £500. The son filled in the guarantee for £500 and added an obligation to pay certain premiums of insurance upon his life of which his father knew nothing. *Held* that A having given his son no authority to fill in this obligation was not bound to pay the premiums.

Observations upon sec. 7 of Mercantile Law Amendment Act.

James Hornsby junior, son of James Hornsby, builder, Gatehouse of Fleet, Kirkcudbright, was cashier and clerk to Messrs Wylie & Lochhead, Glasgow. He left that employment in 1873 to become a hotel keeper in Oban, and got advances in cash and furnishings from the firm. In security for these advances his father gave the following letter of guarantee—written by his son and signed by himself—to Messrs Wylie & Lochhead—"*Glasgow, 14th May* 1873.—Gentlemen,—We hereby guarantee payment of Six hundred pounds sterling by James Hornsby, Oban. Our liability will be held in equal proportions of that amount, and will cease when his debt will have been reduced at 31st December of any year by the said sum.—Yours respectfully," &c. It was intended that a Mr Robert Bell should also sign, but this was never done.

In the following year, 1874, James Hornsby junior removed to a hotel at Gairloch, and agreed to obtain from his father a letter of guarantee for £500 in favour of Wylie & Lochhead, who had made further advances, in lieu of the previous letter of guarantee which was cancelled. He accordingly handed to Wylie & Lochhead the following:—"*Gatehouse, 31st January* 1874.—Gentlemen,—I hereby guarantee payment of £500 stg. by my son James Hornsby, of the Gairloch Hotel, and

the payment of premiums of insurance on his policies with the Scottish Widows Fund and Scottish Amicable Societies, assigned to your firm. But my liability under this guarantee will be reduced according to the amount of security furnished by Mr Robert Bell, brick-builder, or any other party you may accept in his stead. —I am, yours obediently, JAMES HORNSBY."

Upon 3rd February 1874 James Hornsby junior granted an *ex facie* absolute assignation to John Wylie, sole partner of Wylie & Lochhead, of two policies on his life, one with the Scottish Widows Fund, and the other with the Scottish Amicable Society.

James Hornsby senior paid the sum of £500 for his son, but never paid any of the premiums of the policies of insurance.

By agreement dated 13th August 1883 John Wylie assigned all the property, assets, and goodwill of the firm of Wylie & Lochhead to the company of Wylie & Lochhead, Limited. This assignation contained no mention of James Hornsby senior's letter of guarantee, but on 28th July 1887 John Wylie specially assigned to the new company the two policies of insurance upon the life of James Hornsby junior.

In July 1887 Messrs Wylie & Lochhead raised an action in the Sheriff Court at Kirkcudbright against James Hornsby senior, to have him ordained to pay to the pursuers the sum of £47, 7s. 11d. stg., the premiums of the policies of insurance for the years 1886 and 1887 with interest, and further, to free and relieve the pursuers in all time coming of the payment of the periodical premiums to become due on the two policies of insurance for which the defender was liable.

The defender averred that "James Hornsby junior sent to the defender a blank letter stamped with a sixpenny stamp, and requested him to sign same, stating that he (the son) would see it properly filled up. Believing that the blank letter would be filled up in the same terms or to the same effect as the letter founded on by pursuers [of 14th May 1873, *supra*] the defender signed the same, and sent it to his son. It was a considerable time thereafter that defender got to know that above his signature had been inserted an obligation to pay premiums on some policies of insurance on his son's life."

The defender pleaded—"(1) The letter of guarantee in question was not granted to pursuers, nor transferred to them with defender's consent, and they cannot found thereon. (2) The alleged obligation for premiums is subsidiary to payment of the sum of £500, and that sum being paid, the obligation falls therewith. (3) The letter, so far as consisting of an obligation to pay insurance premiums, is not the act of defender, and does not bind him."

Section 7 of the Mercantile Law Amendment Act (19 and 20 Vict. c. 60) provides that "no guarantee, security, cautionary obligation, or assurance, granted or made after the passing of this Act to or for a company or firm . . . or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made . . . unless the intention of the parties that such guarantee, security, cautionary obligation . . . shall continue to be binding notwithstanding such change shall appear either by . . . express stipulation, or by necessary implication from the nature of the firm or otherwise."

The Sheriff-Substitute (DICKSON) assoilzied the defender on the ground that there had admittedly been a change in the firm of Wylie & Lochhead, and that the letter of guarantee was not enforceable by the new firm in consequence of section 7 of the Mercantile Law Amendment Act.

The Sheriff (MACPHERSON) adhered.

The pursuers appealed to the Court of Session, which ordered a proof before the Sheriff-Substitute.

A proof was taken, at which the defender deponed that before 1879 he had paid off the £500; that it was not until that year that he knew his son's life had been insured, and that he never paid anything towards the premiums of insurance. He also deponed that shortly after the beginning of 1874 he received from his son a sheet of blank paper with a sixpenny stamp upon it, and a slip asking him to sign his name through the stamp; that his daughter had not wished him to sign, but that his wife (now dead) had said, "Just sign it, for James would never do anything that would injure him," and that he had signed. His daughter corroborated him as to the signing of the blank paper. His son was not called as a witness, and there was no contradictory evidence.

The Sheriff-Substitute pronounced the following interlocutor:—"Finds that James Hornsby senior by his letter of guarantee of 31st January 1874 guaranteed to the then existing firm of Wylie & Lochhead 'payment of £500 by his son, and the payment of premiums of insurance on his policies with the Scottish Widows' Fund and Scottish Amicable Societies assigned to your firm': Finds that by assignation the said James Hornsby junior assigned on 3rd February 1874 to John Wylie, sole partner of the said then existing firm of Wylie & Lochhead, the said two policies of assurance, and all bonuses which had been or might be declared upon them: Finds that the said John Wylie by deed of assignation dated 28th July 1887 assigned to Wylie & Lochhead (Limited) the said two policies of assurance, as they had been assigned to him by the said James Hornsby junior: Finds that James Hornsby junior came under no obligation to pay the premiums that should fall due after the date of the assignation to John Wylie: Finds that their being no obligation upon James Hornsby junior to pay these premiums, there is no principal obligation to which the letter of guarantee, so far as regards the payment of premiums, can apply, and that therefore no cautionary obligation was entered into by James Hornsby senior for payment of the premiums: Therefore assoilzies the defender from the conclusion of the action: Finds the pursuer liable in expenses of process, &c.

"*Note.*—This action is brought against James Hornsby senior as cautioner under his letter of guarantee. There are some singular circumstances attending the case. The letter of guarantee proceeds upon the narrative that the policies had been assigned, but the date of the assignation is three days subsequent to the letter. The defender says that he never knew that the

policies of assurance were in existence, and could have had no intention of guaranteeing the payment of the premiums. He says that he signed the paper upon which the letter of guarantee has been written before anything was written upon it. But by signing it blank as he did, he put himself in the power of the person who filled it up, and I do not think that his ignorance of the policies, or of the cautionary obligation which was introduced regarding payment of premiums, could have protected him against the present action if James Hornsby junior had obliged himself to continue the payment of the premiums. But he came under no such obligation; and the defender can only be held to have guaranteed that obligation if it existed."

The Sheriff (VARY CAMPBELL) on appeal adhered.

The pursuers appealed to the Court of Session, and argued—The Sheriffs were wrong in viewing this as a cautionary and subsidiary obligation. It was a primary obligation—*Tait* v. *Wilson*, 8th December 1836, 15 S. 221, 1 Robinson's App. 136. The case of *Jackson* v. *M'Iver* was not in point. There were here virtually two letters of guarantee in one; one guaranteeing the sum of £500, and the other the keeping up of the premiums on the policies. This guarantee was an asset of the old firm, assignable and assigned in virtue of the assignation of 1883 to the new company, and enforceable by them.

The respondent argued—(1) This was a cautionary obligation, subsidiary to the son being bound, but the pursuers had failed to take the son bound to keep up the policies, and therefore their claim against the father fell—Bell's Prin. 251; *Jackson* v. *M'Iver*, 6th July 1875, 2 R. 882. (2) The pursuers had no title to sue. Even if the guarantee had been assigned to them, which it was not, they could not have enforced it. It was not assignable. There was *delectus personæ* as regards John Wylie. The new company was a different *persona*—*Thomson's Trustees* v. *Thomson*, 22d February 1889, 16 R. 517. Their position was bad even at common law; it was certainly so under the Mercantile Law Amendment Act.

At advising—

LORD YOUNG—This is an action at the instance of Wylie & Lochhead, and is based upon a document which purports to "guarantee payment of £500 sterling by my son James Hornsby of the Gairloch Hotel, and the payment of premiums of insurance on his policies with the Scottish Widows' Fund and Scottish Amicable Societies assigned to your firm," and to be signed by James Hornsby senior. The action concludes for payment of the sum of £47, 7s. 11d., with interest thereon from the time the same became due as regards the past, and as regards the future "to free and relieve the pursuers in all time coming of the payment of the periodical premiums to become due" on the two policies of insurance. We find from the account produced that the premiums immediately sued for are those for the years 1886 and 1887. We know nothing of those for the years 1874 to 1886 except only that none of them were ever paid by James Hornsby senior, the person here sued as defender.

The pursuers aver that in February 1874 the firm of Wylie & Lochhead as then existing, for it was a different firm from that which now exists, obtained from James Hornsby junior an assignation of two policies of insurance on his life. It is a simple absolute assignation by Hornsby to John Wylie, then sole partner of Wylie & Lochhead. It contains no qualification and no statement that it is in security of a debt, but it is familiar law that if a creditor obtains such an assignation absolute in its terms, and with no reference to any debt, although granted in security of a debt, he may use such an assignation, if that was the honest meaning of the arrangement between the parties, as a security not only for the debt existing at the date of the assignation but also for debts subsequently incurred, and the pursuers' case is that John Wylie obtained this assignation from Hornsby as a security for debt of an indefinite amount then existing or that might thereafter be incurred.

When the case first came up in the Sheriff Court the fact was noted that the pursuers were a limited company, and it was pleaded that the guarantee sued on was not available to them as being a cautionary obligation given to a different firm, and the Sheriffs gave effect to that plea. It appears that in 1883 John Wylie transferred his whole business with the assets and goodwill to the present registered company now suing, but without any special mention of the policies of insurance assigned to him by Hornsby in 1874. It appears distinctly enough, however, that the pursuers are relying on the assignation in 1874 by Hornsby to Wylie, and that not only for the debt then due to John Wylie, but for any debt due to them or him, for they maintain that all Wylie's debts have been transferred to them, the limited company, as creditors therein. They point also to a special assignation of the policies by Wylie to them, dated 28th July 1887. Their case therefore is that as creditors in the debt originally due to John Wylie and not yet paid, and also as assignees of the policies, they are entitled to make them available for their security.

Now, I think that is a sound view in law, and entirely excludes that on which the Sheriffs originally decided the case. We recalled the Sheriff's interlocutor and allowed a proof, which we have now before us, and which we must consider.

Assuming that the statutory difficulty is out of the pursuers' way, I have to point out that the document at the base of the action is the letter of guarantee I have already quoted. That document is not alleged to be holograph, and it is certainly not probative. It requires therefore to be proved, and we must necessarily attend to the proof. There is here some conflicting evidence, or, perhaps I should say, there are conflicting considerations upon the evidence.

James Hornsby senior is *ex facie* of the document the obligant, but he distinctly says in his testimony that it was a blank sheet stamped which was sent to him by his son, Wylie & Lochhead's debtor. He says that his daughter advised him not to sign it, but his wife said, "Just sign it, for James would never do anything that would injure him," and that he signed it. His wife is dead, but his daughter corroborates him, and is equally distinct in her evidence. Now, if that evidence is true, undoubtedly this document, which is the ground of this action, was signed

blank. These are the only two living witnesses, and if their evidence is not true it is deliberately false, because it cannot be the result of error; but I am satisfied of the truth of their evidence, and the result consequently is that the document was signed blank, and that it was not written when the signature was adhibited.

That would be sufficient for its reduction had it been a tested instrument, but it was not, and it was not necessary it should be, and so I proceed to inquire whether the writing over the signature was authorised by the defender.

There are certain cases in which authority to write an obligation above a blank signature is implied. The most familiar case is that of a party putting his name across a bill stamp which authorises the person getting his signature to fill in any amount which the bill stamp will carry, and that will be conclusive in favour of a *bona fide*—that is, an onerous holder of the bill. We need not consider the ground on which that is the law, but it is fairly established. But I know of no authority entitling a man to fill in an obligation above a signature on an ordinary sixpenny stamp, and the person taking such a document, neither holograph nor probative, must at all events prove not only the genuineness of the signature, but also that it was adhibited to the document as it stands, or that authority was given to write over the signature what is written over it. Here the policies were about to be assigned by the son. Was there any authority for him to write a guarantee on his father's part to pay the premiums? The evidence is all one way. Hornsby senior says that he gave no such authority, that he was in ignorance about the policies altogether, and he must have been ignorant of any transfer of these policies to Wylie & Lochhead, for at the date of the supposed guarantee, which is 31st January 1874, there had been no such assignation.

Is there then a guarantee good in law to Wylie & Lochhead that the premiums would be paid upon the policies of insurance assigned to them on 3rd February 1874, and held as a general security for an indefinite amount of debt past or future? I am of opinion there is not. They have not proved there was any authority given—indeed it is proved there was no authority given by the defender to his son to write this guarantee over his signature. The son, who might have been able to give evidence, is not a witness, and there is nothing to show he had any authority whatever to give such a guarantee.

This is not such a document as an ordinary man of business would have founded upon, and I am not sorry we cannot make out of it a guarantee to pay the premiums of the policies of insurance which the pursuers hold.

It is further noteworthy that during fifteen years James Hornsby senior has declined to pay any of the premiums, and has consistently maintained the position he now takes up. I may also note that although there was an assignation in 1883 from John Wylie to the new firm of Wylie & Lochhead of all the stock, the goodwill, &c., there was no assignation of this document, which had been repudiated. There was indeed an assignation to the new company in 1887 of the policies, but we should have expected an assignation of this alleged guarantee if it was intended to belong to and be enforced by the new company.

Upon the whole matter I am prepared to find, in point of fact, that this paper was signed blank, and that the defender did not guarantee the payment of the premiums of the policies, and that therefore he must be assoilzied from the conclusions of the action, with expenses in both Courts.

I wish to add, however, that I do not concur in the views of the Sheriff and Sheriff-Substitute, for had I been of opinion that authority was given to fill up the guarantee I should have entertained no doubt that the guarantee was good and should not have held that there being no principal obligation there could be no cautionary obligation because there was nothing to guarantee.

Lord Rutherfurd Clark concurred.

Lord Lee—I agree in the opinion of Lord Young entirely, but I should have been disposed to go even further, and to proceed upon a construction of the document different from that relied on by the defender. It appears to me to refer to an existing debt and not to any general indebtedness in respect of advances made or to be made. It contains, so far as I see, nothing to warn the defender that his liability was to continue though the existing debt should be paid if the Messrs Wylie & Lochhead should go on to make further advances to the defender's son.

In this view of the guarantee for £500 my opinion is that the guarantee for payment of premiums of insurance on the policies is limited to securing the then subsisting debt, and came to an end when it was paid.

It is true that the policies are mentioned as "assigned to your firm," and that the assignation as between the principal debtor and his creditors was *ex facie* absolute, and therefore enabled them as against him to hold the policies and pay the premiums in security, not only of the subsisting debt but of further advances. The defender, however, is not affected in my opinion by the form of the assignation, for he was no party to it, and was not bound to know that it was other than an assignation in security of the subsisting debt. Indeed it appears that the assignation was not granted till four days later.

I am unable therefore to read the guarantee as continuing to bind the defender to pay premiums of insurance so long as any balance of £500 should remain due by the defender's son to Wylie & Lochhead, although as appears from the account the subsisting debt was extinguished by payments in cash.

The Lord Justice-Clerk concurred.

The Court pronounced this interlocutor:—

"Find in fact that the document founded on by the pursuers is neither holograph nor tested, and was blank when signed by the defender, and that the defender did not authorise the insertion thereon of an obligation to pay the premiums of insurance upon the policies assigned by James Hornsby junior to John Wylie: Find in law that the defender is not liable in payment to the pursuers of the premiums of insurance specified

in the account libelled: Therefore sustain the appeal," &c.

Counsel for the Pursuers—M'Kechnie—C. N. Johnston. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Defender—Jameson—M'Lennan. Agents—J. & F. Adam, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, June 20.

(Before the Lord Justice-Clerk.)

WILSON *v.* M'GUIRE.

Justiciary Cases—Rape—Bail.

In an appeal by a procurator-fiscal against the decision of a Sheriff-Substitute admitting to bail a person accused of rape, it was stated on behalf of the Lord Advocate that the case was an ordinary case of rape, and that his investigations disclosed no facts tending to show that it ought to be dealt with as exceptional.

Held that persons accused of rape ought not to be admitted to bail unless under very exceptional circumstances, and that the Court ought to refuse bail upon the objection of the Lord Advocate, supported by his statement, upon his responsibility, that the case was not exceptional.

This was an appeal by Robert Wilson, Procurator-Fiscal of the Sheriff Court of Lanarkshire at Hamilton, against a deliverance of the Sheriff-Substitute of Lanarkshire at Hamilton (Birnie) admitting John M'Guire, charged with the crime of rape, to bail, and fixing the amount thereof at £50 sterling.

Argued for the Procurator-Fiscal—This was a case in which no bail at all should have been granted. The rape charged was one of a most brutal character. It was alleged to have been committed upon a deformed imbecile of between thirty and forty years of age, able only to utter inarticulate sounds. The amount fixed was insufficient to secure the appearance of the accused for trial. The charge was one upon which, if a conviction were obtained, a sentence must follow altogether out of proportion to the amount of bail fixed.

Argued for the panel—The question whether bail should be allowed or not had been properly decided by the Sheriff-Substitute in granting bail. The Advocate-Depute had no right to assume that the precognitions disclosed the facts that would be proved against the accused. As to the amount of the bail, the sum was ample in every respect to secure the attendance of the accused. In point of fact the accused was quite unable to raise the amount and obtain any benefit or assistance in the preparation of his defence.

At advising—

Lord Justice-Clerk—I am of opinion that bail should not be allowed in any case where the public prosecutor charges the prisoner with the crime of rape unless there be very exceptional circumstances, and certainly not where the Lord Advocate objects to its being granted, and states on his responsibility that his investigation of the case does not disclose any facts tending to show that it should be dealt with as exceptional. If in any such case there were exceptional circumstances the Lord Advocate could himself take these into consideration and consent to bail, but I should regret its being established as a precedent in principle that bail is to be allowed in ordinary cases of rape. In this case I am of opinion that the sum of bail fixed by the Sheriff-Substitute was quite inadequate, and the public prosecutor has by this appeal from the deliverance of the Sheriff-Substitute raised the question not only of the amount of the bail fixed, but whether bail should have been granted at all; he says it should not have been granted, and repeats that the case is a very serious one. As there do not seem to me to be any circumstances to justify the Sheriff-Substitute in granting bail I shall reverse his deliverance and refuse bail.

The Court reversed the decision of the Sheriff-Substitute and refused bail.

Counsel for the Lord Advocate—Duncan Robertson. Agent—Crown Agent.

Counsel for the Panel—Law. Agent—William Chalmers, W.S.

Thursday, July 4.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Kinnear.)

WYLIE *v.* THOM.

Justiciary Cases—Public-Houses (Scotland) Acts Amendment Act 1862 (25 *and* 26 *Vict. cap.* 35), *sec.* 17—*Complaint—Deviation from Statutory Form—Certificate "in that behalf."*

Section 17 of the Public-Houses (Scotland) Acts Amendment Act 1862 provides that "Every person trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of this Act, shall be guilty of an offence."

A person was charged with trafficking in liquors "without having a certificate authorising and empowering him to keep premises for the sale of exciseable liquors therein," and was convicted. In a suspension it appeared that the accused held no certificate for the premises, but that there was a subsisting certificate in the hands of a person who prior to the date of the conviction had granted a trust-deed for behoof of his creditors. It was alleged by the complainer that he had been entrusted by this person with the management of the premises, and was so managing for him when convicted. *Held* that as the charge contained in the complaint was in effect that of trafficking without having obtained a personal certificate, and that it had not been open to the accused to plead his employer's certificate, there had been a deviation from the statutory forms which had prevented substantial justice from being done, and the conviction *suspended*.

This was a suspension brought by Allan Wylie, Linlithgow, of a conviction obtained against him before the Magistrates of the burgh of Linlithgow for a contravention of the Public-Houses (Scotland) Acts Amendment Act 1862 (25 and 26 Vict. cap. 35), sec. 17. Section 17 provides "Every person trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of this Act shall be guilty of an offence." The facts of the case are fully set forth in the opinion of Lord M'Laren.

At advising—

Lord M'Laren—This case comes before us under a bill of suspension of a conviction obtained before the Magistrates of the burgh of Linlithgow for a contravention of the Public-Houses (Scotland) Acts Amendment Act 1862.

Under the provisions of the statute the conviction is not subject to review on the merits, but is liable to be set aside in respect of such deviation from the statutory forms as may have prevented substantial justice from being done.

We have no record of the evidence, but we must consider what are the admitted facts of the case for the purpose of seeing whether the complaint is framed in conformity with the statutory enactments so as to raise a question of criminality upon those facts.

In the present case the complaint sets forth that Allan Wylie, hotel-keeper, Linlithgow (the complainer in this Court), did on a certain day, within the premises occupied by him, traffic in spirits and other exciseable liquors "without having a certificate authorising and empowering him, the said Allan Wylie, to keep premises in Linlithgow for the sale of exciseable liquors therein, contrary to the provisions of the seventeenth section" of the said Act.

It is the fact that there was a current certificate applicable to the Palace Hotel at Linlithgow in which the offence is said to have been committed.

The certificate was in the name of William Tod, the landlord of the Palace Hotel, and it was current at the date of the alleged offence. It is not suggested that Tod had done anything to forfeit the benefit of his certificate.

The suspender states that in September 1888 he was entrusted by Tod with the management of the hotel, Tod being then in a delicate state of health, and unable to continue in the personal management of his business.

Whatever may have been the reason for devolving the management of the hotel on Wylie, such devolution could in no way impair the force of the certificate granted to Tod, or render Wylie liable to a prosecution for selling spirits without a licence, because it is not open to question that a licensed victualler who has obtained a certificate in his own name may lawfully carry on his business through a manager.

Thereafter Mr Tod fell into embarrassed circumstances, and after consulting with his creditors granted a trust-deed in favour of Mr James Craig, C.A., with a view to the payment of his debts out of the proceeds of the trust-estate.

The theory of the prosecution is, that that proceeding divested Tod of his estate, and that his licence, and the certificate on which it was obtained, either became the property of Tod's creditors or lapsed altogether.

This is not the view on which Tod himself or his creditors acted. The creditors apparently were willing that the spirit business should be carried on as formerly under the management of Wylie, and the business was so carried on without objection until notice was given by the authorities of their intention to institute a prosecution unless Wylie should be able to obtain a transfer of the licence into his own name.

If it were necessary to consider whether the prosecutor was well-founded in his view of the effect of the trust-deed, I should most probably differ with him in his view of the law applicable to this point. A trust-deed granted for the benefit of creditors is not a matter with which the public authorities are concerned. Such deeds do not usually displace the trader from the management of his business. Indeed the chief reason of preference for a private trust over a sequestration is that it does not involve the sacrifice of a going business, and very often the deed provides for the business being carried on by the truster under supervision. I am unable to see how the granting of such a deed can have the effect of depriving the licencee of the benefit of his certificate. In this respect the position of the trustee for creditors is not materially different from that of a manager, because he is accountable to the truster, and his powers come to an end when the purposes of the trust are fulfilled.

For reasons which I shall presently state, this point does not directly arise for decision, but it is to be kept in view in considering the form and language of the complaint.

The complaint is founded on the 17th section of the Act of 1862. Now, the offence as declared by that section is, the "trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of the Act."

Comparing the statutory definition of the offence with the description of the offence in this complaint it is evident that there is a material variation of phraseology, because in the complaint the accused is charged with trafficking in spirits "without having obtained a certificate authorising and empowering him, the said Allan Wylie, to keep premises in Linlithgow aforesaid for the sale of exciseable liquors." It is not necessarily an objection to a complaint that it does not merely echo the words of the statutory enactment, provided the meaning be identical with that of the enactment declaring the nature of the offence. But in this case the variation is material. Under a complaint in the statutory form it would be open to the accused to put forward the certificate granted to his employer Tod as being "a certificate in that behalf" in terms of the statute. Under the actual complaint the accused could not found on his employer's certificate, because the charge against him is in effect that he trafficked in exciseable liquors without having obtained a personal certificate. We do not know what were the precise grounds on which the Magistrates of Linlithgow convicted the complainer of an offence, but it is sufficient for the disposal of this case that the Magistrates may have convicted Wylie for the supposed offence of trafficking without having obtained a personal certificate.

For these reasons I am of opinion that the complaint does not set forth an offence in terms

of the Public-Houses Amendment Act of 1862, and that this is a deviation from the statutory forms which is prejudicial to the accused, and which has prevented substantial justice from being done.

If the Court is of this opinion it follows that the conviction should be quashed.

The LORD JUSTICE-CLERK and LORD KINNEAR concurred.

The Court quashed the conviction.

Counsel for the Complainer—Goudy. Agents—Douglas & Millar, W.S.

Counsel for the Respondent—A. J. Young. Agent—Party.

Monday, July 8.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Rutherfurd Clark.)

FERGUSON *v.* CARNOCHAN (P.-F. OF THE BURGH COURT OF STRANRAER).

Justiciary Cases—Breach of the Peace—"To the Alarm of the Lieges."

Under a complaint for breach of the peace it was proved that the accused, in his house, which was situated in a street, had, about three a.m., used loud language, accompanied by oaths and imprecations, which could be heard in the street at a considerable distance, and he was convicted. In an appeal against the conviction, *held* that the acts proved were such as were calculated to cause alarm to the lieges, and conviction *sustained.*

This was an appeal by Neil Ferguson, public-house keeper, Stranraer, upon a case stated, against a conviction for the offence of breach of the peace obtained before the Burgh Court of Stranraer upon a complaint at the instance of James Stuart Carnochan, Procurator-Fiscal of the Court. The following facts, *inter alia*, were set forth in the case as proved, viz.—"That shortly before three o'clock on the morning of Sunday 7th April 1889 a light was seen, and the appellant was heard making a noise and disturbance, and using loud language within his premises in Charlotte Street, Stranraer, same being a licensed public-house, by two constables on duty who were going past said premises on their rounds on the morning in question. The noise continued for some time, but at first was not so great, and the constables on returning about an hour afterwards found the noise still continuing, and which they heard in Castle Street at a part thereof about thirty yards off, and which consisted of cursing and swearing against Lord Stair, and sending him to hell, apparently in a dispute on Home Rule. The constables could not swear that it was the appellant who was cursing and swearing, but they had no doubt that it was his voice, as they knew his voice."

The question of law for the opinion of the High Court of Justiciary was—"Whether the appellant, on the facts so proved, is guilty of the crime charged."

Argued for the appellant—There was no breach of the peace. The alleged disturbance consisted of loud talk in a private house, and did not cause alarm to any person in the house or outside of it—*Ritchie* v. *M'Phee*, October 25, 1882, 5 Coup. 147; *Buist* v. *Linton*, November 20, 1865, 5 Irv. 210; *Galbraith* v. *Muirhead*, November 17, 1856, 2 Irv. 520; *Banks* v. *M'Lennan*, November 16, 1876, 3 Coup. 539; *Armour* v. *Macrae*, March 9, 1886, 1 White, 58.

Argued for the respondent—A breach of the peace might take place in a private house—*Matthews and Rodden* v. *Linton*, February 27, 1860, 3 Irv. 570. The noise was long continued, occurred in a populous part of the town, and was such as was calculated to cause alarm. Actual alarm did not require to be proved. The cases cited by the appellant were not in point, as they were all cases in which the charge was defective in one or other of these respects.

At advising—

LORD JUSTICE-CLERK—There are two points in this case. The first is, whether the offence charged having taken place in the accused's own premises can constitute a breach of the peace. That point is ruled by the case of *Matthews and Rodden*, which decides, and I think soundly, that a breach of the peace may be committed in a private house.

The second point is, whether the facts disclosed are such that a breach of the peace can be inferred from them. I am of opinion that they are. Breach of the peace consists in such acts as will reasonably produce alarm in the minds of the lieges, not necessarily alarm in the sense of personal fear, but alarm lest if what is going on is allowed to continue it will lead to the breaking up of the social peace. The words "to the alarm of the lieges" in a charge of breach of the peace mean that what is alleged was likely to alarm ordinary people, and if continued might cause serious disturbance to the community. In this case what is found proved is that the appellant was making a noise and disturbance, and using loud language within his premises at an early hour upon a Sunday morning. He was heard by two constables. About an hour afterwards the constables being again near the premises heard it still continuing, and from a distance of thirty yards were able to hear specific shouts directed against a particular individual accompanied by imprecations. I am of opinion that if a person at three o'clock on a Sunday morning uses loud language and oaths and imprecations so as to be heard at a considerable distance in the street of a town he commits a breach of the peace, and therefore that the Magistrates had before them facts sufficient to justify them in finding the accused guilty. The facts in this case are almost identical with those in the case of *Matthews and Rodden*, with the exception that in that case there was fighting. But as fighting inside of a house can affect persons outside only in so far as it causes noise in the street, I take it that the case of *Matthews and Rodden* would have been held equally relevant without the allegation of fighting.

LORD M'LAREN—The question is, whether the facts found to be proved support the conviction,

and that involves the consideration of what elements of fact are necessary to constitute the crime of breach of the peace. The clearest case of breach of the peace consists in engaging in hostilities either in the street or in a private ground, for I agree that it makes no difference whether the offence be committed in a public or private place, provided the lieges be alarmed. But breach of the peace is not confined to acts of this description. "Peace" is not used as the antithesis of "war." Breach of the peace means breach of public order and decorum, accompanied always by the qualification that it is to the alarm and annoyance of the public. Mere inarticulate noises and cries not calculated to be offensive to anyone have been held not to amount to breach of the peace. On the other hand, where the brawling is of such a kind as to be offensive and alarming it is not necessary that those who hear it should be alarmed for themselves. It is enough that offensive language should be uttered in a noisy and clamorous manner so as to cause reasonable apprehension in the minds of those who hear it that some mischief may result to the public peace—that is, to other persons than themselves.

I am quite satisfied that the language used here, heard in the public street in Stranraer, with the aggravation that it was used at night, and accompanied by noisy conduct, was calculated to be particularly disturbing, and that facts have been proved sufficient to justify the Magistrates in convicting.

Lord Rutherfurd Clark concurred.

The Court sustained the conviction.

Counsel for the Appellant—A. S. D. Thomson. Agent—R. Broatch, L.A.

Counsel for the Respondent—Ure. Agent—Peter Pearson, S.S.C.

COURT OF SESSION.

Saturday, June 29.

FIRST DIVISION.

[Lord Kinnear Ordinary.

STEWART *v.* KENNEDY.

(*Ante*, p. 388.)

Contract—Sale—Essentials of Sale—Entailed Estate—Reduction—Issues—Essential Error.

An heir of entail in possession having entered into a contract for the sale of the entailed estate, the Court construed the contract to mean that the seller was under a legal obligation to apply to the Court for approval of the sale under the 5th section of the Entail Amendment Act 1853, as amended by the Entail Acts of 1875 and 1882.

In an action by the seller to have the contract reduced on the ground, *inter alia*, of essential error, in respect that in entering into the contract he believed he would be bound by it to apply to the Court for an order of sale under the Entail Act 1882, whereby an entailed estate might be converted into entailed money, and would not be bound to sell at the price proposed if the Court should hold it to be inadequate—*held* (*diss.* Lord Shand) that the error alleged was not in the essentials of the contract, but as to its import and effect, and an issue of essential error disallowed.

Opinion (*per* Lord Shand) that the contract being in the opinion of the pursuer subject to a suspensive condition, there never was *in idem placitum consensus et conventio* between the parties, and that the pursuer was therefore entitled to an issue of essential error.

Process—Jury Trial—Issues—Appeal to the House of Lords—Competency of Motion to Proceed with Cause pending Appeal.

In an action of reduction of missives of sale the Court (Lord Shand *diss.*) appoved of an issue for the trial of the cause, but disallowed certain other issues. The defender thereafter moved to have a day fixed for the trial of the cause, but the Court, in respect that the pursuer had presented a petition to the House of Lords against the interlocutor approving of the issue, *refused* the motion.

In consequence of the judgment of the Court pronounced on 8th February 1889 in the case of *Kennedy* v. *Stewart*, reported *ante*, p. 338, Sir Archibald Stewart raised the present action against John Kennedy, in which he sought reduction (1) of the letter written by him on 19th September 1888, which was in these terms:—"*Murtly Castle, 19th Septr.* 1888.—Dear Sir,—Having reference to my interview and conversation with you and Mr Glendinning yesterday, I now desire to say that I am willing to dispose of the entire estate of Murtly, &c., consisting of about 33,000 acres, with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, on the basis of twenty-five years' purchase of the present, or even an appraised valuation, of the nett rental thereof, as may be ascertained by an agreed appraisement, you appointing one, and me the other, and if the two cannot agree, a third party to be chosen by the two. Payment to be made in cash unless it be otherwise agreed as to any part, and possession to be given not later than the 15th of May 1889. This offer to be open for your acceptance for two weeks from this date, and on your notifying to me or to my agents (Messrs Dundas & Wilson, C.S.) of such acceptance on or before the expiry of that time it will be binding on me. In the event of your acceptance the sale is made subject to the ratification of the Court.—Yours truly, A. D. Stewart. J. S. Kennedy, Esq." And (2) of the letter to him by Kennedy dated 20th September 1888, which was in these terms:—"*Elmpark, Ettrick Road, Edinburgh, 20th Sept.* 1888.—Sir A. Douglas Stewart, Bart., Murtly Castle, Murtly.—Dear Sir Douglas,—I hereby accept your offer of the entire estate of Murtly, &c., with all the buildings and appurtenances thereto belonging, and all the rights, revenues, and issues thereof for ever, as contained in your letter to me of yesterday's date, and I agree to purchase said estate, &c., at twenty-five years' purchase of the present nett rental thereof, and that on the conditions set forth in your said letter, a copy of which is annexed hereto.—Yours

faithfully, JOHN S. KENNEDY. *P.S.*—I have acted more promptly than I would otherwise have liked to do, as I must return to the Continent at once to join my wife. I leave here to-night or to-morrow morning.—J. S. K."

With reference to the circumstances under which the said letters were written, the pursuer averred as follows:—"Early in the month of July 1888 the pursuer received a letter from Mr Peter Glendinning of The Leuchold, Dalmeny Park, desiring to know, 'in the interest of an American gentleman,' whose name he did not disclose, whether the pursuer entertained any idea of selling all or any of his estates, and if so, at what price. The pursuer was not unwilling, if a price should be offered of which he and his legal advisers approved, to convert his entailed estates into entailed money, according to the procedure authorised by the Entail (Scotland) Act 1882. The pursuer replied to Mr Glendinning that he would be glad to see him when he was in the neighbourhood. Mr Glendinning came to Murtly, and saw the pursuer on 13th July. On 18th September 1888 the defender Mr Kennedy (whom the pursuer then saw for the first time) and Mr Glendinning came to Murtly, and were shown over the Castle and grounds, partly by the pursuer and partly by his servants. The pursuer had also given a written order to enable them to visit Rohallion, Strathbraan, and Grantully, and to see the various objects of interest, which it is believed they did on the same day. On the forenoon of the next day, 19th September, Mr Glendinning unexpectedly arrived at Murtly Castle, where the pursuer and Lady Stewart were alone. The pursuer was at and about this time a frail and infirm old man, suffering from illness, and in a nervous and excitable condition. Owing to his physical and nervous state, as well as his advanced age, his mind and will were not in a good state of control. He was in a weak and facile state of mind, and easily imposed upon, unfit to conduct business or to make a bargain, and unable, from his physical and mental conditions, to resist pressure or to endure flurry or excitement. Mr Glendinning, taking advantage of these circumstances, and acting as agent for, or on behalf of, Mr Kennedy, did, by undue pressure or solicitation, and by fraud or circumvention, impose upon the pursuer, and did obtain or procure from him the said pretended letter first set forth in the summons, to his lesion as after mentioned. Mr Glendinning, after expressing regret that Mr Kennedy had been disappointed with the estates, and had not made an offer to purchase them, and enlarging on the advantages to the pursuer of such a sale, suddenly produced from his pocket a draft letter which he earnestly pressed the pursuer to copy in his own handwriting, and sign as his own letter. He represented to the pursuer that the matter was urgent and would brook no delay, and hurried and pressed him to copy and sign it immediately. The pursuer was unwilling to do so, but ultimately, being ill, nervous, and excited, and weak and facile as above mentioned, he yielded to the pressure put upon him by Mr Glendinning, and copied out the draft letter and signed it. The letter thus written and signed by the pursuer is that first set out in the summons. As soon as the pursuer had copied and signed the letter Mr Glendinning put it in his pocket and left Murtly. Throughout the negotiations for a sale of the estates above described, and in his interview with Mr Glendinning, the pursuer had in his mind the method with which, as already explained, he was acquainted, viz., the conversion of the estates into a fund of entailed money under the procedure prescribed by the Act of 1882. Mr Glendinning was well aware that the pursuer had presented a petition under that Act, as already mentioned, and that he was thus acquainted with its general scope and purpose. The pursuer was not aware of any other mode of selling an entailed estate, and it never entered his thought that he might be committing himself to sell the estate on the footing of paying compensation to the next heir or heirs of entail. Mr Glendinning at the said interview represented to the pursuer that the effect of writing the said letter would be merely to give the pursuer a little hold on Mr Kennedy in the event of his accepting its terms. Mr Glendinning thereby induced the pursuer to believe that the result of the acceptance by Mr Kennedy of the offer contained in the said letter would be a conditional bargain; that the pursuer would be bound to go to the Court for authority to sell the estates under the procedure which he knew of to Mr Kennedy, and if the Court should approve of the whole terms of the proposed bargain as fair and reasonable, and should ratify the same, that Mr Kennedy would be bound to purchase on the same terms; but that, if the Court should hold that the price was inadequate, the pursuer would not be bound to sell at the price proposed. The pursuer was induced to believe, and did believe, that the whole matter would on Mr Kennedy's acceptance be still open for investigation and consideration in the application to the Court, and that he might obtain the advice of his law-agents as well as the protection of the Court as above mentioned. The pursuer when he wrote out and signed the said letter was under essential error as to its meaning and effect as above set forth, and said error was induced by the representations made to him by Mr Glendinning. The said representations were false and fraudulent. Or otherwise, Mr Glendinning believed that the meaning and effect of the said letter were such as the pursuer believed and was induced by Mr Glendinning as above stated to believe them to be, in which case the pursuer avers that the contract embodied in the said letter and the defender's reply thereto was entered into under mutual essential error on the part both of the pursuer and defender as to its tenor and effect as above set forth.

The pursuer pleaded, *inter alia*—"(1) The pursuer is entitled to decree of reduction as concluded for, in respect that the said letter dated 19th September 1888 was impetrated from him to his lesion by Mr Glendinning, as agent for or on behalf of Mr Kennedy, by undue pressure and solicitation, and by fraud or circumvention, he being in a weak and facile condition, and easily imposed upon, as set forth in the condescendence. (2) The pursuer is entitled to decree of reduction as concluded for—1st, Because the said letter of 19th September 1888 was signed by him under essential error. 2nd, Because in signing the said letter the pursuer was under essential error induced by the said Mr Glen-

dinning. 3rd, Because in signing the said letter the pursuer was under essential error, induced by false and fraudulent representations made by Mr Glendinning."

The defender pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant."

The pursuer proposed the following issues for the trial of the cause:—"(1) Whether, on or about 19th September 1888, the pursuer was weak and facile in mind, and easily imposed upon; and whether Mr Peter Glendinning, of The Leuchold, Dalmeny Park, taking advantage of the said weakness and facility, did, by fraud or circumvention, impetrate and obtain from the pursuer the letter, dated 19th September 1888, No. 7 of process, to his lesion? (2) Whether in granting the said letter the pursuer was under essential error as to its import and effect? (3) Whether in granting the said letter the pursuer was under essential error as to its import and effect, induced by the said Peter Glendinning? (4) Whether in granting the said letter the pursuer was under essential error as to its import and effect, induced by false and fraudulent representations made by the said Peter Glendinning? (5) Whether the said letter, and the acceptance, No. 11 of process, were granted by the pursuer and defender under mutual essential error as to their import and effect?"

The Lord Ordinary (KINNEAR) on 28th May approved of the first issue proposed, and appointed it to be the issue for the trial of the cause, but disallowed the other issues.

"*Note.*—The averments appear to me to be sufficient to support the first issue, but the remaining issues proceed on the assumption that the issue of facility and fraud or circumvention has been negatived, and on that assumption there is in my judgment no relevant averment of error.

"It is not alleged that the parties were under error as to any of the essential terms of the contract, but only that the pursuer did not know at the time that he could be required to execute the contract in the manner determined by the judgment of the Court. But a contract deliberately executed on the terms which the parties intended cannot be set aside on the ground that one of them misunderstood its legal effect. They are bound by their contract according to its true construction, and the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him."

The pursuer reclaimed, and argued—The averments on record entitled the pursuer to an issue both of essential error and of fraudulent misrepresentation. As to the former the pursuer had but one idea in his mind at the time that he consented to the sale, and that was the conversion of his entailed estate into entailed money under the provisions of the Entail Act 1882. This, by the decision of the Court, it had been found impossible for him to do, and in that respect there was such essential error as entitled the pursuer to get behind the contract. No doubt *ignorantia juris neminem excusat*, but the "jus" thus referred to was the public law of the country which everyone was to be held to know—*Mercer* v. *Anstruther's Trustees*, March 6, 1871, 9 Macph. 618—whereas the special law applicable to any particular contract was really a question of fact—*Cooper* v. *Phibbs*, L.R., 2 Eng. & Ir. App. 149, Lord Westbury at p. 170; *Beauchamp* v. *Winn*, L.R., 6 Eng. & Ir. App. 223, Lord Chelmsford at p. 234. The error here was one of fact and not of law, and the essentials upon which the parties were at variance was the price, instead of the liferent interest of the whole purchase price; the pursuer, after providing for compensations, would, in consequence of the decision of the Court, only have the benefit of a very small balance. Of the five grounds of error for setting aside a contract enumerated in Bell's Prin. sec. 11, the present case fell under (sub-sec. 3) the price, and (sub-sec. 5) the nature of the contract. Similar averments had been held sufficient to entitle a pursuer to an issue of error—*Maconochie* v. *Macindoe*, December 23, 1853, 16 D. 315; *Johnston* v. *Graham*, July 15, 1856, 18 D. 1234; *Wemyss* v. *Campbell*, June 6, 1858, 20 D. 1000; *M'Laurin* v. *Stafford*, December 17, 1875, 3 R. 265. There was in the present case a suspensive condition which distinguished it from those cited on the other side—*Johnston* v. *Johnston*, March 11, 1857, 19 D. 706. Glendinning's actings showed, if not a case of fraud, then one of mutual error, and the pursuer was entitled on his averments to an issue on one or other of these grounds. As to the mode of trial, the pursuer was entitled to have the issues sent to a jury unless he consented to the cause being tried otherwise—*Trotter* v. *Happer*, November 24, 1888, 16 R. 141.

Argued for the respondent on the 2nd, 3rd, and 4th issues—The pursuer's averments did not disclose a case of essential error, nor had the authorities cited any bearing on the present question. In order that error might be a ground of reduction it was necessary that it should be in the substantials of the contract and prevent consent. If the pursuer were to be successful in setting aside this contract, then any party who had entered into a bargain which was construed in a certain way by the Court might make out that he was not to derive the benefit he contemplated from his bargain, and claim to go before a jury on a case of error *in essentialibus*. Further, essential error to invalidate the contract must affect both parties. Mere misunderstandings were not sufficient, and in the present case all the essentials of the bargain had been completed. The parties had fixed the price, and all that the Court had to do was to safeguard the interests of succeeding heirs. Its ratification had nothing to do with the price—Pollock on Contracts, pp. 390 and 403; *Bentley* v. *Mackay*, 4 De Gex, Fisher, & Jones, 285; Ersk. iii. 1, 16; Stair, i. 9, 9, and iv., 40, 24. Error in the subject or person was to be distinguished from error as to the legal effects of the bargain when carried out, which latter was not a ground of reduction. There was no error here as to the price, only as to its disposal, and that was not an essential—Bell's Prin. sec. 11. In the following cases, resembling the present, an issue of essential error was disallowed—*Hog* v. *Campbell*, March 12, 1864, 2 Macph. 848; *Yeatman* v. *Proctor*, November 17, 1877, 5 R. 179; while in *Beresford's Trustees* v. *Gardner*, January 27, 1877, 4 R. 363, an issue of fraudulent misrepresentation, as well as one of essential error, was sought, but the latter only was granted. In the present case there was no

relevant averment of essential error induced by misrepresentation, and the issues based on these averments should be disallowed, as all that could go to the jury was the pursuer's *innuendo*—*Munro* v. *Strain*, February 14, 1874, 1 R. 552; *Dryer* v. *Birrell*, February 8, 1883, 10 R. 585. As to issue No. 1—There was no issuable matter, for it was not alleged in what the fraud consisted, and how the pursuer was unduly pressed into the bargain. With regard to the mode of trial, this was essentially a case to be tried by a Judge without a jury in order that justice might be done to both parties. The questions were involved, and there was a sentimental side which would be sure to weigh unduly with a jury—*Hume* v. *Young*, January 19, 1875, 2 R. 338; Mackay's Practice, i., p. 35; The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112); *Trotter* v. *Happer*, November 24, 1888, 16 R. 141.

At advising—

Lord President—There are some matters in this case upon which I think none of your Lordships have ever entertained any doubt. The first of these is as to the right of the pursuer to obtain the first issue. I am very clearly of opinion that there is a relevant case presented on record in support of that first issue. The other matter to which I refer is that there is no relevant averment on record of misrepresentation or fraudulent concealment inducing the essential error alleged upon the part of the pursuer; and therefore there remains for consideration only the question of the pursuer's right to the second issue as to essential error. That question, I think, must be taken on the assumption that the pursuer fails on his first issue, and also on the assumption that he was not led into the supposed error by misrepresentation or undue or fraudulent concealment. I am of opinion that there is no relevant averment of essential error on record, and that the proposed issue faithfully reflects the irrelevant averment. The error alleged and proposed to be submitted to the jury is error as to the import and effect of the contract sought to be reduced. But a contract cannot be reduced on the ground of error unless the error be in the essentials of the contract. In innominate contracts it is sometimes difficult to ascertain or define precisely what are the essentials, but it is not so in nominate contracts, such as the contract of sale with which we are here concerned. The essentials of this contract are the identification of the parties contracting, the subject sold, and the amount of the price; and as regards these in the present case there is no room for doubt. The parties are certainly ascertained, the lands are sufficiently described in the missive, and the price is twenty-five years' purchase of the nett rental. As to the application of the price the purchaser has no interest or concern, and nothing can be an essential of a contract which does not concern both the parties. Neither is there any error as to the nature of the contract, as in the case of a person signing a disposition believing it to be a lease, or a bond for borrowed money believing it to be a testament. The parties well knew they were making a contract of sale and nothing else. The error which the pursuer says he laboured under when he signed his letter was, that according to its terms he believed he would sufficiently fulfil his obligation as an entail proprietor by selling under the authority of the Statute of 1882, and thereby converting the entailed lands into entailed money. It has been found by our judgment in the previous action that if he entertained this belief he was wrong as to the construction of the offer which he made, and which was accepted, and that according to its true construction he was bound to proceed under the Act of 1853 to obtain ratification by the Court of a sale made and a disposition granted before the Court's interposition is asked. The condition thus introduced into the contract of sale was a potestative condition, which the seller was bound to fulfil to the utmost of his power, and the Court upon an application under the Act of 1853 cannot alter the terms of the contract of sale made by the parties. The Court is no doubt bound to see that the pecuniary interests of the creditors and heirs of entail are not prejudiced by the contract, and if they are it will be the duty of the Court to refuse the application before them on the ground that the sale was for that reason *ultra vires* of the seller. But there is no medium course between ratifying or refusing to ratify the sale according to its terms and conditions. The pursuer has made a contract of sale complete in all its essential parts, but a question arose between the parties as to the construction of one of its clauses not affecting the essentials. That question has been decided against the pursuer by this Court acting as a Court of construction, and the pursuer now demands that because he was wrong in his construction he shall be entitled to set aside the contract. If this plea were listened to, every litigant who is unsuccessful in a question as to the construction and effect, or, to use the pursuer's own words, the import and effect, of the contract would at once have the remedy of reducing the contract which he had deliberately made, and afterwards persistently misconstrued. For these reasons I am against granting the second issue proposed, and on the whole matter I am for affirming the interlocutor of the Lord Ordinary.

Lord Mure—I agree in the opinion which your Lordship has so very clearly expressed as to the second issue of essential error. I think there is no mistake here as to the nature of the contract. The contract is a simple contract of sale, and as I read the letter of the pursuer the subject-matter of that contract, the parties to it, and the price at which the property is to be disposed of, are all fixed; and these are the essentials of a contract of sale. Now, that being so, I am unable to see that what the pursuer here alleges as to his mistake in the matter is an error of a description that is relevant to reduce that contract. The error alleged is simply that he misunderstood or mistook the effect of the stipulation, that the sale should be subject to ratification by the Court; that he thought that would have a particular effect; and he finds he is now mistaken as to what that effect would be upon the application being made. Now, I do not think that is such an error as a party can be allowed to propone as a good ground for reducing a contract; and on that ground, and for the reasons stated by your Lordship, I agree that the interlocutor of the Lord Ordinary should be affirmed.

Lord Shand—I agree with all of your Lordships in holding that the pursuer is entitled to have an issue for the trial of the cause founded on his averments of facility and lesion in entering into the contract which he seeks to reduce. I am also of opinion that there is no relevant statement of misrepresentation by Mr Glendinning as an inducing cause to lead the pursuer to enter into the contract. The single averment of misrepresentation is made in these terms:—"Mr Glendinning represented to the pursuer that the effect of writing the said letter" (meaning the letter of offer to sell the estates) "would be merely to give the pursuer a little hold on Mr Kennedy;" and I do not think that on any reasonable construction of the effect of these words, even in the circumstances in which they are said to have been used, they will bear the meaning which the pursuer has affixed to them in article 7 of the condescendence.

I am further of opinion that no good cause has been shown for having the trial of the cause before a judge whose verdict is subject to an appeal in place of a jury. On the contrary, it appears to me to be extremely desirable that the tribunal whose verdict shall be final on the facts in this case, where so much must depend on the manner in which the evidence of the pursuer and Mr Glendinning is given, as well as on the substance of that evidence, should themselves see and hear the witnesses.

But with all anxiety to avoid any difference of opinion as to the issues to be sent to trial, I have, after the best consideration I could give to the matter, come to the conclusion that the pursuer has stated a case which entitles him to an issue of essential error on his part in entering into the contract.

The former action between the parties related exclusively to the meaning of the contract and the mode of enforcing it. Of the two meanings which were presented by the parties, the Court were of opinion that the construction for which the present defender contended was the true construction according to the proper and legal meaning of the terms used.

The pursuer, accepting this decision as conclusive, as indeed he is bound to do, says, however, in the present case, that if that be the true construction and legal meaning of the words employed in his letter of offer, then he was under essential error, for in using the language he did, and which indeed was a transcript of a paper brought to him by Mr Glendinning, he never intended to make the contract to which he has been held bound, and the difference between that contract and the bargain which by the terms of his offer he intended to enter into, is so material in regard to the substance and effect of this contract itself as to amount to an error in the essentials of the contract against which the law will give redress, though it may be there will be liability on his part for at least the expense which has been thus caused to the other contracting party. The question for determination is—taking the decision of the Court as settling the true meaning of the pursuer's offer of sale—Was there ever really *in idem placitum consensus et conventio*, or were the parties making a contract as to the meaning of which there was an essential difference—a difference in essentialities—between them?

The important words of the offer in the present question, without which indeed it could scarcely have arisen, are these—"In the event of your acceptance the sale is made subject to the ratification of the Court." These words, it must, I think, be conceded, admit of construction—by which I mean it may be fairly said of them that they might in the minds of the contracting parties respectively be used and taken in a different sense—in one sense by the proposed seller, in another sense by the purchaser. Both parties knew they were dealing with an entailed estate, and by a sale "subject to the ratification of the Court," might honestly and fairly be meant (as the pursuer says he understood the words) a ratification which inferred examination and inquiry by the Court into the transaction in the interest of the heirs of entail, and therefore the consideration by the Court of the question of the adequacy of the price, in the view that the entailed estate was to become entailed money, in which the future heirs of entail were interested; or it might properly mean, as the defender understood it, and the Court has held it did mean, on a sound construction of the language, that the Court was to give its approval of the sale and proceedings without any inquiry as to the future interest of heirs of entail, on the footing that the estate was to be disentailed without any substitution of entailed money, in which case all that the Court had to regard was, that present interests affecting the estate were duly provided for, without any regard to the question whether the price was adequate or not. It is clear on his statement that whether the difference was vital and essential or not, it was one of great importance to the pursuer. The difference was so great, as I think I shall immediately show, that in the pursuer's view the contract was made subject to a suspensive condition which might never be purified, while according to the meaning to which the Court has given effect there was no such suspensive condition, because the pursuer was in a position to secure the approval of the Court to the sale, and bound to take the proceedings necessary to obtain this.

It was partly in the view of this material difference which might exist in the understanding of the parties of the meaning of the language which they used, that in the outset of the opinion in the former case I expressed myself thus—"I concur with Lord Mure in thinking that the only question to be determined in this case is in regard to the meaning of the words 'In the event of your acceptance the sale is made subject to the ratification of the Court,' and I think in determining the meaning of these words we must have regard to what the purchaser was entitled to take to be their meaning. It is not a question entirely of what was in the mind of the seller when these words were used; but the question is, how was the purchaser entitled to read these words when he gave a written acceptance of the offer?"

Now, what the pursuer in this action states is, that being quite aware that the Entail Statutes enabled him to sell the estate of Murtly and to convert the price into entailed money, and believing that this could be effected by a private sale, he entered into the contract of sale with that view. He knew by his previous experience, in an application which he had formerly pre-

sented to the Court, that the Court itself made independent inquiry into the propriety of the bargain, and particularly as to the price, in the interest of future heirs of entail, and that the Court would only ratify or approve of the sale if fully satisfied as to the advantage to be gained by the sale, and he therefore stipulated as a condition of his contract that the sale should be "subject to the ratification of the Court." He stated in article 7 of the condescendence that he understood that he was entering into a "conditional bargain," "that he would be bound to go to the Court for authority to sell the estates under the procedure which he knew of to the defender, and if the Court should approve of the whole terms of the proposed bargain as fair and reasonable, and should ratify the same, that Mr Kennedy would be bound to purchase on the same terms, but that if the Court should hold that the price was inadequate, the pursuer would not be bound to sell at the price proposed."

The present question is to be decided on the assumption that this statement is true, and that the pursuer is prepared to prove it. It is clear that on this assumption the pursuer, who was concluding a bargain involving the sale of an estate admittedly worth nearly £400,000 without the intervention of any law-agent, and with a certain degree of haste, was stipulating for a means of completely safeguarding himself against any improvidence in the bargain which he agreed to in such circumstances. But I apprehend, as I have already indicated, that he was in his view, and as he believed by the very language of his offer, stipulating for a ratification by the Court which operated as a suspensive condition of the sale, and not a mere potestative condition only, for if the result of independent inquiry by the Court was that the price agreed on was inadequate, as the pursuer now avers it to be, then there would be no ratification on approval, and consequently no sale.

Now what, on the other hand, was the contract which the defender meant to conclude and did conclude by the language used? It was in effect an absolute not a conditional sale—at least a sale in which there was no suspensive condition which could in any way prevent the sale being carried out. He understood the words "subject to the ratification of the Court" to mean merely the formal approval of the transaction which the Court would necessarily give on the pursuer's application, and on his meeting all claims against the estate, and paying compensation to the next heir for his interest. In this question the Court is called on not to construe the language used, but to go behind the language of the contract to the intention and mind of the parties. Taking it so, according to the pursuer's statement, the sale which the Court has held to have been made was a sale such as he did not know that it was even in his power to make, and it would not be surprising that he should have been ignorant of his right to compel the nearest heir of entail to consent to a disentail on payment of compensation, as this power was only introduced by the Act of 1882.

Was there then here *consensus in idem* between the parties? Each of them no doubt knew perfectly the person with whom he was dealing, and knew the subject of the contract, the estates of Murtly. But were they of the same mind, consenting to the said contract in reference to the price, and in reference to the nature of the contract itself? Professor Bell in his Principles, in section 11, referred to in the argument, states, and I do not doubt with perfect accuracy, that error *in essentialibus* may exist (sub-sec. 3) in relation to the price or consideration, and (sub-sec. 5) in relation to the contract itself supposed to be entered into. Taking the last of these points first, the pursuer was consenting to a sale subject to a suspensive condition which might operate to prevent a concluded sale ever being carried out; he was consenting to a sale which could only be carried out after an independent inquiry by the Court, and after the Court became satisfied that the transaction was advantageous to the heirs generally. It seems to me that such a contract differs *in essentialibus* from what in effect is an absolute sale, a sale subject to a potestative condition only, which the pursuer can be compelled to carry out. A sale which in the intention of the seller is made subject to a suspensive condition, as contrasted with an absolute sale made contrary to his intention, in a particular case where the condition is vital and important, may be quite as truly a difference in essentials as to the nature of the contract itself as the difference between a lease which a party thinks he is agreeing to when he is truly agreeing to a sale, which is the case commonly cited as the clearest illustration of an error *in essentialibus* as to the nature of the contract.

Then as to the price, there was so far agreement between the parties that the price should be twenty-five years' purchase of the rental. But the defender consented to the purchase on the footing that the price was absolutely fixed and certain. The pursuer, however, consented to the sale on the footing only that the price should be reconsidered by the Court after inquiry, and that unless the Court thought the price adequate it should not be accepted. This again appears to me to have been a difference *in essentialibus* between the parties in the making of the contract.

The Lord Ordinary in his judgment has said—"It is not alleged that the parties were under error as to any of the essential terms of the contract, but only that the pursuer did not know at the time that he could be required to execute the contract in the manner determined by the judgment of the Court. But a contract deliberately executed in the terms which the parties intended cannot be set aside on the ground that one of them misunderstood its legal effect. They are bound by their contract according to its true construction, and the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him;" and I understand his Lordship's view there expressed is approved of by your Lordships now. If his Lordship in saying that it is not alleged that the parties were under error as to "any of the essential terms" means that the pursuer and the defender were agreed not only as to the language to be used, but also as to the nature and substance of the contract itself in all its essential terms and conditions, and that the pursuer has averred nothing to the contrary, then for the reasons I have explained I cannot agree in his Lordship's view.

If, again, in the following part of the passage now quoted his Lordship means that where there

has been in all material respects *consensus in idem placitum* between the parties to a contract, one of them cannot be relieved of it because of his discovering at a later time that its effect or consequences will in some respect be injurious to him, or not so beneficial to him in the result as he expected, then I agree in the statement. For example, if in the present case the parties in entering into the contract were agreed as to its essentials—both understood that the contract was unconditional and the price absolutely fixed—the pursuer could not, I think, obtain relief on the ground that he was under the erroneous belief that the price when obtained could be entailed as a substitute for the land, and that he would not be bound to pay compensation to the next heir. That would be a case where the parties were agreed as to the essentials of the contract they were entering into—were agreed as to the terms, meaning thereby the essential conditions and not merely the language of the contract, although one of them did not realise what its legal effect or consequences to himself ultimately would be. If the error were one merely as to the application of the price, the parties being agreed on the essentials of the contract, there would, I think, be no such remedy as the pursuer here asks. But the pursuer's position, it appears to me, entirely differs from this, for his case is, that though the language used was unfortunate for him he shall not be bound by it as construed by the Court, because the parties were not in their intention consenting to and entering into the same contract. A contract may be "deliberately executed in the terms which the parties intended," meaning by this, in the language used to express their mesning, and yet there may be misunderstanding as to the true meaning and effect of the language, clear error *in substantialibus*, and an absence of mutual consent to the same contract. In this instance the parties agreed to the language used, but they differed vitally in intention as to the meaning and effect of the important words, "the sale is made subject to the ratification of the Court."

The defender argued that because the construction of the contract has been decided against the pursuer the pursuer could have no remedy by way of reduction on the ground of essential error, and the Lord Ordinary seems to have given countenance to that view when he says—"the pursuer cannot be relieved of his obligation because upon a question of construction judgment has been given against him." I confess I find myself unable to follow this reasoning. Of course if the pursuer had succeeded in his argument in the former case on the true construction of the argument he would never have required to resort to the remedy of an action of reduction of the agreement on the head of error, though in that case it might have been open to the defender on the other hand to have raised such an action on the ground that he never understood that he was entering into a contract as so interpreted—a contract conditional in its nature, and at a price not conclusively binding on both parties. It is only because the pursuer finds that the contract has been construed as an absolute sale on his part at a price finally fixed, that he brought this action on the ground that there was never any real consent on his part to such a bargain. The same thing might occur, and no doubt has occurred, where loose or ambiguous description of lands, the subject of a contract of lease or sale, has been given in the deed or correspondence between the parties. Each will properly in the first instance maintain his construction of the contract as creating the greater or lesser right. But the defeated party will surely not be precluded from setting aside the contract altogether on the ground of error in its inception and absence of *consensus in idem* as to the subject of the contract, because the construction of the language used is determined against him.

I do not see that it forms any ground for refusing the remedy of reduction on the head of essential error that on the question of construction judgment has been given against the pursuer. And on the grounds I have stated I think the pursuer is entitled to an issue putting the question whether in entering into the contract he was under essential error as to its nature and effect, which is, I believe, the form of issues under which questions of essential error have been in use to be tried.

Lord Adam—I do not understand that there is any dispute that the pursuer and defender entered into a contract here, and that that contract is contained in a letter from the pursuer addressed to the defender dated 19th September 1888, and the defender's answer of the 20th of September.

That the parties entered into a contract by that letter and answer I do not think there is any doubt. Nor do I think there is any doubt as to the nature of the contract which they thereby entered into. It was a contract of sale, and not a contract of lease, or anything of that sort. The meaning of error as to the nature of a contract is that the parties have been in error as to the kind of contract—contract of sale or contract of lease, or any other contract that they meant to enter into. If there is error as to that, then a party may have relief, but not otherwise. If there is no error as to the nature of the contract I have always understood that no averment of error is relevant to reduction, unless it was an averment of error as to essentials of the contract; and I have always understood that the essentials of a contract of sale are three, viz., the person, the subject, and the price. If there is no error on these three points, then I understand there can be no relief against such a contract, however much in point of pecuniary value one of the parties may be prejudiced by the contract which he has entered into. If the error does not enter into one of these three essentials he can have no redress. Now here, as I understand, there is no mistake as to the person. The pursuer and defender made the contract with each other. There is no mistake as to the subject. The estates of Murtly and Grantully were the subject of the contract. There is no mistake as to the price. The price is distinctly fixed by the written contract between the parties, viz., twenty-five years' purchase of the nett rental. These three essentials of a contract of sale are embodied in the offer and acceptance, and I do not find any error as to these essentials at all. But the error which the pursuer says he fell into was this—he says, when I used the words in my

letter, "In the event of your acceptance, the sale is made subject to the ratification of the Court," I mistook the meaning of the word ratification; what I had in my mind was that proceedings must be taken under the Entail Act of 1882, the effect of which is that the Court would order a sale of the subjects, and would determine the price, and further, that when the price was determined it should just be a substitution of entailed money for entailed land. That, he says, is what he meant by ratification. Whereas he says the Court have found that the meaning of it is this, that you shall prepare a disposition, and the Court (as they have the power to do on being satisfied that the interests of the creditors and of the next heir of entail are secured) will approve, and must approve of that disposition, and so the sale will be carried out. That is the error which he avers, and from which he wants relief. Now that is not an error which to my mind goes to the essentials of the contract at all. It appears to me to be simply this, that Sir Douglas Stewart understood that the price of from £300,000 to £400,000 should be disposed of in a particular way. Now, Mr Kennedy, the defender, the other party to the contract, has no concern with the application of the price, and therefore I cannot see how that can be an essential of the contract. Nor do I see that the magnitude of the pecuniary or other result arising from the construction put upon the contract by the Court can make that an error *in essentialibus*. We had a case lately in which the error of the parties as regards amount was very considerable. I refer to the case of *The Steel Company of Scotland* v. *Tancred, Arrol, & Company*, February 1, 1889, 16 R. 440, where the pecuniary result arising from one reading of the contract amounted to many thousand pounds. Yet the magnitude of the result of a certain construction of the contract did not affect the question of the essentiality, simply because it did not go to one of the essentials of the contract itself. Now, what is there more in this contract than that? The contract is in writing, and the Court have construed it, bringing out certain results. But this does not affect the essentials of the contract. The price is the same as before, the subject is the same, and the persons are the same. All Sir Douglas Stewart can say is this, I entered into a contract, and when I used the word ratification I used a word which, as the result has shown, I was not fully acquainted with the meaning of. That is all. But in my humble opinion that does not go to the essentials of the contract. If Sir Douglas Stewart has used language which the Court has been forced to construe to his prejudice, I do not see that the defender has anything to do with that. It does not in my mind go to the essentials of the contract, and therefore I think with your Lordship that there is no relevant averment of essential error on this record. On these grounds I concur with your Lordship.

The Court adhered and remitted to the Lord Ordinary to proceed with the cause.

On 29th June the defender applied to the Lord Ordinary (KINNEAR) to fix a day for the trial of the cause.

The pursuer objected, on the ground that the judgment above referred to had been appealed to the House of Lords.

The Lord Ordinary reported the case to the First Division.

Argued for the defender—The issues proposed by the pursuer did not in any way depend upon each other, and the very worst that could happen to the pursuer was that he might have to undergo two jury trials, but that would only be in the contingency of his failing in the trial in this Court on the issue allowed, and at the same time his being successful in his appeal to the House of Lords. There were many reasons also why the trial should be allowed to proceed without more delay; the pursuer was old and infirm, and if anything happened to him before this trial was concluded the defender's chance of getting this estate would be at an end; and the purchase price was very large, and it was a hardship on the defender to have so large a sum tied up for an indefinite time. On the ground of expediency the motion should be granted, and it was quite competent.

Argued for the pursuer—The course proposed by the defender if not incompetent under the Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 13, was most inexpedient, and no sufficient reason had been suggested why the Court should depart from the rule usually followed in such cases—*Johnston* v. *Johnstone*, 1859, 3 Macq. 619 and 624.

At advising—

LORD PRESIDENT—The motion of the defender is founded on section 13 of the Court of Session Act 1850, which provides as follows:—"And be it enacted that no reclaiming-note to the Inner House and no petition of appeal to the House of Lords in any process before the Court of Session, shall be held to remove such process from before the Lord Ordinary or the Court, as the case may be, as regards any point or points not necessarily dependent on the interlocutor so submitted to review, but such process shall for all purposes and to all effects not necessarily dependent on such interlocutor remain before the Lord Ordinary or the Court, as the case may be, and shall be proceeded in by the Lord Ordinary or the Court notwithstanding such reclaiming-note or appeal if it appear to the Lord Ordinary or the Court to be expedient and proper." The first question which we have to determine then, is, whether the present application is "necessarily dependent on the interlocutor submitted to review" by the pursuer's appeal to the House of Lords.

Now the interlocutor submitted to review is Lord Kinnear's interlocutor of 28th May, and it is in these terms:—"The Lord Ordinary holds the issue, No 12 of process, as now amended, as adjusted and settled, approves of the same as now authenticated accordingly, and appoints the same to be the issue for the trial of the cause;" and this interlocutor we affirmed on the 25th June.

If the judgment of this Court is reversed by the House of Lords on the ground that there are relevant averments of essential error, then it is apparent that there must be more than one issue in the cause. But Lord Kinnear has decided that there is to be one issue only, and accordingly what the House of Lords will in the first place have to determine is whether Lord Kinnear's judgment is sound or not.

If that judgment is reversed, then the issue approved by the Lord Ordinary will not be the

issue for the trial of the cause, and it is in every way undesirable that there should be two trials. I have great doubts as to the competency of our proceeding with the cause here pending this appeal, and if any doubts exist as to the competency, that puts an end to the expediency of the course proposed.

I am therefore for refusing the motion.

Lord Mure and Lord Adam concurred.

Lord Shand was absent.

The Court refused the motion.

Counsel for the Pursuer — Balfour, Q.C.— Asher, Q.C. — Dundas. Agents — Dundas & Wilson, C.S.

Counsel for the Defender—Lord Adv. Robertson Q.C.—Murray—Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 29.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BLASQUEZ *v.* LOTHIANS RACING CLUB AND ANOTHER.

Reparation—Slander—Wrongful Expulsion from Ring at Race Meeting—Jury Trial.

A went to the meeting of a racing club, and was admitted to the ring on payment of the usual charge of 10s. B, a bookmaker, having pointed him out to the inspector of the ring as a man "who owes me money," A was expelled from the ring by the police.

In an action of damages by A against the racing club and B the defenders submitted that the case was not appropriate for jury trial, in respect that it involved difficult questions (1) with regard to the construction of the Jockey Club rules, under which the meeting was held, and which conferred on the racing club and its members neither direction nor authority in controlling the proceedings; (2) with regard to the right conferred by payment for admission to the ring, which they averred was a mere licence liable to be withdrawn for certain reasons; and (3) as to whether it was actionable to charge a person with failure to pay his gambling debts, betting being illegal. *Held* that the case was appropriate for trial by jury, and issues ordered.

Reparation—Slander—Issue—Innuendo—Counter Issue.

In an action of damages for slander the pursuer obtained an issue whether the defender in the ring or paddock of the "Lothians Racing Club and Edinburgh Meeting" at Musselburgh, and in the presence of certain parties named, falsely and calumniously said of and concerning the pursuer, "This is the man who owes me money," or used words of similar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer?

The defender proposed a counter issue. *Held* that the counter issue must fully meet the *innuendo*, and must include the words "and was a person who ought not to be allowed to remain in the said ring or paddock."

On 5th October 1888 Raymond Blasquez attended the meeting of the Lothians Racing Club held on Musselburgh Links. On payment of the usual charge of 10s. he was admitted to the paddock or ring. Shortly after he had entered the ring a bookmaker named Cosmo Reid came up in company of the inspector of the ring, and pointing to Blasquez said to the inspector "This is the man who owes me money," or some words to that effect. Having received this information the inspector ordered a detective to remove Blasquez from the ring, which was done.

In consequence of his expulsion from the ring Blasquez brought the present action of damages against the members of the Racing Club and Cosmo Reid. Damages were laid at £5000 against the defenders jointly and severally, or alternatively at £3000 against the members of the Racing Club, and at £2000 against Cosmo Reid.

The pursuer's averments were to the effect that he had been wrongfully and unwarrantably expelled from the ring by the inspector, in the presence of a number of people to whom only one explanation of the incident was possible, namely, that the pursuer had been guilty of criminal or dishonourable conduct which debarred him from associating or meeting with gentlemen. As the meeting was under the management and control of the Racing Club they were responsible for the pursuer's expulsion from the ring. Reid's statement that the pursuer owed him money, and which was made in the presence of, amongst others, Augustus Powell, medical student, Edinburgh, and Walter Sprott, of the Edinburgh police force, was false and calumnious, and was meant to imply and did imply that he was owing him money on betting transactions which he dishonourably and fraudulently refused to pay, and that he was unfit to remain in the ring, and ought to be publicly and ignominiously expelled therefrom.

The defenders, the members of the Lothians Racing Club, in answer averred that the meeting was held as usual under the rules of racing of the Jockey Club, under which the Lothians Racing Club and its members had neither direction nor authority in the conduct of the proceedings at the meeting other than that they nominated the stewards and the clerk of the course, who required to be approved by the committee of the Jockey Club, and when so approved had the entire control and authority independently of the said Lothians Racing Club. Payment for admission to the ring conferred no absolute right, but a mere licence or franchise which was liable to be withdrawn; and in accordance with the rules of racing, and of all meetings conducted under the Jockey Club rules, the stewards and the clerk of the course, and the inspector of the ring, acting under their authority, had power to

exclude or expel, *inter alios*, any person who was a defaulter, or who disturbed or threatened to disturb the peace. Such power was absolutely necessary for the safety and comfort of the general public who frequented the ring. On the occasion in question the defender Reid, who was known by the inspector of the ring to hold a respectable position as a bookmaker, informed the said inspector that the pursuer was a defaulter, as he owed money to him on betting transactions. The inspector having informed the pursuer of what was alleged against him the latter returned an evasive answer, and was violent in his language and conduct, and the ring inspector, believing him to be a defaulter, and likely to create a disturbance, informed him that he must leave the enclosure, and on his refusal to go requested a detective to remove him, which he did without force or violence.

The defender Reid adopted the averment of the Lothians Racing Club that the meeting was under the rules of racing of the Jockey Club, and the statement with regard to the nature of these rules. He admitted that he informed the ring inspector that the pursuer was a defaulter, and set forth various sums which he averred were owed by the pursuer to him for betting transactions which he had executed for the pursuer on commissions.

The pursuer pleaded—"(1) The defenders, the said Lothians Racing Club, being liable and responsible for the official or officials in charge of the said ring or paddock, or for the official known as the inspector of the paddock, are liable to the pursuer in damages in respect of the wrongful expulsion of the pursuer from the said paddock. (2) The defender Cosmo Reid having instigated, procured, and been a party to the pursuer's wrongful expulsion, is liable to the pursuer in damages in respect thereof. (3) The defender, the said Cosmo Reid, having falsely, maliciously, and calumniously slandered the pursuer, is liable to the pursuer in damages. (4) The whole defenders having been jointly concerned in the pursuer's wrongful expulsion from said paddock, are jointly and severally liable to the pursuer in respect thereof."

The defenders, the Lothians Racing Club, pleaded—"(2) The statements of the pursuer are not relevant to support the conclusions of the action so far as directed against these defenders. (3) These defenders having, in terms of the rules under which the said meeting was conducted, no authority or control at the said meeting, they ought to be assoilzied. (5) *Separatim*—1st. The pursuer having, on the occasion in question, acquired no right of entry to the ring, but merely a revocable permission to be there, and no unnecessary force having been used in removing him, these defenders are not liable in damages for his expulsion as concluded for: 2nd. In respect that the ring inspector, having probable cause to believe the pursuer to be a defaulter, and to apprehend a disturbance and breach of the peace, was justified in removing the pursuer from the ring, these defenders ought to be assoilzied: 3rd. The ring inspector having used no force or violence towards the pursuer, but merely, in the performance of his duty, called in the aid of the police, these defenders ought to be assoilzied."

The defender Reid pleaded—"(1) The pursuer's averments being irrelevant and insufficient, the action ought to be dismissed. (3) The statement complained of as having been made by the defender to an official of the Lothians Racing Club, being true in point of fact, neither it nor the actings of the said official or others thereon, can form a just ground of action against this defender. (4) The defender, not having authorised nor asked the exclusion or ejection of the pursuer from the said ring or paddock, is entitled to absolvitor."

The Lord Ordinary (WELLWOOD) on 28th May 1889 allowed parties a proof of their respective averments, and to the pursuer a conjunct probation, and appointed the proof to proceed on a day to be afterwards fixed.

"*Opinion.*—Both defenders, the Lothians Racing Club and Cosmo Reid, plead that the action should be dismissed on the ground of irrelevancy. The objections stated for the Lothians Racing Club raised, *inter alia*, a question as to the right of the owners or occupiers of lands or premises to expel at their discretion, and without assigning any reason, a person who has paid for admission, leaving the person so expelled to recover if he can in an action for breach of contract. The defender Cosmo Reid again maintains broadly that it is not actionable to charge a man with having failed to pay a gambling debt, because betting being illegal, no one is legally bound to pay such debts. I forbear to express any opinion on those and other questions of law going to the relevancy of the pursuer's averments, because I do not think that they can be satisfactorily disposed of until the precise facts are ascertained. I have accordingly allowed a proof before answer.

"The defenders moved that in the event of my not dismissing the action the case should be tried in the way which I have directed. The pursuer, on the other hand, maintains that he is entitled to have the case tried with a jury, and that he should be allowed issues—one against both defenders applicable to the expulsion of the pursuer from the paddock, and the second against the defender Cosmo Reid in respect of the alleged slander. In ordinary circumstances, this being an action of damages and involving a question of slander should be tried with a jury; but I think that looking to the difficulty of the questions raised, and the whole character of the case, sufficient cause has been shown to warrant me in directing that it shall be disposed of on a proof before a judge without a jury. There would I think be considerable difficulty in adjusting satisfactory issues. If this difficulty were overcome the decision of some at least of the questions of law involved would remain to be argued and decided in the course of the jury trial, and the rulings and directions of the presiding Judge would almost certainly lead to exceptions at the instance of one or other of the parties, and possibly to a new trial. There would therefore in all probability be no saving of expense in sending the case to be tried with a jury, and the questions of law involved would not, I think, be so satisfactorily argued and disposed of in the course of a jury trial as on a concluded proof before answer."

The pursuer reclaimed, and argued that it was a proper case to go to a jury. It was of the class specially appropriated to trial by jury, and

a jury was quite a fitting tribunal to decide the questions which would arise.

The defenders, the Lothians Racing Club, argued that the questions which would arise in the case were difficult questions of law and of the rules of racing, *e.g.*, whether the ring inspector was responsible to the Lothians Racing Club or not, and what right the pursuer acquired by paying for admission to the ring. The case was therefore unsuitable for trial by jury—*Wood* v. *Leadbetter*, Feb. 22, 1845, 13 Meeson & Welsby, 838.

The defender and respondent Reid argued that a difficult question of law might arise as to whether it was a libel to call anyone a defaulter, betting debts not being exigible at law. It would also be difficult to present the case to a jury so as to do justice to the cases of the separate defenders.

At advising—

Lord President—I have always a delicacy in interfering with the discretion of a Lord Ordinary in a case of this kind, but I can see no sufficient cause in the present case to deprive the pursuer of his right to go to a jury. The questions which will be submitted are all questions of unmixed fact. Of course there may be points requiring direction, but counsel for the defence have entirely failed to specify any difficult questions which are likely to arise at the trial, and I do not see reason to anticipate that there will be any. I think therefore the interlocutor of the Lord Ordinary should be recalled, and the pursuer appointed to lodge issues.

Lord Mure—This is one of those actions particularly set apart for trial by jury by statute, and I think there must be very specific reasons for not sending it to a jury. No doubt there may be questions of some little difficulty raised at the trial, but not sufficient difficulty to render the case unfit to go to a jury.

Lord Shand—I share in your Lordships' unwillingness to disturb the Lord Ordinary's decision with regard to the mode of trial of a case, and I listened attentively to see what nice questions of law might arise, but I do not think that this is a case in which any nice questions of will require to be considered at the trial. The members of a jury are probably much more familiar with race meetings than a judge would be, and more suited to deal with the questions likely to arise in a case of this kind. I think this is an appropriate as well as an appropriated case for trial by jury.

Lord Adam—I agree with your Lordships. *Prima facie* when an action arises out of a dispute on a racecourse it looks as if a jury were a more appropriate tribunal than a judge. I do not see any reason to anticipate that the Judge presiding at the trial will not be able to deal with and explain to the jury any questions of law which may arise.

The Court recalled the interlocutor of the Lord Ordinary and appointed the pursuer to lodge issues for trial of the cause.

The following issues were proposed by the pursuer—"(1) Whether, on or about 5th October 1888, within the ring or paddock of the 'Lothians Racing Club and Edinburgh Meeting, at Musselburgh, the defender Cosmo Reid, in the presence and hearing of Augustus Francis Meredith Powell, medical student, Edinburgh, and Walter Sprott of Edinburgh Police Force, and others, falsely and calumniously said of and concerning the pursuer, 'This is the man who owes me money,' or used words of similar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishourably refused to pay, and that the pursuer ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer? Damages laid at £2000. (2) Whether, on or about 5th October 1888, the defenders, The Lothians Racing Club, through their officials, and the defenders Cosmo Reid, or one or other of said defenders, or those for whom the said defenders are responsible, wrongfully expelled the pursuer or caused him to be expelled from the ring or paddock of the 'Lothians Racing Club and Edinburgh Meeting' at Musselburgh, to the loss, injury, and damage of the pursuer? Damages laid at £5000."

The defender Reid maintained that the words in the latter part of the first issue, "and that the pursuer ought not to be allowed to remain in the said ring or paddock," ought to be deleted from the issue as being not in any reasonable sense the meaning of the words said to be used by him, but a consequence deduced by the pursuer from what preceded them in the *innuendo*. He offered to take a counter issue, "Whether the pursuer was owing the defender money on betting transactions which he dishonourably refused to pay."

The pursuer argued—That the counter issue of the defender must be made to meet the issue of the pursuer. The latter part of their issue was a substantial part of the libel, and the defender's issue must meet it. If there were different parts of a libel, it was quite competent to prove justification of one part and not another, but here there was only one libellous statement—*Torrance* v. *Weddel*, December 12, 1868, 7 Macph. 243; *M'Iver* v. *M'Neill*, June 28, 1873, 11 Macph. 777; *Bertram* v. *Pace*, March 7, 1885, 12 R. 798; *Ogilvie* v. *Paul*, *&c.*, June 28, 1873, 11 Macph. 776.

At advising—

Lord President—I think these words should be added to the counter issue for the defender Reid.

Lord Mure—I think the defender Reid must prove the allegation contained in these words as part of his defence, and I do not think there is any hardship in requiring him to do so, because if a person is distinctly proved not to pay his racing debts, one may be entitled to infer from that that he is not a person to be allowed to remain in the ring. I accordingly do not see any harm in the addition of these words, and think they should be inserted.

Lord Shand—I agree with Lord Mure that there is no need to add these words. If the defender makes out the first part of his counter issue, he substantially meets the issue for the pursuer. But I am in the same condition of mind as Lord Mure, and see no harm in the addition of these words.

Lord Adam—The concluding words of the pursuer's issue form, I think, a substantial part of the libel, and if there is to be a counter issue, it must be made to meet that issue, and must include these words.

The Court approved of the following issues for the trial of the cause—"(1) Whether, on or about 5th October 1888, within the ring or paddock of the 'Lothians Racing Club and Edinburgh Meeting' at Musselburgh, the defender Cosmo Reid, in the presence and hearing of Augustus Francis Meredith Powell, medical student, Edinburgh, and Walter Sprott, of Edinburgh Police Force, and others, falsely and calumniously said of and concerning the pursuer, 'This is the man who owes me money,' or used words of similiar import, meaning thereby that the pursuer was owing him money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock, to the loss, injury, and damage of the pursuer?—Damages laid at £2000. Or whether the pursuer was owing the defender money on betting transactions which he dishonourably refused to pay, and was a person who ought not to be allowed to remain in the said ring or paddock? (2) Whether, on or about 5th October 1888, the defender Cosmo Reid wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the 'Lothians Racing Club and Edinburgh Meeting' at Musselburgh, to the loss, injury, and damage of the pursuer?—Damages laid at £5000. (3) Whether, on or about 5th October 1888, the defenders, the Lothians Racing Club, wrongfully expelled the pursuer, or caused him to be expelled, from the ring or paddock of the 'Lothians Racing Club and Edinburgh Meeting' at Musselburgh, to the loss, injury, and damage of the pursuer?—Damages laid at £5000."

Counsel for the Pursuer—Graham Murray—Wilson. Agent—A. W. Gordon, Solicitor.

Counsel for the Defenders, the Lothians Racing Club—Comrie Thomson—H. Johnston. Agents—Gillespie & Paterson, W.S.

Counsel for the Defender Reid—M'Kechnie—Sym. Agent—D. Hill Murray, S.S.C.

Tuesday, July 2.

FIRST DIVISION.

[Lord Kyllachy, Ordinary on the Bills.

MARSHALL & AITKEN *v.* MILLAR.

Sequestration—Compromise of Claim—Resolution of Creditors—Right of Creditor to Sue.

The brother of a bankrupt before the sequestration had received certain funds of the bankrupt and paid therewith certain of his creditors. The trustee on the estate agreed to receive the balance of these funds in full of all claims against the bankrupt's brother, who in turn waived certain alleged claims against the trust-estate for payments made by him on behalf of the bankrupt before the funds came into his hands. A special general meeting of creditors approved of this settlement, and rejected a counter motion by a creditor that as he was prepared to guarantee the expenses in an action against the bankrupt's brother in connection with his alleged illegal intromissions as agent for the bankrupt, the trustee should be requested to give his consent to the said action. The Court *refused* an appeal by this creditor, in respect that the transaction between the trustee and the bankrupt's brother was truly of the nature of a compromise, and that loss might possibly result to the trust-estate if the question was re-opened.

The estates of Captain J. A. L. Campbell were sequestrated on 28th August 1888, and R. C. Millar, C.A., was appointed trustee thereon. The bankrupt had retired in the previous April from the service, and had then received a gratuity of £1200 from the War Office. That sum had at first been put to his credit with Messrs Cox & Company, and subsequently, after deduction of £67, 11s. 10d., the balance due to Messrs Cox & Company by the bankrupt, the remainder, amounting to £1132, 8s. 2d., had been transferred to the account of the bankrupt's brother Captain E. P. Campbell.

On 3rd October the trustee wrote to Captain E. P. Campbell's agent, Mr Greig, for an account of the disbursements made by Captain E. P. Campbell from that sum, and relative vouchers. In reply Mr Greig sent (1) an account showing that Captain E. P. Campbell had disbursed £891, 2s. 7d. of the above sum in payments on behalf of Captain J. A. L. Campbell; and (2) an account of previous payments made by Captain E. P. Campbell to or for Captain J. A. L. Campbell amounting to £1042. He also sent the relative vouchers.

On 15th November the trustee, with the consent of the only commissioner then acting on the estate, wrote to Mr Greig as follows—"I beg to acknowledge receipt of your letter of 14th inst. with the vouchers therein referred to, with the further exception of the £5 paid W. Gordon on 9th February, of which only a memorandum without any account has been produced. I have very carefully considered the accounts sent to me by you, and I am advised that I must claim payment of the balance of the £1200, the gratuity paid on Captain Campbell's retirement, under deduction only of the sums legally paid thereout of by Captain E. P. Campbell. Without prejudice to my right to sue for a larger sum, I am disposed to accept the balance of the £1200 0 0

Less—

Retained by Cox & Co.	£67	11	10
and paid per account	801	2	7
		958	14	5

Balance, . . £241 5 7

if paid to me within five days, as a full accounting by Captain E. P. Campbell with said sum of £1200. I hope you will be able to advise Captain E. P. Campbell to pay over that amount, and should I not receive payment within five days, this letter is to be held *pro non scripto*."

On 22nd November Mr Greig replied in the following terms—"Referring to your letter of

15th inst., and my interview with you yesterday, I now beg to enclose, on Captain Edward P. Campbell's behalf, a cheque for £241, 5s. 7d. in full of all your claims as trustee against him in connection with his brother's sequestration, except the value of the clothes in his possession, of which, as we arranged, he is to send me a list. Please acknowledge receipt."

On 23rd November the trustee wrote again to Mr Greig as follows—"I duly received your favour of yesterday's date with cheque for £241, 5s. 7d., for which I enclose receipt, which I hope will be satisfactory as I cannot accept the money on the broad terms you state, but only in respect of the matters covered by my letter of 15th inst. You are to obtain and send me a letter by Captain E. P. Campbell, stating any other effects under his control belonging to the estate, and which I understand are only the clothes you mentioned."

On the same date Mr Greig replied in these terms—"I have received your letter of to-day and receipt for the £241, 5s. 7d. It must be understood that that payment is in full of all claims on Captain Edward P. Campbell, except the value of the clothes, which he wishes to retain. It was on that footing that he agreed to pay the money, and if you have any other claim on him I must ask you now to intimate it to him through me."

A special general meeting of creditors was held on 25th March 1889, the minute of which meeting bore—"Mr Christie and Mr Dickson were unanimously appointed commissioners on the estate. Mr Christie proposed, and Mr Dickson seconded, that the meeting approve of the conduct of the trustee in settling with Captain E. P. Campbell. Mr Tait, on behalf of Messrs Marshall & Aitken, creditors, moved with reference to the correspondence between his firm (Messrs Tait & Johnston, S.S.C.) and the trustee, that in respect Messrs Marshall & Aitken are prepared to guarantee the expenses in an action to be instituted against Captain E. P. Campbell in connection with his alleged illegal intromissions as agent for the bankrupt, that he, the trustee, be requested to give his consent as such trustee to the said action, the said guarantee to be delivered to the trustee before service of the summons. The preses put the motion to the meeting, but declared that it was not seconded, and that the former motion, approving of the trustee's conduct in settling, was duly carried."

Messrs Marshall & Aitken then appealed against the above resolution to the Lord Ordinary on the Bills, under the 169th section of the Bankruptcy Act 1856, craving the Court to recal the resolution, and in respect of the motion made at the said meeting on their behalf, to ordain the trustee to grant his consent, as concurring pursuer, to an action proposed to be raised by the appellants against Captain E. P. Campbell.

At the suggestion of the Lord Ordinary on the Bills (KYLLACHY) the following minute was lodged for the trustee—"GOUDY, for the respondents, stated with reference to the negotiations between Mr R. C. Millar, the trustee in the sequestration, and Captain E. P. Campbell, the bankrupt's brother, for payment of the sum of £1132, 8s. 2d. received by him on behalf of his brother from Cox & Company, being the balance of the 'gratuity' payable to the bankrupt on his leaving the service, that the trustee brought the matter before the second meeting of creditors, conform to report herewith produced, but no directions were given to the trustee at that meeting; that thereafter the trustee, with the consent of the only commissioner acting in the sequestration, entered into communication with Captain E. P. Campbell and his agent, Mr Somerville Greig, W.S., Edinburgh, and made a claim for payment of the whole of said sum of £1132, 8s. 2d.; that Mr Greig thereupon submitted to the trustee duly vouched accounts, two in number (herewith produced and referred to), and which showed disbursements by Captain E. P. Campbell on his brother's behalf amounting to £1933, 10s. 5d., including the sum of £1042, 7s. 10d. due to himself personally for advances made by him to or for his brother between 1879 and 1884, and claimed to set off the whole of said sum of £1132, 8s. 2d. as against these disbursements; that the trustee and commissioner, after examining said accounts, admitted £891, 2s. 7d. as proper deductions from said sum of £1132, 8s. 2d., but declined to admit the said sum of £1042, 7s. 10d., and claimed payment of the balance of said sum of £1132, 8s. 2d., which amounted to £241, 5s. 7d.; that Mr Greig at first refused to admit liability for said last-mentioned sum, but ultimately, after certain negotiations, and having obtained the opinion of counsel, he agreed to pay over the said sum of £241, 5s. 7d. in full of all claims by the estate against his client, and this sum was accepted by the trustee and commissioner in terms of this arrangement. A copy of the letters between the trustee and Mr Greig, and of the receipt granted by the trustee, are produced and referred to."

The Lord Ordinary on 4th June 1889 refused the appeal.

"*Opinion.*—This is an appeal against a resolution of creditors approving of the conduct of the trustee in a sequestration in settling certain claims against Captain E. P. Campbell, the bankrupt's brother. The appellants contend that the settlement approved of involves the renunciation of a claim competent to the estate which ought to be enforced, and they desire to be allowed to prosecute the same at their own expense, and to obtain the trustee's instance to enable them to do so.

"Had the transaction complained of been of the character alleged I should have thought the appellants were right. Neither the trustee nor the other creditors would in that case have had any legitimate interest to prevent the claim being prosecuted at the appellants' expense. But I am satisfied upon the documents produced, and upon the minute which has been lodged for the trustee, that the transaction was truly of the nature of a compromise whereby the trustee waived certain claims against Captain E. P. Campbell, and on the other hand Captain Campbell waived certain claims of retention which, if well founded, would have extinguished the trustee's claims altogether. I have not the means of judging how far the claims thus mutually waived were well founded. That is a matter on which it appears to me that the trustee and the creditors were entitled to judge. It is enough for the present purpose that by the settlement in question the bankrupt estate obtains payment of a sum of £241, 5s. 7d., to which, according to Captain Campbell's contention, they were not entitled, and which, if the

question were re-opened, as the appellants propose, might be ultimately lost to the estate. It cannot, I think, be said that in these circumstances the body of creditors have no legitimate interest to prevent the matter being re-opened. I therefore refuse the appeal, and find the appellants liable in expenses."

The appellants reclaimed, and argued—The transaction between the trustee and Captain E. P. Campbell was not of the nature of a compromise. It was not a valid compromise, having been made by the trustee and only one commissioner—Bankruptcy Act 1856, secs. 75 and 176: Bell's Comm. (5th ed.) ii. 415, note; *Dennistoun* v. *Dennistoun's Trustee*, June 4, 1853, 1 Macph. 869; *Gray* v. *Fraser*, February 6, 1850, 12 D. 684. The appellants desired to proceed against Captain E. P. Campbell on account of his actings. He was aware of the debt due to them and of his brother's insolvency, and while paying them nothing had paid a number of other creditors in full. If one was entrusted with money for behoof of the creditors of an insolvent, he was not in the same position as the insolvent himself—*Allan* v. *Marquis*, February 23, 1828, 6 S. 595. Captain E. P. Campbell could never have been entitled to pay himself in full, and assuming that he would be entitled to an equal dividend with the other creditors, the trust-estate would still be a large gainer. The appellants were content to sue merely for their own dividend.

The respondents argued—No doubt there was a power in the Court to interfere with the discretionary powers of creditors—Bell's Comm. (7th ed.) ii. 321. But where there had been a compromise creditors were barred from proceeding against an alleged debtor of the trust-estate. In the case of *Spence* v. *Gibson*, December 13, 1832, 11 S. 212, the compromise was inchoate, and the creditor offered to pay the whole sum guaranteed to the trust-estate thereby as well as the expenses of the action.

At advising—

Lord President—In this case I agree with the Lord Ordinary.

It seems to be questioned whether the arrangement arrived at between the creditors and Captain E. P. Campbell was in the nature of a compromise, and I have no doubt that it was. The claim of Captain Campbell on the one hand to retain all the money was waived, and on the other hand the trustee restricted his claim to £241, 5s. 7d. There was the giving and taking on both sides necessary to constitute a compromise. The compromise is not made, as is the usual case, merely by the trustee and the commissioners in consequence of there being only one commissioner on the estate at the time, and the trustee and that commissioner thought it desirable to bring the matter before the general body of creditors. A special meeting of creditors was accordingly called, and when it was held the creditors unanimously approved of what had been done with the exception of the appellants Marshall & Aitken. They desired to open up the whole matter, and to sue Captain E. P. Campbell in the trustee's name for payment of a much larger amount than the trustee undertook to receive as a matter of compromise. Of course such a proceeding would bring into peril the £241, 5s. 7d. paid to the trustee, for if Captain Campbell is sued for a larger sum than he has paid over under the compromise he must be allowed to plead that he is not due anything to the trust-estate, and the trust-estate may consequently lose the £241 altogether.

In these circumstances I do not think it can be said that the creditors have done wrong in refusing to allow the appellants to use the trustee's name, for the question which the appellants propose to raise might be to the great detriment of the trust-estate.

Lord Mure—I am of the same opinion. I agree with your Lordship that there was a compromise arrived at here, and it appears to have been of this sort—the matter was brought before the general body of creditors, and the arrangement come to by the trustee was approved of. Now, if an arrangement by the trustee has been deliberately approved of, it will not help the matter to a proper conclusion if we sanction a demand by an individual creditor to waive the resolution of the general body of creditors that he may sue a particular claim. I think therefore the decision of the Lord Ordinary is sound.

Lord Shand—I am of the same opinion. The case as now presented is one in which a compromise was made, not by the trustee and commissioners, but by the creditors sanctioning an arrangement made by the trustee.

In most cases it appears to me that the Court will refuse to confirm a resolution of creditors appealed against if it appears that the creditors are sacrificing the interests of the estate in any way. For instance, if they are taking a small sum to give up a large claim, where one or more creditors are opposed to such a course. But even then I take it that a person who proposes to have a claim assigned to him to enable him to sue the debtor therein must make it clear that he secures the bankrupt estate against loss. He must undertake that the bankrupt estate will not lose by the course proposed any advantage it may have gained by the compromise. The appellants do not bring their case up to that. There was a question between Captain E. P. Campbell and the trustee, in which Captain Campbell alleged that he was entitled to retain the money in his hands, and the trustee agreed if he got £241, 5s. 7d. not to go back on the payments made by Captain Campbell to some of his brother's creditors. The proposal of the appellants is to re-open the whole affair. This might be a cause of loss to the bankrupt estate, for if they were allowed to take that course the trustee would have to pay the £241, 5s. 7d. back again to Captain Campbell. I agree with the Lord Ordinary when he says—"It is enough for the present purpose that by the settlement in question the bankrupt estate obtains payment of a sum of £241, 5s. 7d., to which, according to Captain Campbell's contention, they were not entitled, and which, if the question were re-opened as the appellants propose, might be ultimately lost to the estate."

Now, the appellants cannot dispute that such may be the ultimate result of an action of the kind proposed, and it humbly appears to me therefore that the resolution of creditors in question is not of the class which the Court can interfere with.

LORD ADAM—I concur. I think the Lord Ordinary has decided the case on the right ground. I think the arrangement come to was of the nature of a compromise, and the resolution of the creditors, it appears to me, should not be disturbed. If Marshall & Aitken had appeared and made an offer to keep the estate *indemnis* of any loss which might occur as well as to pay the costs of the action, if allowed to sue, and the creditors had refused such an offer, quite a different question would have been raised.

The Court adhered.

Counsel for the Appellants—Henderson Begg—Napier. Agents—Tait & Johnston, S.S.C.

Counsel for the Respondents—Goudy. Agents—Smith & Mason, S.S.C.

Friday, July 5.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GILCHRIST *v.* YOUNG PENTLAND AND ANOTHER (GILCHRIST'S TRUSTEES).

Parent and Child—Legitim—Time of Valuation to Ascertain Legitim—Discretion to Trustees.

A truster directed his trustees immediately after his death, or as soon thereafter as they should deem it expedient, to realise his whole estate, which included certain ship shares, and to invest the proceeds for the purposes of the trust. Six months after the truster's death the trustees announced their resolution to retain the estate for the behoof of the beneficiaries. The son of the truster sued the trustees for legitim.

Held (1) that the trustees were not bound to realise the estate in order to ascertain its value, and (2) (*rev.* Lord Fraser) that as legitim was a claim of debt against the estate as at the father's death, the pursuer was not entitled to a proof that the market value of the shares had risen since that date.

Lord Shand *diss.* on the ground that in so far as the shares had risen in value between the date of the father's death and the resolution of the trustees to retain the property, the additional value should be taken into account in fixing the amount of the pursuer's claim.

John Gilchrist, wine merchant, Leith, died on 14th June 1888, survived by his wife and four children.

By trust-disposition and settlement he directed his trustees "immediately after my death, or as soon thereafter as they shall deem expedient, to realise my whole moveable means and estate, including my present business of wine and spirit merchant, and invest the proceeds thereof in good heritable security, and apply the income or annual produce thereof for the purposes of the trust." By codicil he recalled certain provisions which he had made in favour of his son James Watson Gilchrist, and in place thereof bequeathed to him £100 in full of all his claims.

James Watson Gilchrist claimed legitim, and raised this action against the trustees.

The defenders lodged a vidimus of the deceased's personal estate as at the date of his death, including various stocks and shares in the ownership of three steamships and one sailing vessel. The estate liable for legitim was shown at £7359, one-twelfth whereof, being the pursuer's share, was £612, 10s., and the entry embracing the ship shares was as follows:—"8. Ship shares—(1) 6/64 shares of the steamship 'Scotsman' of Leith, at £137, 10s. per share, per Messrs Blaik & Company's valuation, £825; (2) 6/64 shares of the steamship 'Sicilian' of Leith, at £10 per share, per Messrs Blaik & Company's valuation, £60; (3) 6/64 shares of the steamship 'Nicosian' of Leith, at £20 per share, per Messrs Blaik & Company's valuation, £120; (4) 5/64 shares of the ship 'Zuleika' of Leith, per Thomas Law & Company's valuation, £350."

The pursuer objected to the principle upon which the statement was made up. He alleged (1) that the vidimus represented the value of the stocks and shares as at the date of his father's death on 14th June 1888, whereas these stocks, some of which had increased in value since the death, must be estimated as at the value of the present time; and (2) that that value could only be ascertained by selling the whole of the stocks and shares.

The defenders lodged answers, and explained that they regarded the pursuer's claim of legitim as a claim of debt which emerged on the death of his father, and the amount of which was to be ascertained according to the value of the free moveable estate as it then stood. They maintained that the pursuer's claim amounted to his legal proportion of the estate, according to its fair value, as at the date of death, less the necessary expenses of realisation, or according to the amount which it would have fetched if the whole estate had been immediately realised; that his claim was not affected by subsequent fluctuations in value of investments which the defenders continued to hold; and that they were not bound to realise the whole estate under their charge in order that the amount of the pursuer's one-twelfth share might be thereafter ascertained. In explaining their principle of valuation they stated with regard to the ship shares—"*Item* 8. This item represents the value of certain shares in three steamers and one sailing ship held by the deceased. At the date of his death two of the steamers were heavily burdened with debt, for which each individual owner was liable *in solidum*. The value of the shares in each vessel was obtained from information supplied by the managing owners, which was based upon their knowledge of the condition in which the ships were at the time, and the price received for other shares in said steamers sold during the month current at the death. Had these shares been immediately realised, the defenders believe they would not have fetched more than the sums stated, if so much. The defenders repeatedly advertised the shares for sale, but no offers were made for the steamship shares in answer to their advertisement. The shares in the sailing ship were sold on 4th September 1888 at an increase of £80 on the valued price. At this time the market price for ship property had considerably improved. The defenders, at the request of the beneficiaries, have continued to hold said steamship shares,

and have no intention meanwhile of realising them."

On 16th March 1889 the Lord Ordinary (FRASER) repelled the objections stated by the pursuer to the vidimus lodged by the trustees except as regarded the value put upon the shares of the three steamships; found that these shares must be entered as of the market price of the present day; and reserved to the pursuer to move the Court to be allowed a proof that the vidimus did not correctly set forth the market price of the other stocks and shares therein referred to as at the date of death.

"*Opinion.*—[*After stating the facts and the two heads of the pursuer's objections*]—With regard to the first of these points, the Lord Ordinary is of opinion that in the general case the estate out of which legitim is claimable must be taken as of the value at the father's death. To this general rule there are exceptions, as where the estate consists of doubtful or contingent claims, the value of which cannot be ascertained until the money therefor has been actually received by the executor. In such a case the accounting with the claimant for legitim must of necessity be according to the amount actually received. In the present case there was no such difficulty in the way of ascertaining the value. All the stocks of companies, except one, were quoted on the Stock Exchange, and the ship shares, although of no great value at the date of death, were still marketable. The defenders state that they endeavoured to sell the shares in the steamers and could not find a purchaser, although it is said that these have now somewhat increased in value and are saleable. This is a good reason for taking the value of the steamships in estimating legitim as at the present date, instead of at the small nominal value at the date of the testator's death.

"The general rule now stated rests upon this doctrine, that legitim is a claim of debt against the executry for a certain proportion of the personal estate which vests in the child claiming it at the father's death. He is entitled to that proportion and no more. If the executor delays to settle the claim, and the property sinks in value, the claim of the child is not thereby diminished, and in like manner if it increases in value the claim is not thereby enhanced in amount. If the executor without justifiable excuse delays to pay the legitim, he is liable in interest according to many decisions, and that interest is five per cent. In the case of *M'Murray* v. *M'Murray's Trustees*, 17th July 1852, 14 D. 1048, the point was very distinctly brought out and determined. It was held 'that the legitim was a debt to be measured by the amount of the fund at the father's death, and did not infer a right to participate in profits realised by the application of the fund after the father's death.' The whole estate had been employed in the father's business, and profits had been made of which the child claiming legitim demanded a share. Lord Ivory explained the grounds of judgment in the following terms—'The claim of legitim is a claim of debt against the testator's estate. In the ordinary case of a debtor in business, the fund out of which the debt is to be paid is put in peril, but the creditor does not get the profits. In this case the pursuer's claim was a claim against the general fund, and was due at the moment of the testator's death. If the trustees have put the estate into peril and made profit that enlarges the estate—the measure of the creditor's security but not of the claim—the debt is the same as before, unaffected by their trading. It is still due with interest and nothing more. Legitim is a claim of debt. Suppose a party thinking he has right to dispose of his whole property, leaves all of it to one of his children and excludes another, and the child to whom the property was left enters into possession and uses the estate in trade, would that entitle the excluded child on his claiming legitim to claim a share of the profits? It would not, and he would not be worse off; for if the business turned out ill the other would be obliged, if he sacrificed the fund, to answer for it with his own funds.' In like manner, in the case of the *Earl of Dalhousie* v. *Crokat*, March 26, 1868, 6 Macph. 659, the point was again submitted to the Court although under different circumstances. A loss was sustained of the fund from which legitim was payable in consequence of the executor having allowed his agent to embezzle it. The Court held that the executor must bear the loss, and that no part of it could be allowed to diminish the claim for legitim. 'It appears to me,' said Lord Ardmillan, 'that the child entitled to legitim is a creditor of the executor for a share of the free executory estate—that is, for a share of the free moveable estate left by the father as at the date of his death, or as soon thereafter as it can be realised. . . . If the executor had employed the funds of the deceased in trade, the pursuer would have taken no benefit thence arising. If the executor had purchased railway or bank stock, and the stock had risen in value, I cannot think that the legitim would have been increased so as to amount to anything beyond the price paid for the stock, since if the price had fallen the legitim would not have been diminished. Legitim must be calculated as at the date of the father's death, and profit or loss arising after realisation in consequence of the executor's mode of dealing with the funds cannot augment or diminish the claim of the child.'

"There are cases where, in consequence of arrangements between a child claiming legitim, or a widow claiming *jus relictæ*, these persons will be found entitled to a share of profits made from the application of the funds to purposes of trade, and of this class of cases there is an illustration in the case of *Ross* v. *Masson*, February 3, 1843, 5 D. 483. The judgment was not unanimous, as Lord Medwyn dissented, and held that there was not such a specialty as to take the case out of the general rule. It was a claim by a widow for *jus relictæ*, and Lord Medwyn said—'The widow is entitled to revert to her legal rights notwithstanding all that she has done. But then must she not take her *jus relictæ* according to the state of the moveables at the death of her husband? She is not tied down by the valuation then made. She may show that this is inadequate, and she will get her share estimated at their full value. I always understood that the share of the moveable estate payable out of the estate of the husband to the children as legitim, and to the widow as *jus relictæ*, was estimated as at the death and not as it might be at any future period. If the widow had claimed her *jus relictæ*

at the time, would she have been entitled to more than the estimated value of the right according to the then rate of the market? And if by some unexpected opening of trade, or the failure of some neighbouring coal work, the value of this some years afterwards greatly increased, would she have been entitled to claim this additional value after having obtained its value at the time of her husband's death?' Lord Moncreiff assimilated the case to a contingent fund, and upon that ground allowed the widow's claim for a share of the profits. 'If,' he said 'the claim had been a contingent fund which could not be realised at the time of the husband's death, there is no doubt that a widow would be entitled to claim upon it as at the time when it was realised.' And this doctrine is not disputed, for the general rule allows of such an exception.

The second point made by the pursuer is, that the whole of the stocks and shares ought to be sold in order to pay off his one-twelfth proportion. Now, there is no such absolute right on the part of a claimant for legitim or *jus relictæ*. This is a matter entirely in the discretion of the Court, who are entitled and bound to look to the interests of the other beneficiaries who have claims upon the estate, and if they object to such sale the Court will give heed to such objection. To throw all these stocks and shares into the market merely to pay the pursuer's small proportion would be putting the property to the chance of loss, and would certainly be attended with very considerable expense in brokerage charges and commission. If the pursuer challenges the statement that the stocks, &c., are not entered as at the market prices of the day at the time of death, he will be allowed to prove this, but if not he must be settled with according to that market price, seeing that if the property had been all sold he would have got no more from the sale."

On 23rd May 1889 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"In respect the pursuer is satisfied that the vidimus correctly sets forth the market price of the stocks and shares other than the shares of the steamships therein mentioned, Finds it unnecessary to order proof in regard thereto: Allows to the pursuer a proof of the market price at the present time of the said shares of the steamships mentioned in the vidimus, and to the defenders a conjunct probation; and appoints the proof to proceed on a day to be afterwards fixed."

The defenders reclaimed against both interlocutors, and argued—The date of the testator's death was the only time at which legitim could be calculated. If that period were departed from great difficulties would be encountered. The claim of legitim was a claim of debt—*M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048. It was not necessary to fix the exact day of the testator's death for the calculation of legitim, but it ought to be about that time, and interest should run as from the day of death. The pursuer was not entitled to have the whole trust-estate realised—*Earl of Dalhousie* v. *Crokat*, March 26, 1868, 6 Macph. 659; *Pringle's Trustees* v. *Hamilton*, March 15, 1872, 10 Macph, 621; *Minto* v. *Kirkpatrick*, May 23, 1833, 11 Sh. 632; *Fisher* v. *Dixon*, June 16, 1840, 2 D. 1121 and 1138. The duty of the executors here was simply to do what they have done, to estimate the pursuer's share, and to tender the amount thereof—*Chalmers' Trustees* v. *Chalmers and Others*, March 16, 1882, 9 R. 743.

Argued for the pursuer—He was entitled to have the estate realised as at the date of litis-contestation in the present action in order that the true amount of his legitim might be determined; he was not bound to accept a random sum reached by the trustees from *ex parte* valuations. He was not bound to accept anything but money in satisfaction of his claims, for legitim was a money claim. He was entitled to have not only the ship shares but the whole stock valued as at present rates. There had been a considerable increase in the *cumulo* value of the trust-estate, and the pursuer was entitled to a share of that increased value, and was not to be prejudiced by the delay on the part of the trustees as regarded realisation—Fraser on Husband and Wife, vol. ii. p. 983; cases cited by the Lord Ordinary.

At advising—

LORD ADAM—By the interlocutor of 23rd May 1889 submitted to review, the Lord Ordinary, "in respect that the pursuer is satisfied that the vidimus, No. 10 of process, correctly sets forth the market price of the stocks and shares, other than the shares of the steamships therein mentioned, finds it unnecessary to order proof in respect thereto."

I understand that the pursuer is still satisfied that the vidimus correctly sets forth the market price of the stocks and shares, other than the shares of ships, including the sailing ship, as at the date of the truster's death, and if this be so, I think that a proof as regards the value of these shares is unnecessary.

But the Lord Ordinary further "allows the pursuer a proof of the market price at the present time of the said shares of the steamships mentioned in the vidimus."

I do not concur in this part of the interlocutor, because I think the proof to be allowed ought to be one of the value of the ship shares, as at the date of the testator's death.

The claim of legitim by the pursuer is undoubtedly a claim of debt against his father's estate, and the amount must be estimated according to the value of the estate at his death. But the defenders, his trustees, are not bound, in order to ascertain that value, to realise the estate. They may retain the whole, or any part of it *in forma specifica*. The trustees are entitled to realise the estate or any part of it, and had they done so, the amount so realised under the deduction of the expenses of the realisation would be the value of the estate of which the pursuer is entitled to a share.

On the other hand, the trustees may resolve not to realise the whole or any part of the estate, and in that case the value must be estimated as at the truster's death.

In this case, when the claim for legitim was intimated on 22nd October 1888, no part of the estate had been realised except some shares in a sailing ship. The defenders allege that they were then, and are now, holding the estate for the benefit of the beneficiaries, and had resolved not to realise it. If that be so, it appears to me that the value of the estate must be estimated as

at the date of the truster's death.

If the shares had fallen in value, the loss must have fallen on the defenders, and so if they have risen in value, they are entitled to the gain.

With reference to the value of the shares of the sailing ship which were sold on 4th September 1888, I think the question whether the pursuer is entitled to a share of that value depends upon the question whether or not the shares were then being held by the trustees for the beneficiaries, or were in point of fact sold with a view to realisation as at the date of the truster's death.

The Lord Ordinary recognises the general rule that the value of the estate must be estimated as at the date of the testator's death, and has given effect to it as regards all the estate except the ship shares. The defenders state (he says) that they endeavoured to sell the shares in the steamers and could not find a purchaser, although it is said that these have now somewhat increased in value and are saleable. This is a good reason (he says) for taking the value of the steamships in estimating legitim as at the present date instead of at the small nominal value at the date of the testator's death.

While I think that the contingency of a possible or probable prospective rise in value is an element which may fairly be taken into consideration in estimating the value of the shares as at the date of the truster's death, I cannot see that the fact that the shares have increased in value since the truster's death can be a reason for taking such increased value as the value at the date of death.

I think therefore that the Lord Ordinary's interlocutor ought to be recalled.

Lord Mure—The only difficulty which appears to me to exist in this case is as to the time at which the various stocks and shares left by the testator are to be valued. Lord Fraser has laid down at considerable length the general rule as to when valuations for legitim are to take place, and he has referred to several cases, all of which go to show that the date of the testator's death is the time at which such valuations ought to be made. The Lord Ordinary has accordingly applied the rule which he has thus laid down to the ordinary shares left by the deceased, but he has made an exception in the case of the ships. For that exception I can see no good or sufficient reason. It may be that such shares do not find so ready a market as others, but I cannot see that that circumstance ought to make any difference as to the time at which such shares are to be valued for the purposes of legitim. I agree with Lord Adam in thinking that the whole stocks and shares left by the testator, including the ship shares, ought to be treated in the same way, and that the time at which a valuation for legitim ought to take place is the death of the testator.

Lord Shand—In common, I understand, with all your Lordships I agree that legitim is not a right to a share of the estate which entitles the claimant to have the estate realised in order that he may have the realised value of his share. It is a debt, but, at the same time, it is a debt to be measured by the actual value of the moveable estate left by the father at his death. While this is so, it appears to me that it would not be safe nor proper to lay down the rule that the value is to be taken by a valuator of each article or item of the estate made as on the very day of the father's death. What a son claiming legitim is entitled to is a share of the value of the estate—that is, a share of the amount which the estate would bring if it were realised. It is true the executors or beneficiaries are not bound to realise if they resolve and declare that they intend to hold parts of the estate, and to take the risk of future loss by depreciation of value, and the benefit of any profit which may accrue by a rise in value. But even if such a resolution be formed and intimated, the claimant is entitled to have a share of the value which would have been received if the different items of the estate had been realised or sold.

When I say that I think this value is not necessarily to be ascertained as on the very day of the death of the deceased, I mean that a share of the value of the estate as if the estate had been realised, infers that the amount to be ascertained shall be as on a reasonable and prudent realisation, made with a view to gaining the best advantage—realisation such as a person having no purpose of holding for profit, but yet being anxious to make the most of the estate in its different parts or items, would adopt in the ordinary administration of a deceased's estate. There are many parts of an estate which must be advertised with a view to sale, and time must elapse to admit of this, and there may be parts of an estate which it would be quite clearly imprudent as a mere question of realisation to sell without a few days or a few weeks delay.

In reference to property of which this can be said, I do not think that in the ordinary case the value of these is to be taken simply as the sum which could be got for them on the day of the death. If any such hard and fast rule were to be taken, what would be said of the case of a testator having shares in a company which became insolvent some days after his death, involving it might be such consequences as in the case of the *City of Glasgow Bank*? The claimant for legitim could not seek to have the result to the estate thrown out of view in a question with him if prudence and due diligence had been used in the realisation, and so it appears to me that if parts of an estate realized in the ordinary course of an administration have risen in value since the day of the testator's death the benefit should be taken into view in fixing the amount of the value of which the legitim fund is a fixed part. In short, if the estate is to be realised as far as concerned, then the actual realisation ordinary course carried out with due and prudence is the amount to be executors or beneficiaries resolve to to realise, they cannot, as it were, diminish the legitim fund. estate at the deceased's death still be fixed by ascertaining possible what would have been diligent but prudent advantage had actually further add that when in answer to a claim at a considerable death, that they particular parts

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Friday, July 5.

FIRST DIVISION.

CLOUSTON'S TRUSTEES *v.* BULLOCH AND OTHERS.

Succession—Direction to Trustees to Pay—Fee—Liferent—Intention of Testator.

A testator under the *fourth* purpose of his settlement directed his trustees (first) to divide the whole residue of his estate as it came to be realised into five equal shares, and (second) to pay or make over one of said fifth shares to each of his daughters M, C, and E, the shares to be paid over as soon as conveniently might be after his decease, and the remainder when the same became available, the said shares to be at the absolute disposal of his said daughters.

In a subsequent codicil with reference to the clause above named (second) the testator said, "I hereby revoke and alter the clause named (second) . . . to this extent, that in place of the absolute power therein given to my daughters M, C, and E, I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime."

Held (1) that "respective shares of my heritable estate" must be read as "respective shares of my whole estate," that being the obvious intention of the testator; and (2) (*diss.* Lord Adam) that the trustees were not entitled to hold any part of the shares of residue given by the clause named (second) to the testator's daughters M, C, and E, but were bound to pay over the whole of said shares to these daughters.

The late Mr Peter Clouston, formerly insurance broker in Glasgow, died on 30th August 1888, leaving a trust-disposition and settlement dated 31st December 1883, and several codicils thereto, and in particular a codicil dated 29th November 1886.

By his trust-disposition and settlement the testator conveyed to the trustees therein named his whole estate and effects, heritable and moveable, real and personal. With reference to the disposal of the residue, the trust-disposition and settlement directed—"In the *fourth* place, my trustees shall from time to time as the same comes to be realised, divide the whole residue and remainder of my means and estate (including sums or property retained to meet annuities or liferent interests, or otherwise, as the same fall in) into five equal parts or shares, and hold and dispose thereof in manner following—(First) one of the said shares shall (subject to the provisions hereinafter contained in regard to the guaranteed minimum income to my said two unmarried daughters, and the survivor of them remaining unmarried, and subject also to the deductions after mentioned) be held by my trustees for behoof of all the children of my deceased daughter Mrs Sarah Clouston or Mactaggart, share and share alike; . . . (second) subject to the said provisions and the deductions after mentioned, my trustees shall pay or make over one of the said fifth shares of the said residue and remainder of my means and estate to each of my three daughters Mrs Maria Clouston or Bulloch, wife of the said Matthew Bulloch, and the said Miss Christian or Christina Clouston, and Elizabeth Keir Clouston, respectively (being three-fifth shares in all), the said shares so far as available to be paid or made over as soon as conveniently may be after my decease, and the remainder to be paid or made over as and when the same becomes available, the said shares to be at the absolute disposal of my said three daughters respectively;" and (third) the remaining fifth part or share was to be held for behoof of Mrs Hannah Clouston or Bulloch in liferent, and of her husband in the event of his survivance in liferent, restrictable to one-half in the event of his second marriage. On the termination of the liferent the capital was to be divided equally among the truster's surviving children, and the issue of any of them who may have died leaving issue, but in the event of her husband predeceasing her, the said one-fifth part or share was to be paid over to Mrs Hannah Clouston or Bulloch absolutely in the same way as was directed as regards the shares of the other three surviving daughters.

The testator further directed that if the shares of residue falling to his unmarried daughters should not be sufficient at four per cent. to yield each of them an income of £1200, his trustees should retain in their hands sums out of the capital of the shares of the children of his deceased daughter and of his married daughters, sufficient to make up the income of the married daughters to the required amount.

The codicil of 29th November 1886 was in these terms—"After serious and mature consideration, and reflecting on the uncertainty of circumstances which may happen, I hereby revoke and alter the clause named (second) on twenty-third line of page sixth in my trust-disposition or settlement, to this extent, that in place of the absolute power therein given to my daughters Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime."

The value of the truster's moveable estate was estimated at about £175,000, and that of his heritable estate at about £8000, including the value of his house in Park Terrace, Glasgow, estimated at £6000, and which was assigned in

the settlement as a residence to the testator's two unmarried daughters.

The testator left four surviving daughters, Mrs Hannah Clouston or Bulloch, wife of James Bulloch, merchant in London, Mrs Maria Clouston or Bulloch, wife of Matthew Bulloch, merchant in Glasgow, Miss Christina Clouston, and Miss Elizabeth Keir Clouston. He was predeceased by a daughter Mrs Sarah Clouston or Mactaggart, leaving four children who survived the testator.

Questions having arisen as to the effect of the codicil of 29th November, as altering the terms of the original settlement, the present case was presented for the purpose of having the matter settled.

The first parties to the case were the trustees under Mr Clouston's settlement, and the second parties were Mrs Maria Clouston or Bulloch and her husband as her curator, and for any interest he might have, Miss Christina Clouston, and Elizabeth Keir Clouston.

The following questions were submitted for the opinion of the Court—"(1) Are the first parties, as Mr Clouston's trustees, bound by the codicil dated 29th November 1886 to hold one-half of the shares of the whole residue of the truster's estate given by the clause named (second) of the fourth purpose of his trust-disposition and settlement to his daughters Maria (Mrs Bulloch), Christina, and Elizabeth, for behoof of these ladies in liferent, subject to a power of disposal by will only of their respective shares? Or (2) Are the said trustees bound by the trust-disposition and settlement, and the codicil of 29th November 1886, to hold only one-half of the heritable or real estate of the truster for behoof of the said three daughters in liferent, subject to their power of disposal by will only, and to pay or make over their respective shares of the whole moveable estate, as well as the other half of the heritable estate, to the said three daughters in the manner directed by the clause named (second) of the fourth head or direction of the trust-disposition and settlement? Or (3) Is the codicil of 29th November 1886 void on the ground of uncertainty? Or (4) Are the first parties, as Mr Clouston's trustees, bound and entitled by the trust-disposition and settlement, and codicil of 29th November 1886, to hold any part of the shares of the moveable or heritable estate of the truster, or are they bound to pay and make over said shares or any and what part thereof to Maria (Mrs Bulloch), Christina, and Elizabeth, the truster's three daughters, and if so in what terms."

It was contended for the first parties that the truster had by his codicil of 29th November 1886 restricted the absolute right in their respective shares of residue conferred on his three daughters Maria (Mrs Bulloch), Christina, and Elizabeth, by the said trust-disposition and settlement, to a liferent as regarded one-half thereof, and that the trustees were bound to retain the half of such shares for behoof of these ladies in liferent, and subject to their power of disposal by will, but not otherwise.

It was contended by the second parties Mrs Bulloch and her husband, and Miss Christina and Miss Elizabeth Clouston, that the codicil of 29th November 1886 was void for uncertainty, and alternatively, that it applied only to the heritable or real estate of the truster.

Argued for the first parties—(1) The codicil of 29th November 1886 must apply to the testator's whole estate, and not only to his heritable estate. That was the obvious intention of the testator as shown by the terms of the settlement, and by the object of the restriction disclosed in the codicil. Half of a daughter's share of heritable estate would only be about £600 in value, which would not yield a comfortable income, and in his settlement the testator had contemplated £1200 as the proper income for each of his unmarried daughters. In the clause of the settlement referred to in the codicil the testator had not dealt with shares of heritable estate, but of residue, and the trustees had practically a power of sale conferred on them in the settlement, for the direction was to divide the estate as realised. The words "interest" and "revenue" were also more appropriate to income derived from moveable than from heritable estate—*Dunlop* v. *Macrae*, July 18, 1884, 11 R. 1104; *Archibald* v. *Archibald's Trustees*, June 15, 1882, 9 R. 942. (2) There was a valid restriction to a liferent in the codicil. That was the "extent" to which the codicil revoked the clause in the settlement. There was here a trust which was to be a continuing trust, and thus it was not a case in which the Court were asked to create or continue the machinery of a trust, which the testator had not created or continued. This circumstance took the case out of the rule of the cases of *Allan's Trustees*, and *Massy—Allan's Trustees* v. *Allan*, December 12, 1872, 11 Macph. 216; *Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173; *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858, *per* Lord Gifford, 861.

Argued for the second parties—(1) The testator must have known the meaning of the term "heritable," and it must be assumed that he meant what he said. The Court could not construe the terms of a settlement contrary to what it clearly said. (2) There was no valid restriction to a liferent at all. The direction in the settlement to pay was clear and unequivocal, and must be recalled in clear terms, or else the trustees would be bound to carry it out. Doubtful expressions would not be read as inferring revocation. The case fell within the rule laid down in *Allan's Trustees*. The codicil was void from uncertainty, as to arrive at any definite meaning the first parties had to make very serious assumptions—*M'Nish* v. *Donald's Trustees*, October 25, 1879, 7 R. 96; *White's Trustees* v. *White*, June 1, 1877, 4 R. 786, *per* Lord President, 789, *per* Lord Shand, 793; *Smith's Trustees* v. *Smith*, July 11, 1883, 10 R. 1144; Jarman on Wills, i. 181; *Low's Executors* v. *Macdonald*, June 21, 1873, 11 Macph. 744.

At advising—

Lord President—The parts of the testator's will which we have to construe are, first, the provisions in the principal deed in favour of his three daughters Maria, Christina, and Elizabeth, and second, the alterations on those provisions introduced by the codicil of 29th November 1886. In making the provisions in the original settlement the testator expresses himself thus—"(Second) Subject to the said provisions and deductions after-mentioned, my trustees shall pay or make over one of the said fifth shares of

the said residue and remainder of my means and estate to each of my three daughters Mrs Maria Clouston or Bulloch, wife of the said Matthew Bulloch, and the said Miss Christian or Christina Clouston, and Elizabeth Keir Clouston respectively (being three-fifth shares in all), the said shares, so far as available, to be paid or made over as soon as conveniently may be after my decease, and the remainder to be paid or made over as and when the same becomes available, the said shares to be at the absolute disposal of my said three daughters respectively." That is a conveyance which the trustees are to make to the beneficiaries in absolute property, the payment being to be made immediately after the truster's death, so far as funds are available, and so far as funds are not available, then as soon as they become available. To emphasise his meaning the testator adds these unnecessary words at the end of the clause, "the said shares to be at the absolute disposal of my said three daughters respectively."

Now, in the codicil the truster expresses himself thus—"After serious and mature consideration, and reflecting on the uncertainty of circumstances which may happen, I hereby revoke and alter the clause named (second) on twenty-third line of page sixth in my trust-disposition or settlement to this extent, that in place of the absolute power therein given to my daughters Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." Now, the part of the truster's property dealt with by that codicil, taking its words literally, is his heritable estate. That consists of a house (his own residence) in Glasgow, which he arranges in his settlement is to be occupied by his unmarried daughters, and also of another property of which the value does not exceed £2000. Thus, if these ladies were to be restricted only as regards each one's share of the heritable property, the effect of this codicil would be very slight—so slight that it is difficult to believe that that could be the meaning of the testator. Indeed, there are several circumstances which appear on the face of the codicil which point to a different result so strongly that it is impossible to resist the conclusion that the truster did not intend that this codicil should be restricted in its operation to his heritable estate only, but intended it to affect moveable property as well.

The first observation which occurs to me is, that the truster speaks of his daughters' respective shares of his heritable estate, the subject with which he is dealing is not "heritable estate," but "respective shares of heritable estate." Now, if we look back to the principal deed there are no such things as shares of heritable estate dealt with. The testator never contemplated shares of his heritable estate as going to his daughters, but shares of the residue of his means and estate. He dealt with his estate as a mixed estate, and the shares were shares of a mixed moveable and heritable estate.

In the next place, the utterly futile character of the restriction, if the codicil is read according to the strict meaning of the words, gives rise to the gravest doubts whether that strict meaning can be what the testator intended, particularly as the object of the whole codicil is to make sure that the daughters "shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." Now, if they were entitled to spend everything they had just as they liked, except one-half of their shares of the heritable estate, they might very easily, notwithstanding the provisions of the codicil, reduce themselves to absolute poverty. The notion which the truster had of what was a proper income for his unmarried daughters may be gathered from the fact that elsewhere in his settlement he says that they shall not have less than £1200 per annum, and to insure that they shall have that income he burdens the shares falling to his married daughters with the amount necessary to make up that sum should the shares specially given to the unmarried daughters produce an income of less amount. The views therefore of the truster with regard to what was a proper income for his unmarried daughters were largely in excess of the revenue produced by one-half of his heritable estate.

But further, all the rest of the codicil goes to the same result. A power is given to these daughters to deal in their wills with the one-half shares in question, but during their lifetimes they cannot deal with it "beyond the interest or revenue derived from it"—that is, derived from the half he wished to tie up. Now, "interest or revenue" is not the proper way to speak of income derived from heritable estate, such income is almost always spoken of as rent, whereas "interest or revenue" is peculiarly applicable to moveable estate.

All these considerations lead me to the conclusion that there has been a palpable mistake in the use of the word "heritable," a mistake so palpable as to entitle the Court to construe the terms "respective shares of my heritable estate" as intended to mean "respective shares of my whole estate." The result of this would be in one view that these daughters would have an absolute power of disposal of one-half of their provisions under the settlement, but that as regards the other half they would be tied up in such a way that they could not spend the capital but only the income, though they might dispose of the capital by will.

That, I think, was the intention of the testator, but the question then comes to be, has he provided the machinery requisite for carrying out his intention? The original deed directs the trustees to pay over the shares without any qualification, and that direction has never been recalled. In these circumstances it is difficult to see what the trustees can do but pay over the money absolutely. There is no direction to them to hold this part of the estate, and the distinction between holding and paying over the estate was constantly in the mind of the testator throughout the deed, which contains various provisions which the trustees are to hold and not

pay over. To make this restriction, which was evidently the truster's intention, operative, it would require that some means should be given to the trustees to enable them to carry it out, and where, as here, there is a direction to pay over and no direction to hold, I do not see how trustees can hold and refuse to pay over.

If the question was one dependent entirely upon principle, and was now presented for decision for the first time, I should think it a matter of the highest importance, and should be inclined to get further aid before coming to a conclusion, but it has been expressly decided that where a truster has provided no machinery for carrying out such an intention as this, the intention cannot receive effect. That was decided in the case of *Allan's Trustees*, 11 Macph. 216, which was before the other Division of the Court in 1872. In that case a testator directed his trustees to pay and make over the fee of the residue of his estate to and among his whole children, "declaring that the provisions therein made in favour of females shall be purely alimentary to them, and not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration of husbands, and not affectable by their own or such husbands' debts or deeds." It was there held that as there was a clear direction to the trustees to pay to the beneficiaries who were alone interested, and as the Court could not consistently therewith create a trust which was the only mode of rendering the daughters' provisions inalienable, the daughters were entitled to receive payment on their own receipts. The Court, however, in order to give effect so far as possible to the testator's intentions directed that the receipts should bear an exclusion of the *jus mariti* and right of administration. Whether that would have any practical effect the Court did not say, but they at least paid that respect to the testator's intention.

The ground of judgment in that case is very clearly set forth in the opinions of the Lord Justice-Clerk and Lord Cowan. The former says—"If this condition had related to a sum payable annually it would perhaps have been proper that the Court should exercise its equitable jurisdiction for the purpose of carrying into effect such an intention. But in the present case I do not think this is practicable. The testator has attempted to do two inconsistent things. He has ordered his trustees to pay over, while he has endeavoured to limit the full right of property in the payees, and that without a trust, and without creating a separate or resulting right in anyone else." Lord Cowan says—"Mr Bell in his Commentaries, and other writers, lay it down that effectual protection for a fund left by a father to his children can only be obtained by means of a trust, and the question here raised comes in effect to be, whether we are to create a trust in order to carry out the conditions which Mr Allan annexed to his daughters' provisions. I am not aware of the Court having ever exercised such power. I think we are not entitled to authorise the trustees to do otherwise than the testator has directed, which is to pay the money directly to the beneficiaries." In that decision Lord Benholme and Lord Neaves concurred. Now, that is a very weighty decision, and I should be little disposed to dispute its soundness standing by itself. It was, however, followed by the case of *M'Nish* v. *Donald's Trustees*, 7 R. 96, in the same Division. I need not notice that case at any length, because it follows precisely on *Allan's Trustees*, but I may merely say that the Judges composing the Court in this case were not (with the exception of the Lord Justice-Clerk) the same as those who decided *Allan's Trustees*, which of course makes the judicial concurrence of opinion on the point all the stronger.

Another case of great importance which involved a recognition by this Division of the doctrine laid down in *Allan's* case, was the case of *Douglas' Trustees* v. *Kay's Trustees*, 7 R. 295, where by her antenuptial marriage-contract a lady, who was a minor, with consent of her father disponed to trustees the whole estate belonging or which should belong or accrue to her during the subsistence of the marriage. Her father thereafter by his settlement gave her a share of the residue of his estate as her absolute property, and directed his trustees to pay it over to her as here, but expressed a desire that it should not fall under the direction in her marriage-contract, and should be exclusive of the husband's rights, and he authorised his trustees "to take such steps as they may think necessary or proper for giving effect to the provision and declaration." The father there foresaw that if the money came into the wife's hands it would fall into the power of the marriage-contract trustees, and he thought that if he gave the directions I have mentioned to his trustees he might succeed in preventing that. But he had not, as the Court held, taken the proper means to effect his purpose, because there being a clear direction to the trustees to pay over the money to the daughter, it was held that as the father's settlement conferred on his daughter an absolute right to the property and possession of the share of residue, the declaration that it should not fall under the conveyance in the antenuptial marriage-contract was ineffectual.

The reasons which I assigned for the judgment I shall take the liberty to explain by a short quotation from my opinion. I say, speaking of the father—"He says to his trustees, 'Do all you can to prevent the fund from falling under the marriage-contract trust, but do so in a way consistent with giving Mrs Douglas an absolute fee and full power of disposal of the fund.' Now, the question is whether that could effectually be done, whether he could give her a full power of disposal, and yet exclude the operation of the marriage-contract trust. I do not doubt that it might have been done by creating a trust with a direction to pay the income to Mrs Douglas during her marriage for her alimentary use only, or by some provision of that kind. But then the fee would not be in Mrs Douglas, but in the trustees, and whether Mrs Douglas and her marriage-contract trustees would have been inclined to accept such a provision in lieu of her legal rights would have been for them to consider. But in the case here which we have actually to consider there is nothing more than a declaration of will and intention by the testator. He does not give any power, and does not give any authority by which his trustees can do what he wishes. They could not create a subordinate trust at their own hand; that is well settled by the case of *Allan's Trustees*, 11 Macph. 216, nor

could they continue to hold the money themselves, for they are directed to pay it over to Mrs Douglas as soon as the state of the trust permitted. The father desired that the money should not pass into the hands of the marriage-contract trustees. But what has that to do with the question? Could it be said for one moment that he could by a mere expression of intention exclude the diligence of his daughter's creditors? As I said before, this is a most onerous obligation by Mrs Douglas. She is personally bound just as if she had contracted a debt by borrowing so much money. Therefore I think that there is no answer to the demand of the marriage-contract trustees.

"I may put the question in this way—Was Mrs Douglas not entitled if she chose to give the money to the marriage-contract trustees? It would be very difficult to answer that question in the negative. She had full power of disposal; she could give the money to whom she pleased, including these trustees, and if she had the power was she not also under an obligation to give it." The rest of the Court, with the exception of Lord Deas, agreed in that opinion. Now, that case appears to me to involve a full recognition by this Division of the authority of the case of *Allan's Trustees*, and the principle embodied therein. The application of the principle to the present case is too clear to require explanation.

I am therefore of opinion that though the intention of the testator in this codicil was to tie up one-half of his daughters' shares, he has not effectually done so, not having provided means whereby his intention may be carried into effect.

Lord Mure—On the first question for consideration here, namely, the precise meaning of Mr Clouston's codicil of 29th November 1886, I think it is quite clear from the terms of the codicil that the testator's intention was to restrict the daughters' right to the provisions made to them in his settlement to the extent of giving them only one-half of their shares in absolute property, but the other half in liferent, with a power to dispose thereof by will; and he gives a very distinct intimation of his reasons for taking this course, for he says his object in making the restriction was that they should not "by any act on their part deprive themselves of a fair livelihood during their lifetime."

Now, in making this short codicil the testator unfortunately uses the expression "heritable estate," which gives rise to the question whether the restriction is meant to apply to the whole of the provisions to his daughters, or only the part which is heritable. It is, I think, quite plain from the nature of his fortune, the moveable estate being very large, and the heritable estate small, that the object stated in the codicil can never be carried out by applying the restriction to the respective shares of the "heritable estate," as that is so small that a liferent of half a share would not be much more than the wages of a superior servant.

It is quite clear therefore to my mind that the testator meant to deal with the daughters' shares of the provisions of residue consisting of his estate of whatever kind it might be, and we are, I think, entitled to construe the codicil as applicable to each daughter's shares of the residue, and as meaning that one-half of their shares should go to them in absolute property and one-half in liferent.

The difficulty in my opinion begins with the question, has Mr Clouston provided the machinery by which this can be done? And on that matter I am in the same position as your Lordship. If we were free to deal with it, I should be inclined to adopt some means by which the intention of Mr Clouston could be carried out. But we were referred to two cases in which it was held that where there was a direction to trustees to pay absolutely, followed by a subsequent qualification, such qualification cannot be made operative without provision being made for a continuing trust. I do not go into the reasons of the rule there laid down to the effect that any alteration of a testator's intention, unaccompanied by machinery to give effect to it, fails of its purpose. I hold we are bound by these decisions, and are not entitled to consider what would have been the effect here if the rule had not existed.

Lord Shand—I am of the same opinion on both points.

I think nothing can be plainer on the terms of the settlement and codicil to which we were referred than this, that when the testator used the word "heritable" he did not mean heritable as opposed to "personal." Taking that as clear, it appears to me it must be held to mean the estate in general of the testator, and I think Mr Graham, in the argument he submitted to the Court, gave us the means of doing so without doing violence to the words of the deed. The word "heritable," in the popular sense, has received a meaning which is given to it in the leading dictionaries, and which makes its use by the testator quite intelligible. In Webster's dictionary the word is defined in this way—(1) "Capable of inheriting or taking by descent," and as illustrating this meaning of the word he quotes the following line from Hale—"By the canon law this son shall be legitimate and heritable;" and (2) "that may be inherited." If we substitute for "heritable" "that may be inherited," the language of the codicil is quite correct, and I have in that view, it being clear that the term is not used as opposed to "personal," and there being a use of "heritable" which includes all estate, no difficulty in construing the word here in that sense.

As to the other point I have no difficulty. It is clear, in the first place, under the provisions of the original settlement, that there is an absolute direction to pay over, and I see nothing in the codicil to withdraw that direction. I doubt very much if such a direction could be withdrawn as a matter of inference. I think if there is such a direction in the settlement there must be an equally clear direction to the trustees in the subsequent deed to hold.

Now, what is the provision in the deed of settlement. It is in these terms—"My trustees shall pay or make over one of the said fifth shares of the said residue and remainder of my means and estate to each of my three daughters." The important clause in the codicil refers to half of the shares so given, and is in these terms—"In respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from

it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper." Can we read into that clause words conveying a suggestion and instruction to the trustees not to pay over, but to continue to hold the same in trust for the daughters? I do not think we can. The Court is not entitled to add words to those in the deed. There is a clear direction to pay, and the testator may have thought that, even if the fund were paid over, that might be done under conditions which would attach to the fund in the hands of the legatee. No doubt that would have been an error on his part, and it would require a recal of the direction to pay, and the addition of a direction to hold, to make the restriction of the daughters' rights effectual.

As a contribution to the cases to which we have been already referred, I may add the case of *Gibson's Trustees* v. *Ross*, 4 R. 1038.

On these grounds I agree with your Lordships.

Lord Adam—I concur with your Lordships on the first point, and have nothing whatever to add. But I differ with regard to the conclusion at which you have arrived on the second question, as to whether the half share is now to be paid over to the testator's daughters absolutely. Of course I do not differ as to the law applicable to the case; I must accept the law contained in *Allan's Trustees* and the other cases referred to; but I differ on the construction of this settlement and codicil. I think the effect of the codicil is to take away and destroy the direction to pay the half share in question to the daughters. I think the case must, like other cases, be settled by the intention of the testator, unless the testator has expressed his intention in such a way that the law will not give effect to it.

I am, however, humbly of opinion that if the intention of a testator be clear, his trustees are bound to give effect to it so far as they can, and that there is no doubt here as to the intention of the testator; it is clearly expressed in the codicil. He there says, in the first place, that he alters and revokes the clause named (second) on the twenty-third line of page six of his settlement, that is, the clause beginning with the direction to pay, and he then goes on to say, "in place of the absolute power therein given to my daughters Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one-half of their respective shares"—that is, as regards one-half, the daughters' shares remain to them as before to be paid over in absolute property. He thereby relieves the other half from the absolute direction to pay, and goes on to set out his intention with regard to it. Now what is his intention with regard to this second half? He says, "and in respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." I do not think the intention of the testator is anything else than that his daughters should have nothing but a liferent—"the interest or revenue"—of the half of their shares, for the fee is directed to be paid "to such person or persons or such objects as they may think proper." I therefore look upon the clause as an expression of intention on the part of the testator directing that the liferent of one-half of their shares should be paid to each of his daughters, and the fee to the persons named by them.

If such is the intention of the testator, it humbly appears to me that it goes to the roots of the direction to pay. If it is his intention, clearly expressed, that the trustees should not pay the fee to the daughters but to persons named by them, I think that necessarily implies a withdrawal of the direction to pay. That being so, I think the case does not fall under the principle of the cases of *Allan's Trustees*, *Massy*, and *Douglas' Trustees*, because there is no direction to pay to the daughters absolutely, but a direction to pay to persons named by them. In these cases there was a direct and imperative instruction to the trustees to pay or make over the legacies to the legatees. There being that direct order to pay as in *Allan's Trustees*, and to settle as in *Massy*, on certain conditions, it was considered, and quite properly, that the direction to convey in absolute property could not be qualified except by the creation of a trust. This case differs from these, because the effect of the clearly expressed intention of the testator is, that the trustees are not to pay to the daughters the one-half of their shares, and there being no direction to pay, the question arises, is there any difficulty in carrying out the testator's intention as I read it? I think there is none, for if I am right the truster's clearly expressed intention that that half should be paid over to persons named by his daughters implied a direction to the trustees to hold till the time for paying it over arrived. My construction of the deed does not conflict at all with the authority of *Allan's Trustees* and the other cases, simply because we have no direction here to pay the fund over to the daughters in absolute property or to give them a fee of it. In *Allan's Trustees* and the other cases there was a direction to pay over the fee under certain conditions; here there is a direction that the fee is not to be paid over. That is a distinction to which attention has been called before, and which your Lordships have said might possibly call for the exercise of the equitable power of the Court to give effect to it. We do not, however, require the exercise of any such power here, because here we have a continuing trust provided in the deed by which the intention of the truster may be given effect to completely.

The Court pronounced this interlocutor:—

"Find and declare that the first parties, as Mr Clouston's trustees, are not bound or entitled by the codicil dated 29th November 1886 to hold any part of the shares of the residue of the truster's estate, given by the clause named (second) of the fourth purpose of his trust-disposition and settlement to his daughters Maria (Mrs Bulloch), Christina, and Elizabeth, for behoof of these ladies in liferent, subject to a power of disposal by

will only of their respective shares; but that the said trustees are bound to pay over the whole of the said shares to the said Maria, Christina, and Elizabeth, and decern."

Counsel for the First Parties—Sir C. Pearson—J. E. Graham. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Second Parties—Gloag—Sir Ludovic Grant. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, July 5.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

STEWART *v.* NORTH.

STEWART *v.* ELDRED & BIGNOLD.

Jurisdiction—Arrestment jurisdictionis fundandæ causa—Foreign—Transference of Right to Fund Arrested.

An arrestment valid to found jurisdiction at its date is not rendered ineffectual, though, after the raising of the action but before the defences are lodged, the right to the fund arrested is transferred from the party against whom it is sought to found jurisdiction to someone else.

Arrestment—Foreign—Transference of Right to Fund Arrested.

A having used arrestments to found jurisdiction, raised an action against B, on the dependence of which he again used arrestments. The fund arrested was in both cases the amount of costs due by the arrestee to B under the decree of an English Court. About a fortnight after the arrestments had been laid on, the solicitors who had acted for B in the action before the English Court obtained from that Court a charging order upon the costs in said action.

In an action of multiplepoinding raised by the arrestee to determine who had right to the fund arrested, the Court ranked and preferred B's solicitors, in respect that by the law of England the charging order transferred the right to the fund arrested from B to his solicitors, and that the arrestments on the dependence were thereby rendered ineffectual.

Robert Stewart, farmer, Elibank, near Peebles, raised an action of count, reckoning, and payment against John Thomas North, residing near London, against whom arrestments had been used *ad fundandam jurisdictionem*.

The arrestments were used in the hands of a Mr Welsh, and the fund arrested consisted of a sum of £419, 11s. 4d., due by Mr Welsh to the defender under a decree of the High Court of Justice in England, Queen's Bench Division, for costs. That decree was pronounced on 25th April 1887. The arrestments *ad fundandam* were executed on 26th May 1887, and the summons in the present action was signeted on 27th May, and on the same day the said fund was again arrested on the dependence of the action. A certificate of the judgment in the English suit, dated 31st May, was registered in the Books of Council and Session on 1st June under the Judgments Extension Act 1868. On 13th June Messrs Eldred & Bignold, solicitors in London, who had acted for the defender Colonel North in various litigations in England, including the action before the High Court of Justice already referred to, obtained from the English Court a charging order upon the costs recovered in that action, and this was intimated to the arrestee on June 14th.

The defender averred, *inter alia*—"The sum in the said decree was not arrestable or attachable in respect of claims against the defender. Messrs Eldred & Bignold are in right of the whole fund, which is due and payable only to them in respect of their costs as solicitors to the defender North in the said cause, which costs exceed the said fund of £419, 11s. 4d., and have not been otherwise paid or satisfied. They hold the said judgment or decree as from the date of the same being signed, and instructed registration thereof to recover their said costs, consisting chiefly of outlays. According to the law of England, so long as the costs of the solicitors of the party found entitled to costs by decree of Court are not otherwise paid or satisfied, the debtor in the said decree is not entitled to pay or satisfy the decree except with their assent or through their hands, and they have a lien on the decree, and all costs payable to their client in the cause, for the full amount of their costs as between solicitor and client, which lien attaches *ipso jure* on judgment being signed, and is preferable to the claim of any assignee or creditor of their client. The said solicitors are held as creditors in the said debt *quoad* their unpaid or unsatisfied costs substantially to the same effect as law-agents who have obtained decree for expenses in the Courts of Scotland in their own names as agents-disbursers. The said Messrs Eldred & Bignold on or about 13th June 1887 obtained a charging order for their said costs upon the said fund, which is produced and referred to, and which declares their pre-existing right as aforesaid."

The defender pleaded—"(1) The said debt not being arrestable by a creditor of the defender, no jurisdiction has been founded against him. (2) The alleged arrestments not having affected any property of the defender, the jurisdiction ought not to be sustained, and the present action should be dismissed, with expenses."

On 2nd December the Lord Ordinary (Lee) repelled the plea of no jurisdiction, and allowed parties a proof of their averments on the merits.

Against this interlocutor the defender reclaimed to the First Division, and on 20th December their Lordships recalled the interlocutor of the Lord Ordinary, and remitted to him to allow the defender a proof of his averments (above quoted) in support of the plea of no jurisdiction.

At the proof Mr Eldred, of the firm of Eldred & Bignold, who was the only witness examined, gave evidence to the effect that Colonel North had been due from 25th April 1887, and still was due, to his firm in respect of their account in the action before mentioned, a sum exceeding £419, 11s. 4d., which was the amount of costs found due by Welsh to North.

A case was thereafter prepared for the opinion of English counsel, on the assumption that from and after April 25th 1887 there had been due by

North to Eldred & Bignold in respect of their account in the said action a sum exceeding £419, 11s. 4d., which, after a recital of the facts narrated, proceeded as follows—"The question between the parties to the present action, viz., Stewart and North, is whether the arrestments used by Stewart attached anything. The answer to that question depends upon whether Welsh was or was not under an obligation to account to North for the £419, 11s. 4d. of costs in the action which had depended between them, and it is on this latter point that the opinion of counsel is desired. It is said by North that the solicitors are the creditors in the debt instituted by the judgment for their unpaid costs, and that the debtor is not entitled to pay this debt to the other party in the action, except through the hands of the solicitors, or with their assent. Stewart, on the other hand, founds upon the terms of the judgment as constituting a debt by Welsh to North, which Welsh is bound to pay to North, unless it is regularly assigned to some other creditor."

The opinion of counsel is desired on the following queries—"(1) Was North, before his solicitors obtained the charging order, entitled, while his solicitors' account for the costs of the action remained unpaid, to demand payment to himself of the amount of costs found due in the action, or were the solicitors the true creditors to the exclusion of their client? (2) What was the effect, if any, either at common law or under the provisions of the 28th section of 23 and 24 Vict. c. 127, upon the respective rights of the solicitors and North of the charging order, and in particular, had it any retrospective effect upon their respective rights?"

The opinion of Mr Finlay, Q.C., to whom the case was referred, was in these terms—"I assume from my instructions, and the terms of the charging order of 13th June 1887, that Colonel North is still indebted to Messrs Eldred & Bignold in a sum not less than £419, 11s. 4d., in respect of the costs of the action in which he obtained judgment for that sum as costs.

"Query 1. Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Mr Welsh, and could have given a good receipt for it—*Mercer* v. *Graves*, L.R., 7 Q.B. 499—but Messrs Eldred & Bignold, in virtue of their particular lien for costs in that action, might, at any time while the money remained unpaid, have given notice to Mr Welsh not to pay Colonel North, and if, after such notice, Mr Welsh had paid Colonel North, he might have been compelled to pay again to Messrs Eldred & Bignold—*Omerod* v. *Tate*, 1 East. 464. To this extent, but no further, were Messrs Eldred & Bignold the true creditors to the exclusion of Colonel North. In virtue of this lien, as it has been called, the claim of Messrs Eldred & Bignold in respect of their costs would have priority over an attachment obtained by a judgment creditor of Colonel North against Mr Welsh as garnishee, if notice of their lien had previously been given to the garnishee—*Eisdale* v. *Conyngham*, 28 L.J. Ex. 213; *Simpson* v. *Prothero*, 26 L.J. Chan. 671—and I think even where notice had not been so given, though on this last point there does not appear to be any direct authority. In the case of *Hough* v. *Edwards*, 1 H. and N. 171, the solicitor had no lien for costs in the proceedings in which the judgment had been recovered.

"Query 2. I am of opinion that the charging order of the 13th June 1887 conferred a valid title upon Messrs Eldred & Bignold under the statute, and that such charging order had a retrospective effect. This order was properly made, as costs are 'property recovered,' within the meaning of the section (*per* Brett, M.R., in *Dallow* v. *Garrold*, 14 Q.B.D. 545, 546). A charging order under the statute 23 and 24 Vict., c. 127, sec. 28, gives the solicitor priority over a judgment creditor who has previously served a garnishee summons—*Dallow* v. *Garrold*, 14 Q.B.D. 543. As Mr Stewart was of course aware that the sum which he arrested was payable under a judgment, he had constructive notice of the lien of Colonel North's solicitors—*Faithful* v. *Ewen*, 7 Ch. D. 495. I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of their claim against Colonel North."

On 3rd November 1888 the Lord Ordinary (KINNEAR) (to whom the case had been transferred) found the arrestments used by the pursuer were inept to found jurisdiction; therefore dismissed the action, and decerned.

"*Opinion.*—The question whether the arrestments used by the pursuer are effectual to found jurisdiction depends upon the relative rights of Colonel North and his solicitors Messrs Eldred & Bignold in the debt which is said to have been attached.

"Before the date when the arrestments were used, Colonel North had obtained judgment against the arrestee for the sum of £419, 11s. 4d. as the taxed costs of a suit in the High Court of Justice in England. At the date when the defences in the present action were lodged, Messrs Eldred & Bignold had obtained a charging order, the legal effect of which is explained in Mr Finlay's opinion. It was held in *Walls' Trustees* v. *Drynan*, 15 R. 359, that the question raised by a plea to jurisdiction is 'not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction *de presenti* at the time when the objection is stated,' and if it were to be held in accordance with that judgment that the question is to be determined with exclusive reference to the state of rights at the time when defences are lodged, it would appear to me to follow from Mr Finlay's opinion that the jurisdiction is not well founded, because at that time the arrestments were according to the opinion ineffectual. Mr Finlay says not merely that the charging order 'conferred a valid title upon Messrs Eldred & Bignold,' but also that it had a retrospective effect, so as to give them a priority over an attachment previously obtained by a creditor of Colonel North.

"It is enacted by the statute to which the learned counsel refers, sec. 28, that 'all conveyances and acts done to defeat or which shall operate to defeat such charge or right, shall, unless made to a *bona fide* purchaser without notice, be absolutely void and of no effect as against such charge or right.' It seems to be clear enough, both from the opinion and from the case of *Dallow* v. *Garrold*, cited by Mr

Finlay, that the pursuer, as arresting creditor, does not fall within the exception in favour of purchasers without notice, and accordingly it was hardly disputed that in the multiplepoinding Messrs Eldred & Bignold must be preferred, because in a question with them the arrestments used by the pursuer are absolutely void.

But it is said that the true point of time to be considered is the date when the arrestment was used to found jurisdiction, because if that arrestment were effectual at the time no subsequent event could displace the jurisdiction thereby established. It may be that is a sound proposition—and I do not think there is anything to the contrary in the judgments delivered in the case of *Walls*—but I think the arrestment was inept from the beginning, because I must hold, in accordance with Mr Finlay's opinion, that it was ineffectual to attach the debt. It is true that before his solicitors obtained the charging order Colonel North could have demanded payment, but Messrs Eldred & Bignold might at any time while the money remained unpaid have given notice to Mr Welsh not to pay to Colonel North. Colonel North therefore had at no time an exclusive right to recover, and his right, such as it was, could not be made available to attach the debt so as to exclude Messrs Eldred & Bignold, because they could defeat the attachment so long as the money remained unpaid. They have in fact defeated the arrestment, and they must obtain decree in the multiplepoinding for payment of the money alleged to have been well arrested by Mr Stewart. It appears to me impossible to give effect to their claim in that action, and at the same time to hold in the present action that the money was effectually arrested by the competing claimant in the multiplepoinding.

"It is said that the arrestment to found jurisdiction is in a totally different position from an arrestment in execution, because it does not impose a *nexus*. It may not be a lasting *nexus*, and there may be a question how long it continues. But still, like any other arrestment, it must be effectual to attach the subject arrested for the purpose for which it is used or else it must be inept.

"The *nexus* must be capable of subsisting until the time when the objection to jurisdiction can be pleaded or else it is of no effect. This appears to me to be very clearly brought out in the Lord President's judgment in the case of *Lindsay*, where he explains the meaning of an arrestment to found jurisdiction. 'It means this, that it fixes a subject in the country, and the subject being in the country the party is answerable to the jurisdiction of this Court.' On this principle it was held in the case of *Trowsdale's Trustee* v. *The Forcett Railway Company*, 9 R. 89, that in order to found jurisdiction by arrestment the subject arrested must be capable of attachment by diligence in execution; and Lord Neaves states the reason very much in the same way as the Lord President does in *Lindsay's* case. The principle rests on the fact that there is something within the jurisdiction of the Court which can be specifically taken in execution of any decree which may be pronounced. . . . But must not extend the fiction beyond the limits already recognised. I am not aware of its having been extended beyond circumstances where the arrestment shows that the decree will not be a *brutum fulmen* from there being a subject within the jurisdiction of the Court which can be attached.' It is true that the effect of the decree is not to be measured by the value of the subject arrested. But the subject, whatever be its value, must be effectually seized by the arresting creditor, although the seizure may be only temporary, and although it may cease to operate without the procedure which is necessary to determine the effect of an arrestment in execution.

"In the present case the arrestment has fixed nothing within the country. There is no subject attached which could be taken in execution of a decree against the defender. The arrestment is therefore in my opinion inept.

"No other ground of jurisdiction is alleged."

The pursuers reclaimed, and argued—(1) If arrestments were valid at their date to found jurisdiction their validity could not be affected by the fact that the fund arrested was subsequently carried away through the intervention of a *vis major*. If that were not so, all that would be required to defeat the jurisdiction of the Court would be to break the arrestments, and it would follow that the view of the Court varied according to the time looked at. Defeasible debts and contingent debts were arrestable—Bell's Law Dict. *voce* Arrestment; *Corse* v. *Masterton*, January 31, 1705, M. 767. The *nexus*, if it could be called a *nexus*, imposed by arrestments *ad fundandam* was of a very different kind from that constituted by arrestments in execution. The former could never be the basis for an action of furthcoming—*Malone and M'Gibbon*, v. *Caledonian Railway Company*, May 28, 1884, 11 R. 853; *Carlbey* v. *Borjesson*, November 21, 1877, 5 R 188, *per* Lord President, 192. When the arrestment used in this case was laid on, North was the creditor in the fund arrested, as was clear from the opinion of English counsel. The arrestment was therefore valid to found jurisdiction against him, and the fact that a charging order was subsequently obtained could not affect the jurisdiction which had been validly constituted, even on the assumption that the fund arrested was carried away by the charging order—*Baines & Tait* v. *Compagnie Générale des Mines d'Asphalte*, March 15, 1879, 6 R. 846; *Lothian* v. *M'Cree*, November 27, 1828, 7 S. 72; *Douglas* v. *Jones*, June 30, 1831, 9 S. 856; *Lindsay* v. *London and North-Western Railway Company*, January 27, 1860, 22 D. 571, *per* Lord President (M'Neill) 585—*aff.* February 1858, 3 Macq. 99. (2) Further, the decree for costs had been made a Scotch decree by registration, and the fund arrested was thus due under a Scotch decree. The arrestments would not therefore be defeated by the preference given by an English statute to the charging order, the effect of which was necessarily local.

The defender and respondent argued—An arrestment *ad fundandam* was a *realis vocatio in jus*. It was necessary that the subject arrested should be within the territory of the Court in which it was intended to found jurisdiction, and should not be moved therefrom till caution be found *judicio sisti*, or till the defender prorogated the jurisdiction of the Court. The time at which the question of jurisdiction fell to be

decided was when defences were lodged. If the arrestments did not impose a *nexus* till then, they failed altogether—Ersk. i. 2, 19; *Walls' Trustees* v. *Drynan*, February 1, 1888, 15 R. 359. Arrestments *ad fundandam* did not differ from other arrestments with regard to the subject arrestable—*Trowsdale's Trustee* v. *Forcett Railway Company*, November 4, 1870, 9 Macph. 88, 92; *Cameron* v. *Chapman*, March 9, 1838, 16 S. 907. The judgment following on arrestments could only affect the property arrested—*Lindsay* v. *London and North-Western Railway Company*, *per* Lord Cranbourne, 3 Macq. In this case North's right was from the beginning a qualified one, the fund arrested being *ex facie* of the decree subject to all the rights under that decree, and to the rights of North's agents. It was clear from the opinion obtained that the effect of the charging order was to transfer the right to the fund arrested from North to his agents. The effect of the arrestments had thus been defeated—*Ellis* v. *Muckersie & Rose*, May 12, 1831, 9 S. 585; *Chambers' Trustees* v. *Smith*, April 15, 1878, 5 R. (H. of L.) 151; *Wyper* v. *Carr & Company*, February 2, 1877, 4 R. 444. (2) The registration of the decree did not make it a Scotch decree. It was only to be treated as a Scotch decree for the purposes of execution. If the action were still pending in the English Court, so that the charging order could be pronounced, its effect must be judged of by English law, and the right of the arresting creditor measured by the rights of the English solicitors under the charging order—Judgments Extension Act (31 and 32 Vict. cap. 54), sec. 2.

At advising—

Lord President—In this case the Lord Ordinary has found that the arrestments used by the pursuer "are inept and ineffectual to found jurisdiction," and he therefore dismisses the action. Now, I am unable to agree with the Lord Ordinary, and I am of opinion that the arrestments used in this case were effectual to found jurisdiction. The debt due by the arrestee to the defender was a debt depending on a judgment of the English Court for costs. That judgment has been registered, and has become as a judgment of this Court effectual to found diligence. Now, the execution of the arrestment *ad fundandam jurisdictionem* was on 26th May 1887; the summons was raised the following day, and on the same date arrestments were used on the dependence. In the present case we have nothing to do with the arrestments on the dependence, and the case may be dealt with as if these had not been used. We are entirely dealing with the validity and effect of the arrestments *ad fundandam jurisdictionem*.

The reason why these arrestments are said to be inept is that the London solicitors of the defender were entitled to a preference on the arrested fund in competition with their client and all the world, and I think that to be so provided they obtained from the Court in England a charging order. That order was not obtained till 13th June, and the arrestments were used on 26th May. I have not the smallest doubt that on the 26th May the arrestee was a debtor of the defender in a sum of £419, 11s. 4d., and that he should cease to be a debtor of the defender by assignation or legal diligence does not prevent arrestments good at the date at which they were used from being good arrestments. If the arrestments were good at the date of execution, it does not affect their validity for the purpose for which they were used—to found jurisdiction—that the fund has since been carried off by someone else. Arrestments *ad fundandam jurisdictionem* can never be followed by a furthcoming, and in no other way can the funds arrested be made available for payment unless they are followed by other arrestments on the dependence; they have no further effect than for the time to lay upon the fund in the hands of the arrestee such a *nexus*, or whatever it may be, as is requisite to found jurisdiction in this Court. Now a charging order appears to me to be not different from any other preferential diligence which is not preferential from reason of priority in time but by reason of inherent right. The arrestments may be defeated by a subsequent preference caused by the charging order, but it depends whether the solicitors had occasion to obtain it or chose to obtain it. They might have refrained from applying for it if their account had been paid. In short, it was a mere contingency whether the debt should be affected by the charging order or not.

However that may be, the charging order was a subsequent proceeding, and the circumstance that it carries off the fund, if it does so operate, does not effect the validity of the arrestments *ad fundandam jurisdictionem*.

The Lord Ordinary refers to the case of *Walls' Trustees* v. *Drynan*, and I think he has misread what was the decision in that case. He says it was there held that "the question raised by a plea to jurisdiction is 'not whether the Court had jurisdiction over the defender at any antecedent time, but whether it has jurisdiction *de presenti*, at the time when the objection is stated.'" The point raised in that case was whether an arrestment *ad fundandam* was used too late or in time to found jurisdiction. The arrestment was used after the summons had been served, and the question was whether that was too late. The opinion which I gave was that the question of jurisdiction must be judged of as to the time when the objection was taken. If I could not affirm in this case that there was jurisdiction when defences were lodged and the objection stated I should adhere, but I think there was jurisdiction, because anterior to the raising of the summons arrestments had been used against a fund then belonging to the defender. I am therefore of opinion that we should recal the interlocutor of the Lord Ordinary, and repel the first and second pleas of the defender.

Lord Mure—I concur in the opinion expressed by your Lordship. On the facts of the case there is no doubt that at the date of the execution of the arrestments there were funds in the hands of the arrestee to which the defender had right. If that be so, an arrestment to found jurisdiction was laid on and jurisdiction was founded. A firm of solicitors in London contend that they have a right over the fund arrested upon which they obtained a charging order some days after the arrestment was used, the effect of which they say was to transfer any right in the fund from the defender to them. If, however, *prima facie* at the date of the execution of the

arrestment *ad fundandam jurisdictionem* there were funds in the hands of the arrestee due to the defender, any subsequent right acquired by the solicitors cannot effect the validity of that arrestment. That was settled in the case of *Douglas* v. *Jones*, 9 S. 856, where the Court held that an arrestment used by the creditor of a foreign partner of a company in Scotland in their hands, and over goods belonging to them created a jurisdiction over the partner, although he alleged he had no claim on the company funds.

Lord Shand—At the time the arrestment in question was used there was a decree of an English Court against the arrestee for payment of £419, 11s. 4d. in favour of Colonel North. The opinion of English counsel has been taken as to the right of Colonel North to that sum, and the opinion given is to this effect, that "Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Welsh, and could have given a good receipt for it." That is to say, when the money was arrested the fund was one of which Colonel North could have demanded payment, and which the arrestee was safe to pay to him, although as time went on it appeared that others had a right to come forward and defeat the right of Colonel North, and by Mr Finlay's opinion Colonel North's right came to an end. The question is, whether a subject of this kind is not an arrestable subject, and it is scarcely maintained that it is not. Although the right of Colonel North is defeasible in its nature, yet till defeated it is a valid right, and could be made the subject of a transaction. There can be no doubt that the fund was an arrestable subject, and of such a kind as to create jurisdiction. The usual procedure was followed, the pursuer using the arrestment before serving the summons, and then signeting and serving the summons. The point maintained by the defender is that some time after a charging order was obtained and Colonel North's right defeated before defences were lodged, and that in judging of the question of jurisdiction we must look at the time when defences are lodged. In support of this contention the defender relies on the case of *Walls* v. *Drynan*. I do not think that case has any such effect. The point decided in that case is expressed by the Lord President in these words—"It is enough to say that jurisdiction is founded in perfectly good time if it is founded when the summons is served, because until the summons is served there is no action." In this case jurisdiction was founded by an arrestment used before the summons was served or signeted. The arrestment was at its date a good arrestment, and there was nothing, I think, to lead to the conclusion that an arrestment good at its date to found jurisdiction would lose its effect because of something happening between that date and the lodging of defences.

Lord Adam—On the 26th May 1887 the pursuer executed an arrestment *ad fundandam jurisdictionem* in the hands of Mr Welsh, who is allowed to have been a debtor of Colonel North, the defender. The subject arrested is a sum of £419, 11s. 4d., the costs in an action by the arrestee against North, for which North had obtained decree. *Ex facie* of that decree there is no doubt that a debt is due by the arrestee to North, but it is said that it is not really due to North, but to North's solicitors in London by its nature. On that matter the opinion of an English counsel has been taken, and his opinion is that up to the 13th of June, when the charging order was obtained, North was entitled to demand from Welsh, and Welsh was bound to pay to him, the above mentioned sum. If that be so, I cannot understand a better description of a debt due, and therefore I have no doubt that at the date of the arrestments *ad fundandam jurisdictionem* there was a debt due to North which was a proper arrestable subject. If that be so, the arrestments were valid, and they were followed by the signeting of the summons on May 27th, and by arrestments on the dependence on the same date. If the arrestments were good that summons formed a perfectly valid and good depending action. But if there was a valid depending action, it seems quite clear that the defender was bound to answer the citation given in the action because of the preceding jurisdiction founded by the arrestments *ad fundandam jurisdictionem*. It was because the arrestments *ad fundandam jurisdictionem* created jurisdiction that the service of the summons was a valid transaction. If that is so, it shows that as soon as the summons was served the object of the arrestments had been served; they were of no further use; they could never have been followed up in any way, and could be used for no other purpose.

It is contended that the effect of the charging order is to sweep away the fund arrested, and that may raise a question as to the effect of the arrestments on the dependence, but I do not see that the result of that charging order can affect the validity of the arrestments *ad fundandam jurisdictionem*. In my view these arrestments had already served their purpose, and could not be affected by the charging order. The conclusion to which I have come is accordingly that the use of the charging order can in no way affect the validity of the arrestments *ad fundandam jurisdictionem*, and I therefore am of opinion with your Lordship that the interlocutor of the Lord Ordinary should be recalled.

The Court, by interlocutor dated 14th June 1889, recalled the interlocutor reclaimed against, repelled the first and second pleas of the defender, and remitted to the Lord Ordinary to proceed with the case.

On 20th October 1887 Mr Welsh, in whose hands the sum of £419, 11s. 4d., being the amount of costs due under the decree of the Court of Queen's Bench in England had been arrested on the dependence of the above action, raised an action of multiplepoinding and exoneration to have it determined who had right to the said sum.

Competing claims were lodged by Messrs Eldred & Bignold, the English solicitors of Colonel North, and Robert Stewart, the pursuer in the action of count, reckoning, and payment above mentioned, and who on the dependence of that action had used arrestments in the hands of Welsh.

The claimants Eldred & Bignold pleaded, *inter alia*—"(1) In respect of their holding the said

decree for their costs as from the 25th day of April 1887, the claimants are entitled to be ranked and preferred in terms of their claim. (2) The said fund not being arrestable by any creditor of North's at the date of the said arrestments being used, and the alleged arrestments being inept, the claimants should be preferred to the arrestor or alleged arrestor. (3) The right of the claimants being preferable to arrestments laid on subsequent to 25th April 1887, they should be ranked and preferred in terms of their claim."

The claimant Stewart pleaded, *inter alia*—"(1) The claimant having attached under the diligence set forth the fund *in medio*, he is entitled to be ranked and preferred in terms of his claim."

The proof in the action *Stewart* v. *North* was held as the proof in this action.

The Lord Ordinary on 3rd November 1888 pronounced this interlocutor—"Sustains the claim for Eldred & Bignold as contained in the joint claim, and ranks and prefers them accordingly: Repels the claim for Robert Stewart," &c.

The Lord Ordinary's opinion on the point here decided is contained in his opinion in the action of *Stewart* v. *North*.

Stewart reclaimed, and argued—The effect of the charging order was necessarily of local limitation. It was an equitable remedy to enable solicitors in England to recover their disbursements. The matter of debt rested no longer on local law, as the decree had been by registration made a Scotch decree, and the sum in question was the subject of a Scotch litigation. The charging order was obtained after the arrestments on the dependence had been executed, and the arrestments as the prior diligence must prevail—*Goetze* v. *Aders*, November 27, 1874, 2 R. 150.

Argued for the respondents Eldred & Bignold—The opinion of the English counsel settled the matter in favour of these claimants, for it clearly showed that the right of Colonel North in the sum arrested was of a defeasible nature, and had been defeated by the charging order. The fund arrested had therefore been carried off by the charging order.

At advising—

Lord President—In this case I think the Lord Ordinary was right in sustaining the claim for Messrs Eldred & Bignold, the English solicitors of Colonel North. The fund *in medio* consists of a sum owing by Mr Welsh under a judgment pronounced by the High Court of Justice in England for costs in favour of North, who had been successful in an action brought against him by Welsh, the common debtor, and we have it proved to us that the right which North obtained under the English judgment was of a qualified nature. So long as there was no intervention on the part of the English solicitors he could have received payment of the same from Welsh, and the latter would have been in safety to pay to him; but it was in the power of the English solicitors to interpose by obtaining a charging order, which had the effect of transferring the right in the sum due on the decree of the English Court to themselves from North. Therefore, according to English law, North's right was a qualified one from the beginning, and I am of opinion that the question as to the nature of the right is to be determined by the law of England.

Now, the arresting creditor arrested in the hands of the debtor under the judgment the accountability of the arrestee to North, but if there was no such accountability in the arrestee—if he was liable not to North, but to North's solicitors in England—then the debt was not prestable by the arrester, and I think the charging order, though obtained subsequently to the execution of the arrestments, has the effect of making the arrestee accountable to Eldred & Bignold instead of to North.

Lord Mure—I agree. The sum in question is the amount of costs for which decree was given in an action in the English Courts. The present question is, I think, to be determined by the law of England. I have accordingly no difficulty in concurring, for the import of the opinion of Mr Finlay is that the action taken by the English solicitors, who are claimants in this case, transferred North's right to them, for he says—"I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of the claim against Colonel North."

I concur therefore in the opinion that Eldred & Bignold must be preferred to that sum.

Lord Shand—This fund in the arrestee's hands was arrested by Mr Stewart on the dependence of his action against Colonel North on 31st May 1887. The sum arrested was the amount due under a decree for costs obtained by North in England. After the arrestment had been executed by Stewart, a charging order was obtained by the English solicitors, who had conducted the case for North in the English Court, on 13th June, and it was intimated to the arrestee on 14th June. The question we have to decide is, what is the effect of the intimation of the charging order? Is it such that the English solicitors are entitled to vindicate their claim to the money, or is their claim defeated by the previous arrestment? I am pretty clearly of opinion that the arrestment is not good in competition with the claim of the solicitors. The matter must be determined by the law of England, because the question between the parties is one not of remedy but of right. The nature of North's right is explained in the opinion of Mr Finlay very clearly. In the first place, he says—"Colonel North was, before his solicitors obtained the charging order, entitled to demand payment to himself of the amount of costs found due to him by Mr Welsh, and could have given a good receipt for it." But he goes on to qualify that statement by saying—"Messrs Eldred & Bignold, in virtue of their particular lien for costs in that action, might, at any time while the money remained unpaid, have given notice to Mr Welsh not to pay Colonel North, and if, after such notice, Mr Welsh had paid Colonel North, he might have been compelled to pay again to Eldred & Bignold." In a subsequent passage he says—"I am of opinion that the charging order of the 13th June 1887 conferred a valid title upon Messrs Eldred & Bignold under the statute, and that such charging order had a

retrospective effect." Finally, in the important passage read by Lord Mure he says—"I am of opinion that the charging order converted the inchoate right of Messrs Eldred & Bignold at common law into an actual charge, and made them the owners in equity of the sum due from Mr Welsh to the extent of their claim against Colonel North."

What, then, was the right of North at the date when the arrestments were used, and what was the arrester's claim? According to Mr Finlay's opinion, North's right was of a defeasible nature. If the arrestee had thought fit to pay North, North could have received payment, and could have given a good discharge, but till payment his right could be defeated by a charging order obtained and intimated. If that be so, can the arrester get a higher right than there was in the person of the arrestee. Suppose North had assigned his right, the assignee could only take the right as it stood in the assigner. An arrestment gives no higher right than an assignation, and the arrestment in this case only attached the right as it stood in the person of Colonel North. Now, the right which he had was of a defeasible nature, as I have said, and was defeated by the charging order. I am therefore of opinion that the Lord Ordinary was right in preferring the claim of Eldred & Bignold.

LORD ADAM concurred.

The Court adhered.

Counsel for Stewart—Murray—Wilson. Agents—J. & A. Hastie, S.S.C.

Counsel for Colonel North and the Claimants Eldred & Bignold—Gloag—Kennedy. Agent—Alexander Campbell, S.S.C.

Saturday, July 6.

FIRST DIVISION.

[Lord Trayner, Ordinary.

STEWART *v.* GUTHRIE AND OTHERS.

Process — Reclaiming-Note — Competence — Court of Session Act 1868, *secs.* 53, 54.

An interlocutor repelling an objection to the competency of a multiplepoinding on the ground that there has been no double distress can only be reclaimed against within ten days, and with the leave of the Lord Ordinary.

This was an action of multiplepoinding and exoneration raised by Charles Frederick Crewes, Bank of Victoria, Melbourne, and his attorneys in this country. The pursuer and nominal raiser was Robert Stewart, solicitor, Glasgow, judical factor on the trust-estate of the deceased William Rae Wilson of Kelvinbank, near Glasgow. Charles Frederick Crewes, the real raiser, and a number of other persons were called as defenders. The nominal raiser and holder of the fund lodged objections to the competency of the action on the ground that he had not been doubly distressed, and the record was closed on the summons and objections.

On 20th February 1889 the Lord Ordinary (TRAYNER) pronounced this interlocutor:—"Repels the objections to the competency of the multiplepoinding, and appoints claimants on the fund *in medio* to lodge their condescendences and claims within the next fourteen days, reserving all questions of expenses: Further appoints intimation of the dependence of this action to be made to all concerned by advertisement twice for two successive weeks in the *Scotsman* and *Glasgow Herald* newspapers."

On 14th June the Lord Ordinary pronounced this interlocutor:—"Finds the real raiser entitled to the expenses of raising and executing this cause, bringing the same into Court, and conducting it, and remits the account thereof, when lodged, to the Auditor to tax and report: Finds Stewart, the judicial factor, liable in expenses in connection with the preliminary defences, and remits the account thereof, when lodged, to the Auditor, to tax and report."

Against this interlocutor the nominal raiser and pursuer reclaimed, but the reclaiming-note was not lodged till July 5th.

The respondent, the real raiser, objected to the competency of the reclaiming-note, on the ground that the interlocutor reclaimed against disposed merely of preliminary defences, and was in no sense a final interlocutor, and therefore could only be reclaimed against with the leave of the Lord Ordinary, and within ten days—Court of Session Act 1850 (13 and 14 Vict. cap. 36), sec. 11; Court of Session Act 1868 (31 and 32 Vict. cap. 100), secs. 52, 53, and 54.

The reclaimer argued—That a multiplepoinding was a congeries of actions. The Lord Ordinary's interlocutors disposed of the only question in the cause on which the record had been closed, viz., the question of double distress—*Walker's Trustee* v. *Walker*, February 20, 1878, 5 R. 678.

At advising—

LORD PRESIDENT—The real raiser of this multiplepoinding is not the holder of the fund, but a person who is going to claim in the competition, and who is called as a defender. The nominal raiser, and the holder of the fund, is the judicial factor on the trust-estate of the deceased William Rae Wilson. There are a number of other persons called as defenders besides the real raiser, who are supposed to have an interest in the fund.

The nominal raiser was of opinion that he had not been doubly distressed, and he lodged an objection or preliminary defence to the competency of the action, and that preliminary defence was disposed of by the Lord Ordinary on 20th February 1889 by being repelled, and by an interlocutor which he has now pronounced disposing of the expenses of the discussion. A reclaiming-note has been lodged on the footing that the judicial factor is entitled to reclaim against this last interlocutor, and thereby bring up the interlocutor of 20th February for review on a twenty-one days' reclaiming-note.

It appears to me that this reclaiming-note is not competent without leave of the Lord Ordinary, nor with leave after the expiry of ten days, because it is simply a reclaiming-note against the judgment of a Lord Ordinary repelling a preliminary defence.

Lord Mure—I am entirely of the same opinion. The interlocutor of the 14th of June on the face of it bears to be an interlocutor dealing with the expenses incurred in connection with a preliminary defence, and with that question only.

Lord Shand—My opinion is that this is a reclaiming-note against a judgment of the Lord Ordinary disposing not of the whole merits of the cause, but only a part of it, and that it must be reclaimed against within ten days, and even then, only with the leave of the Lord Ordinary. I think it is evident that when this objection has been disposed of, the cause between the nominal raiser and the other claimants will go on to the effect of the nominal raiser being next required to lodge a condescendence of the fund *in medio*, with regard to which there may be very considerable discussion, and till all this is finished there can be no concluded cause between the nominal raiser and the claimants.

I am of opinion therefore that the reclaiming-note now presented is incompetent, the leave of the Lord Ordinary not having been obtained.

Lord Adam—As I understand the matter, the reclaimer says that the interlocutor of 20th February was an interlocutor disposing of the whole merits of the case as between the nominal raiser and the claimants, except in so far as it did not dispose of the question of expenses, and that if it had disposed of these it would have been a final interlocutor, which might be reclaimed against within twenty-one days. He now says that the present interlocutor does dispose of expenses, and that therefore the whole merits of the cause are now disposed of. I think he is mistaken. The preliminary defence which has been repelled is the same as a preliminary defence in an action of reduction. There is a great deal of necessary procedure to go on between the nominal raiser and the claimants. The first thing will be an order upon the nominal raiser to lodge a condescendence of the fund. If any questions arise on that, they will all be between the nominal raiser and the claimants. I think therefore that the interlocutor of the Lord Ordinary was one disposing of a strictly preliminary defence, and could not be reclaimed against without leave.

The Court refused the reclaiming-note as incompetent.

Counsel for the Reclaimer—C. S. Dickson. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Respondent—Guthrie. Agents—Cumming & Duff, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

HIGHLAND RAILWAY COMPANY *v.* SPECIAL COMMISSIONERS OF INCOME TAX.

Revenue — Income-Tax — Railway — Expenditure on Improvements—Deductions from Profits.

A railway company in making their return for assessment under the Income-Tax Act claimed as deductions from the revenue of the year of assessment (1) a sum expended upon the improvement of the permanent way of one section in order to bring it up to the standard of the rest of the line; and (2) a sum representing the cost of the extra weight in relaying another portion of the line with steel in place of iron rails, and with chairs of additional weight. In the books of the company these sums were charged against capital.

In an appeal by the railway company, *held* that the sums so expended were properly charged against capital, and a determination of the Special Commissioners disallowing the said sums as deductions from revenue *affirmed*.

The Highland Railway Company in making their return to the Income-Tax Act of 1888-89, based on the profits of the preceding year, as shown by their printed accounts for the two half-years ended 31st August 1887 and 29th February 1888, claimed to deduct in addition to the several items charged as the expenditure of the year in working the railway, four sums of £9119, £755, £1555, and £878. These amounts were entered under the following heads in the said accounts of the company for the half-years ended 31st August 1887 and 29th February 1888—

£9119, August 1887 £1555, February 1888	Improvement of Sutherland and Caithness section, to bring it up to the standard of the rest of the main line.
£755, August 1887 £878, February 1888	Cost of extra weight. Relaying with steel rails and heavier chairs, &c.

The Special Commissioners, in assessing the profits of the Highland Railway liable under the Income-Tax Act of 1888-89, disallowed these four sums, on the ground that they were properly charged to capital, as shown in their own printed accounts, duly certified to by their auditors, and they added the amounts to the sum returned by the company's secretary, against which notice of objection was given on the 5th November 1888.

The company appealed, and the appeal was heard by the Special Commissioners at Edinburgh on 6th March 1889.

The company contended that the sums of £755 and £878, £9119 and £1555, before mentioned, expended for extra weight, &c., in relaying the railways, and improvement of the Caithness section, represented the extra cost necessitated by the inferior condition of the permanent way of the original line, and also that of Caithness line when amalgamated with the Highland Railway in 1884. The expenditure on

the Caithness line was stated to represent the extra cost of relaying the lines, over and above what would have been necessary to renew and relay the section as it was previous to the amalgamation in 1884.

The company failed to satisfy the Commissioners that the deductions were admissible, and the charge was confirmed to the extent of the addition of the four sums above described.

The ground of the Special Commissioners' decision was that the expenditure was an improvement of the property, and chargeable to capital; and as regarded the Sutherland and Caithness section, that the purchase of that railway in an inferior condition would obviously affect the cost at which it was obtained.

The company expressed dissatisfaction with this decision of the Special Commissioners as being erroneous in point of law, and they demanded a case for the opinion of the Court of Exchequer.

The present case (from which the preceding narrative has been taken) was accordingly stated by the Special Commissioners in terms of the Taxes Management Act 1880 (43 and 44 Vict. cap. 19), sec. 59.

In an appendix annexed to the case the details of the expenditure of the foresaid sums were set out as follows:—

MAIN LINE.

Amount expended during the year ending 29th February 1888—

£755 3 8
878 2 10

	Ton. Cwt. Qr.	Price.	£ s. d.	£ s. d.
The additional weight of the steel rails over the iron ones, was, average, £4. 17s. 2¾d., per ton,	105 15 2	95s. to 100s.	514 0 3	
The additional weight of chairs over the old ones was, average price, £3. 6s. 4½d. per ton,	337 6 3	65s. and 67s. 6d.	1119 6 3	
				£1633 6 6

SUTHERLAND SECTION.

Amount expended during the year ending 29th February 1888—

£9119 4 9
1555 15 4

	Ton. Cwt. Qr	Price.	£ s. d.	£ s. d.
Steel Rails,	833 8 2	110s.	4594 9 9	
Chairs,	327 10 0	65s.	1064 13 11	
Fish-plates and other accessories,	.. ..	..	648 15 1	
Sleepers,	No. 26,235	3s. 4d.	4372 11 4	
Engine power,	.. ..	..	135 0 0	
Timber beams for girder bridges,	.. ..	..	260 2 3	
Carriage of materials,	.. ..	..	7 16 8	
Wages of platelayers and labourers,	.. ..	..	857 16 3	
			11,941 5 3	
Cr. Old iron flange rails and fish-plates taken up	.. ..	..	1266 5 2	
				£10,675 0 1

Argued for the company—The case as stated by the Commissioners did not fairly represent the company's contentions, and there ought therefore to be a remit for a fuller statement. While for the purposes of the company, and as between the company and the shareholders, those outlays were charged against capital, yet they ought properly to be charged against revenue. They really were sums expended on the maintenance of the line. The mere circumstance that steel rails and not iron ones were used in connection with these repairs did not alter the character of the repairs. There was no such permanent improvement of the property as to make these outlays a proper charge against capital—*Caledonian Railway Company* v. *Special Commissioners of Income-Tax*, November 18, 1880, 8 R. 89. The company had never been allowed anything for depreciation under the Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), sec. 12. If the deductions claimed were not allowed the company would not have enjoyed the profits upon which they had been charged. The company derived no additional revenue from these outlays, and so they were a proper deduction from the revenue of the year. The rules under Schedule D of the Income-Tax Act 1842 (5 and 6 Vict cap. 35), sec. 100, had no application to the present case—*Coltness Iron Company* v. *Black*, April 7, 1881, 8 R. (H. of L.) 67.

Argued for the Commissioners—There was sufficient stated to enable the Court to deal with the question between the parties. The company were condemned by their own actings in entering this expenditure against capital, and in so doing they acted properly, as the money laid out had materially improved the permanent way, and had made the company's property more valuable. The repairs on the Sutherland section were really a portion of the cost of the undertaking, as owing to its inferior condition it had been purchased so much the cheaper. The repairs on the main line had been actual renewal, not maintenance, and they had been properly charged against capital both by the company and the Commissioners.

At advising—

LORD PRESIDENT—I am of opinion that the deliverance of the Commissioners is right. The sums which the appellants propose to charge against income are, it must be kept in mind, entered in their own accounts as a proper charge against capital, but it is urged that these sums properly form a part of the outlay essential for the upkeep of the line, and indeed it is only upon this ground that the contention of the appellants can in any way be maintained.

Now, it is to be observed that by charging in their accounts these sums complained of against capital the company has been able to declare a much larger dividend than they could have done if these sums had been set against revenue, and one result of adopting their present contention would be that the aggregate sum of income-tax deducted by the company from the dividends of their shareholders would be considerably larger than the sum which the company would have to pay to the Inland Revenue, and the company would thereby be gainers to a considerable extent. This is somewhat of an anomaly, but it is one result of the way in which the sums are dealt with in the books of the company taken along with their present contention.

I do not say that this result is conclusive of the present question, but it is a result arising from the way in which the appellants have kept their books.

If we turn now to the items complained of, we see that in connection with the Sutherland section the £9119 was expended, according to the appellants' own showing, on the "improvement of Sutherland and Caithness section to bring it up to the standard of the rest of the main line." Now this, I think, presupposes that in acquiring this portion of the line the company were aware that it was not up to the standard of the rest of

the main line, and further, that they in consequence acquired it at a lower figure on account of its being in an inferior condition. That being so, the sum expended in renewing the section of the line, and bringing it up to the standard of the main line, was just part of the cost of taking it over, as if it had been in good order the appellants would have had to pay just so much more for it.

It was urged that when the details of the sum are looked at they show items which much more naturally fall under the heading of maintenance than as proper charges against the capital account, but these items must be read along with the pursuers' books, and so looked at it becomes perfectly clear that the sum of £9119 should be treated as the Commissioners have done, and that it really is a proper charge against capital.

As regards the alterations on the main line, it is to be observed that these do not take the form of a mere re-laying of the line after the old fashion, for that would not alter the character of the line. But when one kind of rail is substituted for another, and the new rail is of a superior quality, then the *corpus* of the heritable property of the company is thereby improved. Further, all that is charged by the Commissioners is for additional weight of steel rails and chairs, and this is a charge made for the permanent improvement of the appellants' property.

If the proprietor of an estate erects a new house on his lands the cost of this would properly be made a charge, not against income, but against capital; and so if a proprietor carries a line of railway through his lands the expense of this would be similarly treated. I therefore entertain no doubt as to the soundness of the Commissioners' determination upon both points.

Lord Mure, Lord Shand, and Lord Adam concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Low—Salvesen. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Respondents—Gloag—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Wednesday, July 10.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BLAIR *v.* THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Bankruptcy — Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 22—*Sequestration —Oath of Verity—Terms of Oath.*

In a process of sequestration the debt of the petitioning creditors was constituted by two Sheriff Court decrees to which they had obtained an assignation. The oath set out in general terms that the debt in question was due, and the decrees and assignation were produced to the Justice of Peace.

A petition by the bankrupt for the recal of the sequestration, on the ground that the oath did not set forth in terms that the sum in the decrees had not been paid either to the assignees or to the cedent, *refused.*

Observations upon cases of *Taylor* v. *Drummond*, 10 D. 335, and *Glen* v. *Borthwick*, 11 D. 387.

On 31st January 1889 a petition was presented by the North British and Mercantile Insurance Company to the Lord Ordinary on the Bills praying for the sequestration of the estates of William Blair, bookseller and stationer, Dundee, and on 1st April 1889 the Lord Ordinary (Wellwood) granted the prayer of the petition.

In May 1889 Blair presented a petition praying for the recal of the said sequestration. The grounds upon which this application was made are fully narrated in the opinion appended to the interlocutor of the Lord Ordinary (Kyllachy), who refused the petition.

"*Opinion.*—The recal of the sequestration is sought upon various grounds, some of which have been considered by my predecessor, but on none of which a final judgment has been pronounced. I have therefore considered the questions raised as still open, and have heard a full argument upon them.

"(1) The first ground of recal is the allegation that the petitioning creditors' debt, being also the debt upon which notour bankruptcy was constituted, was not justly due, in respect that although constituted by two decrees obtained of consent in the Sheriff Court of Dundee, those decrees had been accompanied by an arrangement that no diligence should be used upon them as against the bankrupt, and that the debt therein contained should be treated as a debt only against the bankrupt's property. Of this allegation the bankrupt now desires a proof, with a view to the recal of the sequestration. It appears to me to be quite clear that no such proof can be granted, the proposal being truly a proposal to contradict or qualify the terms of a formal decree by a general proof—that is to say, by parole evidence —which appears incompetent.

"(2) The second ground of recal is rested upon an objection to the terms of the petitioning creditors' oath, which is said to be disconform to the statute as interpreted by certain decisions, viz., *Taylor* v. *Drummond*, 10 D. 335; *Glen* v. *Borthwick*, 11 D. 387. The debt of the petitioning creditors is, as before-mentioned, constituted by two decrees of the Sheriff Court of Dundee, to which the petitioning creditors have obtained an assignation. The objection is, that the oath did not set forth in terms that the sum in the decrees had not been paid either to the assignees or to the cedent. In point of fact the oath is in general terms, and simply sets out that the debt in question is due to the petitioning creditors, the decrees and assignation being produced to the Justice of the Peace, but the oath itself not going into particulars. My opinion is that this objection is not well founded. The statute does not require that the oath shall set forth more than that the particular debt is justly due (secs. 21 and 22), and the oath in the present case in my opinion sufficiently complies with the statute. No doubt it has been held that where the petitioning creditors' title to the debt depends upon an assignation, and the oath proceeds upon the

principle of narrating first the constitution of the debt, and then its transmissions, and then proceeds to aver non-payment, it is necessary that the averment of non-payment shall apply both to the deponent and to the previous creditors. In other words, there must be no doubt upon the face of the oath that the petitioning creditor depones that the debt is due, and due to him. But each of the cases referred to proceeded on its own specialities, and they do not appear to me to have laid down any rule which is applicable to the present case.

"(3) The third and only other objection to the sequestration was one founded upon the provisions of sections 9 and 15 of the Bankruptcy Act, which relates to the commencement of notour bankruptcy and the date of presenting the petition for sequestration. It appears that the petitioner was rendered notour bankrupt so far back as July 1888, in virtue of a charge following on the decrees above referred to, and that sequestration followed on 28th August 1888, but was subsequently, on 8th January 1889, recalled by the Court in respect of an informality in the oath. New charges were thereafter given on 17th January, and notour bankruptcy being thus constituted anew, the present sequestratien was awarded on 31st January 1889. The objection is that this sequestration was incompetent in respect that it was dated more than four months from the commencement of notour bankruptcy in July 1888. It appears to me that it is a sufficient answer to this objection that while the 9th section of the statute provides that 'notour bankruptcy shall be held to commence from the time when its several requisites concur, and when it has once been constituted shall continue in case of a sequestration till the debtor shall obtain his discharge, and in other cases until insolvency cease,' it is at the same time expressly declared that all this shall be 'without prejudice to notour bankruptcy being anew constituted within such period.' It seems to me that this provision was expressly designed to meet cases like the present. Reference may be made to *Balfour* v. *Pedie*, 3 D. 612, where a similar question was raised under the previous Bankruptcy Statutes.

"On the whole, I am of opinion that no grounds exist for recalling the sequestration, and I therefore refuse the petition with expenses."

The petitioner reclaimed, and argued—The oath of verity presented by the respondents along with their petition for sequestration was bad, as they did not specify that they were assignees of the debts, nor were the assignation and decrees constituting the said debts produced to the Justice of the Peace before whom the oath had been made, nor were they docqueted and signed in reference to the said oath.

The respondents argued that the proceedings were regular.

The Bankruptcy (Scotland) Act 1856, after providing by section 21 for the form of petitions for sequestration, and declaring that in all cases the petitioning creditor is to produce an oath to the verity of the debt claimed by him, provides by section 22 as follows:—"Such oath . . . shall be taken . . . before a judge ordinary, magistrate, or justice of the peace to the verity of the debt claimed," and the creditor "shall, in such oath, state what other persons, if any, are besides the bankrupt liable for the debt, or any part thereof, and specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than there specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect."

At advising—

LORD PRESIDENT—As to the second ground upon which the recal of this sequestration is sought, I can only say that I should not like to hold the cases of *Taylor* v. *Drummond* and *Glen* v. *Borthwick* as binding authorities. They have been questioned, and I think with very good reason. Apart from that, however, I think the oath here is good, as being an oath of verity in the terms required by the statute under section 22. The oath here declares that the bankrupt is indebted to the deponent in the sums claimed, conform to a state annexed thereto, and this is signed by a Justice of the Peace. I can see no ground therefore for saying that this is not a good oath of verity. It affirms that the debt is resting-owing, which is all that the statute requires. With regard to the other grounds of recal I do not think it necessary to enter into them.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel and Agent for the Reclaimer—Party.

Counsel for the Respondents—Low—Maconochie. Agents—J. & F. Anderson, W.S.

Wednesday, March 20.

OUTER HOUSE.

[Lord Fraser.

WATTS, WARD, & COMPANY *v.* GRANT & COMPANY.

Shipping Law—1878 *Black Sea Charter-Party—Liability of Consignee for Expense of Measuring and Weighing Cargo at Port of Delivery—Custom of Trade.*

A cargo of grain was shipped from Sevastopol to Aberdeen under a charter-party known as the 1878 Black Sea Charter-Party, which provided for the payment of freight according to cubic measurement. The cargo was consigned by weight and not by measurement, the bill of lading setting forth the weight in Russian "poods." The shipowners having weighed the cargo, and also measured samples thereof, in order to ascertain the whole measurement, sued the consignees for the expense of the operation, alleging a general custom of the British shipping trade in the carrying of grain cargoes that these expenses fell to be borne by the consignee. The defenders alleged a contrary custom in the port of Aberdeen known to the pursuers. *Held* that the de-

fenders were liable, it being established that by the universal custom of the shipping trade such expenses fell to be borne by the consignee.

This was an action by Watts, Ward, & Company, of No. 2 Whittington Avenue, Leadenhall Street, London, owners of the steamer "Jesmond," against Grant & Company, of No. 42 Regent Quay, Aberdeen, for recovery, *inter alia*, of the sum of £15, 8s. 9d., being the sum paid by the pursuers to the Harbour Commissioners of Aberdeen for weighing a cargo of wheat consigned from Sevastopol to the defenders at Aberdeen by the pursuers' steamer "Jesmond." The charter-party under which the cargo was shipped, known in the grain shipping trade as the 1878 Black Sea Charter-Party, provided, *inter alia*, "that the said steamer should proceed as ordered to the port of discharge, there delivering the cargo on being paid freight as follows—'From Sevastopol to a port in the United Kingdom, 16/, or to a port on the Continent 16/6 sterling per ton of 20 cwt. gross of tallow delivered, seed $\frac{\text{and}}{\text{or}}$ grain in proportion, according to the London-Baltic printed rates, being in full of all port charges and pilotages as customary.' It was also agreed (sec. 2) that the freight should be paid on unloading and delivery of the cargo, if in the United Kingdom in cash; and (sec. 5) that the receivers or owners should have the option of having one quarter out of every fifty measured and weighed, from which average and the gross weight of grain $\frac{\text{and}}{\text{or}}$ seed the number of imperial quarters should be determined." The cargo was described in the bill of lading as 127,060 poods of Ghizca wheat. On the arrival of the "Jesmond" at Aberdeen the defenders on 24th April 1888 wrote to Messrs Adam & Company, the pursuers' agents there, in the following terms:—"We intend to weigh this cargo of wheat for our own satisfaction, and on your agreeing to pay us the half the expense of so doing, we will provide you with the gross weight of the cargo discharged, to enable you to make up your freight account. The half expense we estimate to be about £5. We will also utilise our meters for your benefit, to take the imperial average as we may arrange, and charge you for this £2, 10s. extra. Failing your agreeing to above, we request you to carry out the terms of the charter-party, and measure and weigh one quarter (8 bushels out of every fifty qurs.), from which average and the gross weight of grain discharged the number of imperial quarters to enter in your freight account shall be determined as per clause 5 of your charter-party. In order to certify your freight account, we require certificate of quantity discharged daily, and number of bushels taken daily. We wait to hear to-day which mode you adopt." To this letter the pursuers' agents on same day replied as follows:—"We have your letter of date, and beg to say we cannot agree to the first proposition you make. We, however, note your proposal to take delivery of cargo in terms of clause 5, and your declaration of exercising your option of the manner of delivery under this clause we hereby confirm. On behalf of the owners, we reserve their rights on all other conditions of charter-party." The pursuers thereafter had the cargo measured and weighed, for which they paid the Harbour Commissioners of Aberdeen the sum of £15, 18s. 9d., the sum sued for. The pursuers averred "that by the custom of the British shipping trade generally, and particularly in London, where the said charter-party was entered into, the consignees or receivers of the cargo are bound to bear the expenses of measuring or weighing cargo at the port of delivery. It is denied that any such custom as is alleged by the defenders exists at the port of Aberdeen. If there is any such custom the pursuers were not aware of it, and were under no duty to be so."

The defenders averred in answer—"The defenders are not liable to pay the sum of £15, 18s. 9d. charged as the expenses of tallying, measuring, and weighing the cargo. This was done, and was necessary to be done, in order to ascertain and make up the said freight account rendered to defenders. The said expenses were incurred solely by and for the behoof of the shipowners, and fall to be borne by them, no part of it being payable by the defenders. Further, according to the custom of the port of Aberdeen, which the pursuers knew or ought to have known, the said expenses fall to be borne by pursuers. When the shipowners, as the pursuers did here, measure and weigh the cargo in order that the amount of freight due may be ascertained and the account made out, or otherwise for their own behoof, the custom of the said port is that the whole expense so incurred falls to be borne by the shipowners alone, and no part thereof by the consignees of the cargo."

The pursuers pleaded, *inter alia*—"(2) The pursuers are entitled to be reimbursed the sum of £15, 18s. 9d. paid for weighing and measuring the cargo in question, in respect that said weighing was done by request of and for behoof of the defenders, and that neither by contract nor custom of trade are the pursuers bound to pay any part thereof. (3) The defenders' averments of local custom are irrelevant."

The defenders pleaded, *inter alia*—"(2) On a sound construction of the said charter-party and bills of lading, the defenders are not liable for the expense of tallying, weighing, and measuring cargo sought to be recovered. (3) The said expense having been incurred in order to ascertain and make up the freight account in the interests of the pursuers; and *separatim*, being by the custom of the port of Aberdeen payable solely by the shipowners as libelled on, the defenders are not liable in payment thereof. (4) The pursuers' averments of general custom are irrelevant."

The case having been discussed upon the procedure roll, the Lord Ordinary (FRASER) pronounced the following opinion:—"Although this action has been brought for the sum of £83, 19s. 7d., the only dispute between the parties has reference to a sum of £15, 18s. 9d. paid for weighing a cargo of wheat consigned to the defenders at Aberdeen. The bill of lading states that the weight is 127,060 'poods.' The cargo came from Sevastopol, and the weight stated in the bill is a Russian weight. The defenders apparently were not satisfied with the statement of weight, and therefore on the 24th of April 1888 they wrote to the pursuers' agents in Aberdeen a letter stating that they 'intend to weigh this cargo of wheat for our own satisfaction,' and proposed that the pursuers should pay one-half

of the expense for so doing. This proposal was declined by the pursuers, but they agreed that the wheat should be weighed according to an alternative proposed by the defenders as set forth in the 5th clause of the charter-party in the following terms:—'The receivers or owners have the option of having one quarter (or if abroad, one hectolitre) out of every 50 measured and weighed, from which average and the gross weight of grain and or seed the number of imperial quarters shall be determined.' The pursuers aver that in terms of this clause they had the wheat 'measured and weighed, and for said weighing the pursuers paid the Harbour Commissioners at Aberdeen the sum of £15, 18s. 9d.' The defenders refused to pay this sum to the pursuers, and maintained that the weighing was done solely for their own behoof and in order to enable them to make up their freight account, and they aver that the custom of the port of Aberdeen is 'that the whole expense so incurred falls to be borne by the shipowners alone, and no part thereof by the consignees of the cargo.' The weight in Russian poods, as stated in the bill of lading could be turned into imperial quarters according to the tables. The law upon the subject as to who shall pay is stated in a sentence by Mr Justice Willis in the case of *Coulthurst* v. *Sweet*, L.R., 1 C. P. 654—'In the absence of any custom to govern the matter the person who wants to ascertain the quantity must incur the trouble and expense of weighing.' Now, the persons who wanted to ascertain the quantity in the present case were the defenders. Their averment as to the custom of the port of Aberdeen must be taken into consideration, as Mr Justice Willis says, but only upon the condition that that custom was known to the pursuers. The law upon this subject is very well settled by decisions both in Scotland and in England. In the case of *Kirchner* v. *Penus*, 12 Moore's Privy Council Reports, p. 362, the Privy Council laid down the law as follows:—'Evidence of the usage of a particular place, to add to or in any manner to affect the construction of a written contract, is admitted only on the principle that the parties who made the contract were both cognisant of the usage, and are presumed to have made the agreement with reference to it.' This judgment was followed by the First Division of the Court of Session in the case of *Holman* v. *Peruvian Nitrate Company*, February 8, 1878, 5 R. 657. The parties in this case were quite alive to the law as thus declared, for the defenders aver that the custom of the port of Aberdeen was known to the pursuers, or that they ought to have known it, while the pursuers positively deny 'that any such custom as is alleged by the defenders exists at the port of Aberdeen. If there is any such custom the pursuers were not aware of it, and were under no duty to be so.'

"In the circumstances the Lord Ordinary can proceed no further until this question of the knowledge of the pursuers as to the alleged custom be cleared up by proof, and the case has been put to the roll in order that the defenders may state whether they will undertake a proof of the averment that the pursuers had knowledge of the alleged custom of the port of Aberdeen. If no such proof be led, then the Lord Ordinary will decide this case according to the opinion expressed by Mr Justice Willis, with which he entirely concurs."

The defenders undertook to prove their averments with regard to the custom of the port of Aberdeen, and the pursuers' knowledge of it, and the case was sent to proof.

Proof having been led, the Lord Ordinary on 20th March 1889 pronounced the following interlocutor and opinion:—"Finds that the defenders are indebted to the pursuers in the sum of £66, 16s. 8d.; decerns against defenders for said sum: Finds the pursuers entitled to expenses: Allows an account thereof to be given in, and remits the same, *&c.*

"*Opinion.*—This action is brought for payment of the sum of £83, 19s. 7d., but the pursuers admit that the defenders are entitled to a deduction from that sum of £17, 2s. 11d., leaving a balance still claimed of £65, 16s. 8d. The defenders admit liability for this latter sum except to the extent of £15, 18s. 9d., and the only question in dispute is whether or not liability attaches to the defenders for this sum of £15, 18s. 9d. The pursuers are owners of the steamship 'Jesmond,' which was chartered for a voyage from Sevastopol to a port in the United Kingdom by charter-party dated 19th March 1888. The freighters shipped on board at Sevastopol a cargo of wheat, which was consigned to the defenders, and the vessel arrived with the wheat ready for delivery on 24th April 1888. The £15, 18s. 9d. in dispute is a sum connected with an operation that took place at Aberdeen at the discharge of the cargo. A very elaborate proof has been led by both parties.

"The cargo was carried under what is known in the trade as the 1878 Black Sea Charter-Party. By this charter-party the vessel was to proceed to the port of discharge, there delivering the cargo 'on being paid freight as follows, viz., from Sevastopol to a port in the United Kingdom, 16/; do. Continent, 16/6 sterling per ton—of 20 cwt. gross of tallow delivered, seed or grain in proportion, according to the London-Baltic printed rates.'

"The ton tallow which is taken as the basis is thus explained by Mr Graham—'We buy the grain by weight, but the shipowners have nothing to do with our contract with the shippers. The shipowner requires to know the number of imperial quarters, because he fixes his vessel to carry a cargo upon the basis of the ton tallow, and if he did not measure the cargo he would not be able to render us the freight account.' And again, Mr John Smart Smith, manager of the Northern Agricultural Company, Aberdeen, explains the matter thus—'Black Sea cargoes of linseed are weighed to the quarter of 424 lbs. We do not require to know anything else except that weight. In order that the ship may ascertain the amount payable on freight, the broker has to ascertain how many bushels there are in the cargo; but without that they cannot determine the number of imperial quarters, and without the number of imperial quarters they cannot translate it into tons tallow, upon which the freight is payable.'

"When the vessel arrived at Aberdeen there were two operations that were necessary—first, the ascertainment of the gross weight of the cargo which was to be paid for by the buyers, the defenders, at 33s. 3d., less 2 per cent. per 492 lbs. delivered. There was also necessary another operation, viz., measuring (or, as it is

called, bushelling) the cargo. The buyer pays for the goods according to the gross weight; the freight, on the other hand, is calculated on the measure or cubic space occupied by the grain. Mr Cormack, chairman of the Leith Chamber of Commerce, states the difference between the Black Sea Charter-Party and other charter-parties as follows:—'I know the 1878 Black Sea Charter-Party. There is a peculiarity in a Black Sea Charter-Party that the freight is to be paid per ton of 20 cwt. gross of tallow duly delivered. That involves a translation into imperial quarters, which requires measuring. That does not appear in other charter-parties. It is peculiar to the Black Sea Charter. (Q) So that here, in order to the ship ascertaining the amount of its freight account two operations are necessary, viz., to discover the gross weight and also the measure?—(A) Yes.' The charter-party contains this clause—'The receivers or owners have the option of having one quarter (or if abroad, one hectolitre) out of every fifty measured and weighed, from which average and the gross weight of grain $^{and}_{or}$ seed the number of imperial quarters shall be determined.' The freight is paid according to the number of imperial quarters. In order to ascertain the number of imperial quarters it is necessary to know the gross weight of the cargo, and also the average measure and weight of every 51st bushel. The ascertainment of the gross weight is absolutely necessary to the receiver of the cargo, because it is according to that weight that he has to pay the seller, and this part of their duty the defenders performed at Aberdeen, and incurred thereby an account to the meters of £8, 7s. 8d., which they paid. The other operation of measuring and weighing the 51st bushel was one with which the defenders declined to have anything to do. They said that this was an operation that must be performed entirely at the expense of the shipowner, it being necessary for him to ascertain the average measure and weight of each quarter in order, it is said, to make out his freight account. This he could not do without ascertaining the gross weight from the defenders, which they took effectual means to prevent. On the 25th of April 1888 the defenders wrote a letter to Mr M'Lean, the superintendent of Harbour Meters at Aberdeen, in these terms—'Please send three men on board "Jesmond" to weigh cargo of wheat for us—to 490 lbs. per qur. These men are not to assist the steamer's people in any way in the measuring of the cargo unless our foreman give them permission, and not to divulge the work they do to anyone but our Mr Chalmers.' The result of this proceeding was that the pursuers were unable to obtain from the defenders, as they had hitherto done, the gross weight, and therefore were obliged to put on six men of their own in order to accomplish this purpose. On former occasions when the receiver of the goods had weighed the grain as it came from the hold he gave the weight to the shipowner. All that the latter required to do was to put one man upon duty in order to measure and weigh the 51st quarter that came up, and this expense did not, except in the case of a large steamer, cost more than 25s. to 30s. The expense incurred in this operation and weighing by the pursuers was £15, 18s. 9d. The superintendent of Harbour Meters at Aberdeen, Mr M'Lean, states that 'there were six men necessary to carry out the instructions (to measure and weigh for the pursuers). These men were necessary because the men who were put on before to weigh the cargo for Messrs Grant were instructed not to assist the steamer's people in any way in measuring the cargo unless Messrs Grants' foreman gave them permission. That instruction was contained in the letter which I produce. They were not to divulge what work they did to anyone but to Mr Chalmers of Messrs Grant & Company.'

"The defenders are perfectly willing to give the shipowner the necessary information if he will pay half of the expense of weighing. This the shipowner refuses to do, and maintains that by custom and the practice of trade he is entitled to that information from the consignee or the stevedore or the meter without paying anything for it.

"The way in which the information as to the gross receipt has been hitherto ascertained has been explained by several witnesses. Mr Thomas Adam, shipbroker in Aberdeen, says of it—'The custom of the port has been for the ship's broker to ascertain the weight of the cargo from the stevedore, the superintendent of meters, or the merchant. In some cases we agreed on the weight of the cargo with the merchant.' Until within the last four or five years, and until the agitation was begun by the defenders, the consignee paid the whole expenses of weighing and measuring, but several witnesses say that latterly the custom has changed, 'the ship now,' as explained by Mr Adam, 'paying a small sum ranging from £1, 0s. 4d. to £2 odds for the measuring.' And Mr Paul Ludwig says—'It used to be the custom for the merchant also to pay the bushelling, but of late some merchants have tried to get off that, and have endeavoured to get the shipowners to pay part of it. Some of the shipowners agreed to that, mostly, I suppose, because they did not wish to fight it out. I cannot say for certain who the first merchant was that objected to pay for the bushelling, but I believe it was Grant & Company.' Mr Copland, in reference to the nature of these bargains, says—'(Q) Is not the natural weight of the grain the weight that is shown by weighing it?—(A) No, the natural weight of grain is shown by the bushel, which contains a certain cubic space, but that is altogether different from the weight it would have upon a scale; the natural weight of a quarter of linseed might be 420 lbs. or 424 lbs., but we buy it on the understanding that we get 424 lbs. to every quarter. (Q) You have to make it up to that?—(A) We buy it by the actual weight; the term "natural weight" is used when bushelling is done. We buy not with reference to bulk but simply with reference to weight. The freight is charged with reference to bulk according to the cubic space it occupies in the ship.'

"The question thus submitted to the Court is as to whether or not there was a custom universal at all the ports that the consignee of goods should pay for the weighing and for the measuring (or both) of the cargo. A large body of respectable men interested in the grain trade from America and from the Black Sea, and from other countries from whence grain is imported into the United Kingdom, have been examined as witnesses, and the result is an almost univer-

sal consensus to the effect that the consignee must pay for the weighing and bushelling of the cargo. To this universal custom two or three exceptions have been proved. The defenders began opposition to the custom in Aberdeen, and have tried to get it altered by resisting the payment. Messrs Gripper & Son, of London, have also vainly attempted to change the custom of that port, which is to the same effect. The trade between the ports in the Baltic and Aberdeen in grain has not a very remote origin, for it began in 1864, and perhaps there is scarcely time for the formation of a custom. But then it is just as plain that this custom existed at all the other ports, such as Glasgow, Leith, London, Bristol, the Channel ports, Liverpool, Belfast, Hull, and Cork, and Aberdeen just adopted the custom that was in use at these places, and it was quietly submitted to till Grant & Company resisted. Whether the mode of payment for this work be just or expedient is a matter with which the Court has no concern. The only point now determined is that according to the universal custom, which is the law, the consignee must pay it. If he thinks it unjust he has the remedy in his own hands by making a special arrangement or contract that the shipowner shall pay all the charges of bushelling or weighing or both, but in the meantime until such special contract is presented to a court of law it must enforce the contract according to the custom.

"Wherever this custom has been broken in upon, except in the case of the defenders in Aberdeen, and Gripper & Son in London, it has been done in consequence of special arrangements made between the shipowner and the freighter. Mr Graham himself speaks to these arrangements—'On many occasions,' he says, 'we made an arrangement with the shipbroker that on his paying us a certain sum we would perform his work.' And Mr Connon speaks also to this practice—'In the cases I spoke of in recent years it was generally by special arrangement that the shipowner paid part of the measuring and bushelling. It was not by custom, simply as a matter of arrangement to save litigation and annoyance.'

"Mr Graham and the witnesses who appear for the defenders dwelt very largely upon the hardship which they would suffer were they obliged to pay for the measuring and bushelling. It is their contention that they derive no good from the bushelling. Now, this argument would not be a good argument, even although the assumption on which it is based were true, because if the custom be that the consignee must pay the expense of bushelling and weighing, then it is of no moment how small or how great may be the benefit derived by the consignee from these operations. But it is not the case of a payment without beneficial results. The consignee or the seller to him according to their bargain must pay the freight as brought out by the combined operations of weighing the gross weight and of taking the average of every 51st eight bushels. It is perfectly clear that the consignee in such circumstances has a material interest in checking the measuring done by the shipowner. Unless this measuring be exact, the consignee may be paying freight for a part of a cargo he never received, and he therefore has as much interest in checking the measurement as the shipowner has."

Counsel for the Pursuers—Jameson. Agent—F. J. Martin, W.S.

Counsel for the Defenders—Kennedy. Agent—Wm. Officer, S.S.C.

Thursday, July 11.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

DURIE'S TRUSTEES *v.* EARL OF ELGIN AND KINCARDINE.

Superior and Vassal—Obligation to Relieve from Public Burdens—Negative Prescription.

A contract and agreement was entered into between C and D in 1764 to the effect that "the said C has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu right to the said D, his heirs and successors," of certain lands described, "to be held in feu farm and heritage of the said C, his heirs and successors, for yearly payment of £3 sterling . . . and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said publics a real burden upon his other lands . . . for the which causes, and on the other part, the said D, on the said C performing his part of the premises—that is, granting the said feu-contract in the terms above narrated, binds and obliges him, his heirs and successors, to content and pay to the said C, his heirs, executors, and successors whatsoever, the sum of £600 sterling." The deed contained a precept of sasine on which D was infeft in the said lands. This sasine was followed by a series of unchallenged infeftments confirmed by successive superiors, and by uninterrupted possession, but apparently no feu-contract was granted in pursuance of the above agreement.

In an action by vassals into whose hands the *dominium utile* of the lands had passed after a series of transmissions against a singular successor of C in the superiority, *held* that the defender was not bound to free and relieve the pursuers of ministers' stipend and other public burdens, in respect that the existing investiture of the lands made no mention of such an obligation, and that it could not be supplied from the contract of 1764, which was not a feu-contract, and merely imposed the obligation of relief as a personal obligation on C and his heirs.

Question by Lord Kinnear whether the negative prescription would apply if an obligation to free and relieve the vassal of public burdens contained in an original grant of lands was omitted from the investiture for forty years, and not actually enforced.

Res judicata—Submission—Superior and Vassal—Singular Successor.

Opinion by Lord Kinnear that an award by counsel on a submission by a superior and vassal was not binding on their singular successors.

This action was raised by the marriage-contract trustees of Dr Andrew Durie and his wife Mrs Eliza Durie against the Earl of Elgin and Kincardine to have it found and declared "that the defender, as superior of the sixty acres Scots measure of the Room of Drumtuthill, lying in the parish of Dunfermline and county of Fife, being the lands described in a contract agreement and disposition dated 5th June 1764, and registered in the Books of Council and Session 3rd October 1792, entered into between George Chalmers, merchant in Edinburgh, and William Drysdale, tenant in Drumtuthill, of the *dominium utile* of which lands the pursuers, as trustees aforesaid, are proprietors, is bound to free and relieve the said lands of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, excepting the feu-duty payable by the said lands, and also to make repetition to the pursuers of all payments they have made or may yet make in respect of such minister's stipend, schoolmaster's salary, cess, and public burdens since the term of Martinmas 1882, being the date at which the defender became superior of the said lands."

By the contract agreement of 1764 it was contracted and agreed between George Chalmers and William Drysdale as follows—"That is to say, the said Mr George Chalmers has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu right to the said William Drysdale, his heirs and successors, of sixty acres Scots measure of the Room of Drumtuthel" —[here followed a description of the lands]— "to be held in feu-farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, and doubling the said feu the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled, all lying within the parish of Dunfermline and shire of Fife, and reserving the coal, freestone, limestone, and other minerals below ground, with liberty to win the same and to make pits, levels, coalhills, and roads for that purpose, upon paying damages above ground (the said William Drysdale always having liberty to win freestone and limestone for the uses of the farm allenarly), and to assign the rents from and after the term of Martinmas 1765 for crop and year 1766, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming except the said feu-duty, and to make the said publics a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said sixty acres, betwixt and Martinmas 1766 on the east, south, and west sides, with a sufficient stone dyke six quarters high, which dykes are afterwards to be upheld on their mutual expenses: For the which causes, and on the other part, the said William Drysdale, on the said Mr Chalmers performing his part of the premises—that is, granting the said feu-contract in the terms above narrated—binds and obliges him, his heirs and successors, to content and pay to the said Mr George Chalmers, his heirs, executors, and successors whatsoever, the sum of £600 stg., and that at and against the term of Martinmas 1765, with a fifth part more of penalty in case of failure, and annual rent after the said term of payment during the not-payment, and to pay yearly the sum of £3 stg. of feu at Martinmas, beginning the first year's payment at Martinmas 1766 for the crop 1766, and so forth yearly in all time coming, and to double the said feu each year at the entry of every heir and singular successor, and to grind his victuals at Meldrum's Mill, conform to the thirlage of the said lands: Attour to the effect the said William Drysdale and his foresaids may be infeft in the said 60 acres, the said Mr George Chalmers desires and requires and ilk one of you conjunctly and severally his baillies in that part, that, incontinent this his precept seen, ye pass to the ground of the said 60 acres, and there give and deliver heritable state and sasine, with real actual and corporal possession, of All and haill the said 60 acres of ground described in the manner foresaid to the said William Drysdale or his foresaids, and that by deliverance to them or their certain attorney or attorneys in their names bearers hereof, of earth and stone of the grounds of the said lands, with an handfull of grass and corn, for the said teinds and other symbolls necessary and used in the like cases, and this on noways ye leave undone, the which to do he commit to you his full power by this his precept directed to you for that effect."

In virtue of the precept of sasine contained in the said contract agreement William Drysdale was infeft in the said lands, conform to instrument of sasine recorded in the Register of Sasines for the shire of Fife on 17th May 1766, which instrument bore:—"Compeared personally William Drysdale . . . holding in his hands a contract of sale of the date underwritten, entered into betwixt Mr George Chalmers, merchant in Edinburgh, and the said William Drysdale, on the one and other parts, whereby, for the causes therein specified, the said Mr George Chalmers sold, disponed, and bound and obliged him, his heirs and successors, to grant a feu right to the said William Drysdale, his heirs and successors, of 60 acres Scots measure of the Room of Drumtuthill"—[here follows the description of the lands]—"to be held in feu farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, . . . and to free and relieve the said of all minister's stipend, schoolmaster's salary, cess, and all other publick burdens in all time coming, except the said feu, and to make the said publicks a real burden upon his other lands."

By disposition dated 15th April 1769 William Drysdale sold and disponed the 60 acres in question to Charles Durie, his heirs and successors, and in corroboration of this disposition he again sold and disponed these lands to the same party by disposition dated 8th April 1779, which contained a clause in the following terms:—"Which lands, with the teinds and others foresaid, were sold and disponed to me by the said George Chalmers by the contract of sale before mentioned, and which contains an obligation upon the said George Chalmers to free and relieve the said lands, teinds, and others foresaid, of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 sterling therein mentioned, and to make the said publick burdens a real burden

upon his other lands." Upon this disposition the said Charles Durie was infeft, conform to instrument of sasine recorded in the foresaid Register of Sasines for the shire of Fife 22nd May 1779.

By disposition dated 4th October 1792 Charles Durie disponed to Robert Scotland 40 out of the 60 acres, and upon this disposition Robert Scotland was infeft, conform to instrument of sasine recorded in the said Register of Sasines 1st December 1792.

By disposition and assignation dated 2nd September 1794 Robert Scotland conveyed the said 40 acres to Robert Russell, who was infeft therein, conform to instrument of sasine recorded in the said Register of Sasines 18th December 1807.

By charter of confirmation dated 14th May 1814 Thomas Hog of Newliston, who had acquired from George Chalmers the superiority of the said lands of Drumtuthill, ratified and confirmed in favour of Robert Russell, his heirs and assignees, the whole writs and deeds above set forth, beginning with the disposition by William Drysdale of 15th April 1769. This charter, in narrating the disposition of 1779, contained the following clause:—"Which lands, with the teinds and others foresaid, were sold and disponed to the said William Drysdale by the said George Chalmers by contract of sale entered into between them dated the 5th day of June 1764, and which contains an obligation upon the said George Chalmers to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 stg. therein mentioned, and to make the said public burdens a real burden upon his other lands, together with the obligement to infeft *a me vel de me*, procuratory of resignation, precept of sasine, and other clauses contained in the said disposition."

In 1823 Robert Russell's trustees sold and disponed the 40 acres acquired by him to Captain Robert Durie, who was infeft therein conform to instrument of sasine dated 5th April 1823. The disposition and sasine thereon referred to the contract of 1764, and recited the obligation of relief contained therein. The disposition also contained the usual clause binding the seller to relieve the purchaser of cess, minister's stipend, and other public burdens preceding the term of entry, the purchaser being bound to pay these after that term.

By disposition and assignation dated July 31st 1819 Charles Durie disponed the remaining 20 of the 60 acres to himself in liferent, and to Captain Robert Durie in fee, and Captain Durie was thereafter duly infeft therein. This disposition also contained the usual clause binding the granter to free and relieve the disponee of feu-duties, cess, minister's stipend, and other public burdens prior to the term of entry, the disponee being bound to relieve the grantee thereof in all time coming.

After a series of transmissions the 60 acres came into the hands of the trustees of Dr Charles Durie, who in May 1845 were infeft in the whole subject, and by charter of confirmation dated 6th June 1856 John Buchan Hepburn, who had acquired right to the superiority, ratified and confirmed to these trustees all and whole the said 60 acres, and an instrument of sasine in their favour dated 21st May and recorded 20th June 1845. This charter made no mention of the obligation of relief in question, the *tenendas* and *reddendo* being in these terms:—"To be holden the said lands and others immediately of me and my foresaids, superiors thereof, in feu-farm, fee, and heritage for ever: Paying therefor yearly the sum of £3 sterling at the term of Martinmas, and doubling the said feu-duty the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled." The obligation of relief was not mentioned in any of the subsequent titles.

The *dominium utile* of the lands was thereafter transmitted in the following manner:—By disposition dated 26th March and recorded 5th April 1860, the trustees of Dr Charles Durie disponed the whole 60 acres to Robert Durie, the disponee being taken bound to free and relieve the parties of feu-duties, casualties, and public burdens due or to become due, and by writ of confirmation dated 30th April 1868 the superior confirmed the said lands to Robert Durie in so far as consistent with the charter of confirmation granted by him in 1856. On Robert Durie's death his sister Eliza Durie made up title to the said 60 acres as heir of provision in special to him, and by disposition dated 8th and recorded 12th April 1869 she conveyed the lands to the trustees under her antenuptial marriage contract (the pursuers), in whose favour the superior granted a writ of confirmation dated 9th June 1869. This writ was in the form prescribed by the titles to Land Consolidation Act 1868, and confirmed to the said trustees the disposition in their favour in so far as consistent with the charter of confirmation in 1856.

The defender, the Earl of Elgin and Kincardine, acquired the superiority of the 60 acres by purchase at Martinmas 1882. From 1856 to 1885 feu-duty was regularly paid without any deduction being made for public burdens.

The defender produced and founded on a joint memorial for Messrs D. M. & H. Black, W.S., as acting for Dr Charles Durie's trustees, and Messrs J. & W. R. Kermack, W.S., as acting for John Buchan Hepburn, Esquire, dated in 1856, in which the question whether the proprietors of the *dominium utile* of the 60 acres in question had a right to enforce against the superior the obligation of relief founded on by the pursuers, had been submitted to the decision of Mr Penney, Advocate, afterwards Lord Kinloch, and an opinion by Mr Penney that the superior was not liable.

The defender averred—In 1856, when the trustees of Dr Charles Durie were in course of obtaining an entry with the superior, they raised the question for the first time of the right of the proprietors of the *dominium utile* of the subjects in question to enforce against the superior the obligation of relief now founded on by the pursuers; and the said trustees and the said John Buchan Hepburn agreed to refer the question to the decision of Mr William Penney, Advocate. The charter of confirmation already mentioned, and which had been signed on 26th June 1856 before the reference was entered into, was delivered after Mr Penney's decision was issued, and a composition was paid by Dr Durie's trustees along with thirty-four years' arrears of feu-

duty, without any deduction in respect of public burdens or otherwise. Feu-duty was thereafter paid regularly for twenty-nine years without any deduction for public burdens.

The pursuers averred—"With reference to the explanations in the answer, it is denied that the question of the right of the vassals to enforce against the superior the obligation of relief was raised in 1856 for the first time; and it is believed and averred that it was then for the first time that the superior denied that that right was in the vassals. It is believed and averred that during the period between the granting of the original feu-right in 1764 and the date of the foresaid charter of confirmation in 1814 these superiors as regularly relieved the vassals of the public burdens in question as the vassals paid the annual feu-duty of £3 to the superiors, and that the same course was followed until the question was raised in 1856. . . . Explained that neither the present pursuers nor the defender had any knowledge of the foresaid joint memorial and opinion thereon by Mr Penney until after the pursuers had raised the present question, namely, in 1885."

The pursuers pleaded, *inter alia*—"(1) On a sound construction of the clause of relief contained in the contract agreement and disposition of 5th June 1764 the pursuers are entitled to decree of declarator in terms of the declaratory conclusion of the summons. (3) The obligation of relief in question is an inherent condition of the original feu-right of 1764, and has never been abrogated. (4) The pursuers are onerous disponees, and singular successors in the feu, and were and are entitled to rely upon the records, which disclose the existence of the obligation of relief in question. (5) The feu-right of 1764 is the writ which confers on the defender the right to the feu-duty payable under the same; and he cannot enforce payment thereof and yet refuse to perform his counterpart of the contract, including this obligation of relief of burdens. (6) The alleged reference to counsel was never intended, and was never understood to alter or discharge any condition of the original feu-right; it is not binding on the pursuers as singular successors: *Separatim*, the alleged opinion was unsound in law, and inherently unjust."

The defender pleaded, *inter alia*—"(2) The question raised in the present action having been raised and decided in the submission set forth on record, it is *res judicata* that the pursuers have no such right of relief as is now claimed by them. (3) On a sound construction of the titles of parties and their authors, and by prescriptive practice and possession, the pursuers have no right to the relief claimed. (4) The contract of 1764 merely set forth an agreement as to the clauses and obligations which the feu-charter when granted should contain, and the contract itself contained no obligation of relief, but in any view the obligation of relief from public burdens was, and was intended to be, personal, and not transmissible against singular successors in the superiority of the feu; and *separatim*, the said obligation, assuming it to have been granted, not having been validly transmitted against the defender, or in favour of the pursuers, the defender is entitled to absolvitor. (5) The obligation of relief alleged by the pursuers never having been validly constituted a real burden on the superiority of the lands in question, the defender is entitled to absolvitor, with expenses. (7) Assuming the agreement of 1764 to have contained a valid obligation of relief, it has been extinguished by the negative prescription."

On 31st December 1888 the Lord Ordinary (KINNEAR) assoilzied the defender from the conclusions of the summons, and decerned.

"*Opinion.*—The question is, whether the pursuers as proprietors of the *dominium utile* of certain lands in the county of Fife, are entitled to be relieved by the defender as their immediate superior, of 'all minister's stipend, schoolmaster's salary, cess, and other public burdens,' now and in all time coming. The latest renewals of the investiture prior to the Act of 1874 were effected by a charter of confirmation in 1856, and by writs of confirmation in 1868 and 1869; and these instruments express no obligation of the kind now sought to be enforced. But the pursuers maintain that no mere omission in charters by progress can alter the terms of the investiture, and that the question must therefore be determined by the conditions of the original grant. As a general proposition, this is perfectly correct. But the peculiarity of the present case is, that the instrument upon which the pursuers found is not a grant of the lands, but a mere personal contract to make such a grant on the performance of a certain condition. And the defender maintains that, as a singular successor, he is in no way bound by the obligations contained in the personal contracts of a remote author.

"The contract in question was entered into in 1764 between George Chalmers, then proprietor of the *plenum dominium*, and William Drysdale. It contains no *de presenti* conveyance. But it sets forth that Chalmers, 'has sold and disponed, and binds and obliges himself, his heirs and successors, to grant a feu-right to the said William Drysdale' of sixty acres of the Room of Drumtuthill, which are specifically described 'to be held in feu-farm and heritage of the said George Chalmers, his heirs and successors, for yearly payment of £3 sterling;' . . . 'and to assign the rents from and after the term of Martinmas 1765 for crop and year 1766, and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said publics a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said sixty acres betwixt and Martinmas 1766, on the east, south, and west sides, with a sufficient stone dyke six quarters high, which dykes are afterwards to be upheld on their mutual expenses: For the which causes and on the other part the said William Drysdale, on the said Mr Chalmers performing his part of the premises'—that is, granting the 'said feu-contract in the terms above narrated—binds and obliges him' to pay to Chalmers the sum of £600 at and against the term of Martinmas 1765. That this is not a feu-contract but an obligation to execute and deliver such a contract in return for a payment of money to be made at a future term, is perfectly clear. But although it is not a conveyance, it contained a precept of sasine; and the pursuers found upon an instrument of sasine following upon the precept, dated and recorded in May 1766, by which

they maintain that William Drysdale was duly infeft in the lands, upon the conditions expressed in the contract of sale. If this sasine had stood alone, it could not, in my judgment, have been upheld as a valid infeftment. There is authority for holding that at an earlier period, a precept alone, *secundum chartam conficiendam*, might have been sustained as a valid title if followed by possession, even if no charter had afterwards been made out. But even if this had been still a recognised method of infeftment in 1766, the sasine would be invalid because the stipulations of the contract in which the precept is contained exclude the possibility of its being used as a warrant for present infeftment. A contract to grant a charter in consideration of a payment of money at a certain future date could not be of itself a warrant of infeftment, notwithstanding that it contained a precept. It gives no absolute right to obtain infeftment. To acquire such a right it was necessary for the feuar to satisfy the condition of the contract by paying £600 at Martinmas, 1765; and when he had made payment, it was further necessary, in order to establish the right and complete the title, that he should either obtain a charter or feu-contract, or adjudge in implement.

"The defective character of this first sasine, however, is of no importance to the validity of the pursuers' title, because it has been followed by a series of unchallenged infeftments confirmed by successive superiors, and by uninterrupted possession. By a charter of confirmation in 1814, Thomas Hog of Newliston, who had acquired the *dominium directum* from Chalmers, confirmed four successive dispositions of forty of the original sixty acres, and the instruments of sasine following thereupon. The remaining twenty acres, after a series of transmissions, came into the same hands as the forty. In May 1845 the trustees of Dr Charles Durie were infeft in the whole subject; and by charter of confirmation on the 6th of June 1856, John Buchan Hepburn, who had then acquired right to the *dominium directum*, confirmed to these trustees all and whole the said sixty acres and the instrument of sasine in their favour. Subsequent infeftments were confirmed by writs of confirmation in 1868 and 1869. There can be no doubt, therefore, of the validity of the pursuers' title, or of the feudal relation between them and the defender, who is a singular successor of Mr Buchan Hepburn.

"It is a different question whether by virtue of their admitted title they are in a position to enforce the obligation of relief. This obligation is recited in the writs confirmed in 1814, and also in the charter of confirmation. But it is not mentioned in the charter of 1856, in the instrument thereby confirmed, or in any of the subsequent titles. The defender maintains that he is not bound, not merely because the obligation itself is collateral and extrinsic to the feu-right, but because the contract in which it is contained is altogether personal, so that none of its obligations can be held to affect singular successors in the superiority. The answer is that the feudal relation being in fact established, its terms, *hinc inde*, must be determined by the only right to which it can be traced, which is the contract of 1764. It is said that there is nothing but the contract to fix the feu-duty, and that the superior who enforces its obligations against the vassal must also accept the corresponding obligations in the vassal's favour. On the other hand, it is said that the superior does not require to go further back than the instrument of sasine and the charter of 1856 in order to ascertain the conditions of the infeftment then confirmed. It is true that this is only a charter by progress, and its terms are therefore liable to be corrected by the original grant. But if no original grant can be produced there is no authority for controlling the infeftments upon which the vassal has possessed for the period of prescription by reference to previous transmissions of the *dominium utile*.

"The question thus raised would be one of considerable difficulty if the pursuers' construction of the contract were clear, and if the possession had been all along in accordance with that construction. But I think the construction by no means clear, and there is nothing to show that the obligation ever became operative even against Mr Chalmers.

"When an obligation of this kind has been embodied in a feu-contract or feu-charter it will in general be read as a condition of the grant, and therefore available against singular successors in the superiority. But it may bear a very different construction when it is found only in a personal contract to grant a feu, because there may be stipulations in such a contract which are not intended to enter the charter as permanent conditions of the grant. In the agreement in question there are a variety of conditions, some of which are purely personal. By the obligation immediately following that in question the superior is taken bound to enclose the subjects with a sufficient stone dyke, which is certainly personal; and a very material part of the stipulation in dispute is purely personal also, because the granter binds himself to make the public burdens a real burden upon his other lands, that is, upon lands of which the property remains in him. There is thus a personal obligation in the superior and his heirs to relieve the feuar, and to make the right of relief a real burden on their property lands, and no similar obligation to make it a burden on the superiority as such. As a question of construction, therefore, it appears to be at least very doubtful whether the condition was intended to affect singular successors in the superiority. It is not one of the essential conditions of a feu-right, and it could not be embodied in a feudal grant as a permanent condition of the right, because an essential part of the stipulation, if it were expressed in such a grant, would be altogether inapposite and ineffectual.

"But if the construction be even doubtful it appears to me to be conclusive in favour of the defender, that no grant has in fact been executed in terms of the contract. The feu-contract is to be given in return for a payment of money, and there is nothing to show that the payment was ever made. The proper evidence that the condition had been performed upon which, according to the argument, the proprietors of the superiority were to become bound to relieve the *dominium utile* of public burdens would be the production of a charter or feu-contract. If no such right were granted the inference is that the condition was not performed. It is true that the successors of the feuar are in possession. But they have possessed under a title which in its

inception was ineffectual to bind the superior. Their right in the lands has now come to rest upon titles which are perfectly valid, but which do not import the obligation in question.

"It is a very material consideration that the successive proprietors of the *dominium utile* have made no claim for relief, at all events since 1856. The defender avers that no such claim has been ever made since 1764; and although the pursuers allege that they 'believe and aver' the contrary, there is no evidence in process to show that the alleged obligation has ever been enforced. The inference from the titles is that no payment of relief can have been demanded from the superior for more than forty years. The result is that there is nothing to show that the obligation ever came into force by performance of the condition on which it became prestable. The available evidence tends to show the contrary.

"I am therefore of opinion, upon the construction and legal effect of the titles, that the defender is not liable in the relief claimed. In this view it is unnecessary to consider the plea of prescription, which cannot be disposed of until the fact of non-payment for forty years has been more conclusively ascertained. But assuming non-payment to be proved, I am not satisfied that the defender's plea of prescription is excluded by any of the previous decisions. In *Hope* v. *Hope* it was held by Lord Benholme that the superiority title had been relieved of a similar burden by its omission from the investiture for forty years. His Lordship's judgment was reversed by the First Division, but upon the ground that the condition as expressed in the original grant had in fact received effect. It was not decided that the negative prescription would be inapplicable if the condition had neither been expressed in renewals of the investiture nor actually enforced.

"The defender's plea that the question is preclosed by an award upon a submission to Mr Penney in 1856 is not in my opinion well founded. Mr Penney's opinion was probably binding upon the parties who submitted the question to him. But it cannot affect singular successors. Their rights must be determined by the titles."

The pursuers reclaimed, and argued—The deed of 1764 followed by sasine constituted a valid feudal right in the persons of the pursuers. A precept for immediate infeftment followed by sasine was sufficient to give a valid title—Stair, ii. 3, 14, and ii. 11, 2; Ersk. ii. 3, 19; *King* v. *Chalmers*, November 15, 1682, 1 Ross' Leading Cases, 18; Bell's Lectures on Conveyancing, pp. 576, 578, and 647. It was a question whether words of *de presenti* conveyance were necessary to pass property in lands where there were words of conveyance *de preterito*. In all cases where *de presenti* words had been held necessary, the question had been whether words *de futuro* were sufficient. The deed of 1764 contained executive clauses as well as all essential conditions of the grant. There was no novelty in distinguishing one of a batch of obligations from others, and holding that it was to run with the lands, and that the others were personal. When an obligation was of a continuing character as here, there was no reason why it should not transmit against singular successors. This obligation was a counterpart of the obligations undertaken by the vassal. The charter of 1814 barred the superior from maintaining that the feu-duty was due except upon the conditions of relief contracted for. Being a charter by progress it could not alter the conditions of the title, and it was therefore necessary to go back to the deed of 1764—*Harvie* v. *Stewart*, &c., November 17, 1870, 9 Macph. 129; *Duke of Montrose* v. *Stewart*, February 15, 1860, 22 D. 755, March 27, 1863, 1 Macph. (H. of L.) 25, and 4 Macq. 499; *Stewart* v. *M'Callum*, February 14, 1868, 6 Macph. 382, February 17, 1870, 8 Macph. (H. of L.) 1; *Hope* v. *Hope*, February 20, 1864, 2 Macph. 670; *Dunbar's Trustees* v. *British Fisheries Society*, July 12, 1878, 5 R. (H. of L.) 221. The obligation had not been extinguished by the negative prescription. In 1856 there were thirty-four years' arrears of feu-duty. The moment the feu-duty was exacted the counter claim was made, and the matter referred to Mr Penney. Thereafter feu-duty was paid for twenty-nine years without deduction, but for some of that time under the award by a person bound thereby, and since 1885, when the pursuers became aware of the existence of the clause of relief, it had been paid under protest. The pursuers were not bound by the submission—*Fraser* v. *Lord Lovat*, July 29, 1850, 7 Bell's App. 171.

The defender and respondent argued—The obligation of relief was not binding on the defender. There was no mention of it in the recent charters. In order to modify the existing feudal relations the pursuer was bound to show a very clear title. The contract of 1764 could in no way be held the foundation of a valid feudal title. It was titled and recorded "contract and agreement," and it contained no words of *de presenti* conveyance. The infeftment following upon it was a bad infeftment. Even on its terms, however, the obligation to relieve was clearly intended to be only a personal obligation on the superior, and was not intended to be binding on his singular successors. It was not the counterpart of the *reddendo* at all, another remedy being provided by the superior binding himself to make these burdens real burdens on his other lands; the inference was that the obligation had nothing to do with the lands in question. All that was done by Chalmers in the agreement of 1764 was to engage to grant a feu right in certain terms. There was nothing in the disposition of 1779 or the charter of 1814 to impose the burden of stipends, &c., on the superior if that had not been done by the deed of 1764. The subsequent charters of 1856, 1868, and 1869 contained no mention of this obligation of relief, and the obligation had been extinguished by the negative prescription, there having been no deduction from the feu-duty for sixty-three years. The question had also been settled by the submission to Mr Penney, and was *res judicata*—Stair, iv. 40, 16; Bell on Arbitration (2nd ed.), p. 262; *Rutherfurd* v. *Nisbett's Trustees*, November 27, 1832, 11 S. 123; *Earl of Leven and Melville* v. *Cartwright*, June 12, 1861, 23 D. 1038.

At advising—

Lord President—This action is brought by the marriage-contract trustees of Dr Andrew Durie and his wife, who are the proprietors of the *dominium utile* of 60 acres of the Room of Drumtuthill lying in the parish of Dumfermline

and county of Fife, against the superior in the lands, to have it found and declared that the superior is "bound to free and relieve the said lands of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, excepting the feu-duty payable by the said lands, and also to make repetition to the pursuers of all payments they have made or may yet make in respect of such minister's stipend, schoolmaster's salary, cess, and public burdens since the term of Martinmas 1882, being the date at which the defender became superior of the said lands."

The existing investiture of the lands is a writ of confirmation by John Buchan Hepburn dated 7th June 1869, in which under the form prescribed by the Conveyancing Act of 1868, he enters the marriage-contract trustees in place of the last vassals with this qualification, "only in so far as consistent with the charter of confirmation granted by me as superior foresaid in favour of Henry Black, solicitor in Edinburgh, 'and others' dated the 20th day of June 1856."

Now, this writ of confirmation really contains nothing but what I have read, except a formal statement of who are the parties entered, and those in whose place they are entered. It contains no *tenendas* and *reddendo*, as they are not necessary clauses under the Act of 1868, and therefore a reference back to the charter of 1856 is necessary to complete the terms of entry under this writ of confirmation. It must, in short, be taken that the charter of 1856 together with this writ of confirmation constitute the existing investiture of the lands. Now, the charter of 1856 was granted by John Buchan Hepburn, the then superior of the lands, and he confirms to the disponees in the deed of settlement of the late Dr Durie the 60 acres in question, and an instrument of sasine in the lands dated 1st May 1845. The *tenendas* and *reddendo* clauses are thus expressed:—"To be holden the said lands and others immediately of me and my foresaids, superiors thereof, in feu-farm, fee, and heritage for ever; paying therefor yearly the sum of £3 sterling at the term of Martinmas, and doubling the said feu-duty the first year at the entry of every heir and singular successor and being thirled to Meldrum's Mill, conform as the said lands are thirled," and so forth.

Now, the conditions of the tenure are therefore clearly expressed in the charter of 1856, and there are none except the manner of holding, the feu-duty, and the servitude. The obligation to relieve of minister's stipend, &c., is therefore not in the existing investiture of the lands, but of course if that obligation occurs in the original constitution of the holding, it would be quite competent for the vassal to go back to it and say that he is not barred from insisting in the conditions of the original right because they are omitted in the charter of confirmation.

But, then, is there an original feu right in existence, and if so, what is it? This inquiry does not involve the consideration whether the vassal has a good feudal title, because he is possessing under a charter from the superior, and has been so possessing for more than the prescriptive period. The title to the feu is therefore unimpeachable. The vassal, however, says he has got the deed which is really the constitution of the original feu right, and that it contains the obligations sought to be enforced.

This writing is dated in 1764, and is certainly a very singular document. I might almost say that it is a sort of bargain or contract such as has never been seen before in the history of conveyancing in this country, and it therefore requires precise consideration. It sets out that "Mr George Chalmers has sold and disponed, and binds and obliges him, his heirs and successors, to grant a feu right to the said William Drysdale, his heirs and successors, of sixty acres Scots measure of the Room of Drumtuthill, "being no doubt the sixty acres of which the pursuers are in possession." The words are "has sold and disponed," which words in the ordinary forms of our conveyancing writs mean that he "has already agreed to sell and dispone," but they are not followed by the words "and hereby sells and dispones;" the words following are, "and binds and obliges him, his heirs and successors, to grant a feu right." He has not therefore granted a feu right, but he comes under a personal obligation to grant one. The lands are next described, and the deed then proceeds thus—"To be held in feu-farm and heritage of the said Mr George Chalmers, his heirs and successors, for yearly payment of £3 sterling at the term of Martinmas yearly, and doubling the said feu for the first year at the entry of every heir and singular successor, and being thirled to Meldrum's Mill, conform as the said lands are thirled, all lying within the parish of Dunfermline and shire of Fife, and reserving the coal, freestone, limestone, and other minerals below ground, with liberty to win the same and to make pits, levels, coalhills, and roads for that purpose, upon paying damages above ground (the said William Drysdale always having liberty to win freestone and limestone for the uses of the farm allenarly), and to assign the rents from and after the term of Martinmas 1765 for crop and for year 1766."

Now, all these provisions are governed by the original words "binds and obliges him, his heirs, and successors," and then comes the particular obligation in question, "and to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens in all time coming, except the said feu-duty, and to make the said publics a real burden upon his other lands; and also the said George Chalmers binds and obliges him and his foresaids to enclose the said 60 acres" . . . "for the which causes, and on the other part," on Mr Chalmers granting a feu-contract as expressed, he, the other party, "binds and obliges him, his heirs and successors, to content and pay to the said Mr George Chalmers, his heirs, executors, and successors whatsoever, the sum of £600 sterling, and that at and against the term of Martinmas 1765."

Now, all this therefore stands upon the obligation of the granter, and there is nothing but a personal contract between the parties. Of course if a feu right followed upon it, and contained all these clauses, and Mr Drysdale paid the £600, and received delivery of the feu right, he would then have become vassal in the lands, and the obligations *hinc inde* would have been binding on both parties. But we are bound to assume that no feu right was ever granted, because we are shown none, and that the sum of £600 was never

paid. In short, this deed remains exactly what it was from the beginning, a personal obligation on the one hand and the other.

There is superadded to this deed a precept of sasine in the simplest and purest form, and on that infeftment was taken. It is not easy to see with what view a precept of sasine was added to this singular deed, but certainly mere infeftment on an unqualified precept could never convert the contract in question into a valid feu right—could not feudalise the personal obligation in the instrument.

That being so, it appears to me that what the vassal here refers to for the purpose of correcting the terms of the existing investiture is not a feu right at all, but contains only a personal obligation, and not even a personal obligation to free and relieve from minister's stipend, &c., but only to insert in the feu-contract an obligation to that effect. That is not an obligation binding on the singular successors of Chalmers, who granted the obligation. The progress and history also of the case is certainly against the supposition that this was ever considered to be a condition of the right of property of William Drysdale or a condition of the superior's drawing the feu-duty, because there was never any demand, so far as can be seen, from 1764 down to the present time, that this obligation should be fulfilled.

There was something attempted to be made of the charter of 1814, and it is quite necessary to refer to it to remove any confusion that may seem to arise from its terms. It confirms a disposition dated 18th April 1769 granted by William Drysdale, the supposed feuar in the instrument of 1764, in favour of Charles Durie of Craigluscar, and also another by the same party and in favour of the same party dated 8th April 1779, and then after setting out the lands the charter proceeds thus—"Which lands, with the teinds and others foresaid, were sold and disponed to the said William Drysdale by the said George Chalmers by contract of sale entered into between them dated the 5th day of June 1764, and which contains an obligation upon the said George Chalmers to free and relieve the said ground of all minister's stipend, schoolmaster's salary, cess, and all other public burdens, except the feu-duty of £3 stg. therein mentioned, and to make the said public burdens a real burden upon his other lands, together with the obligement to infeft *a me vel de me*, procuratory of resignation, precept of sasine, and other clauses contained in the said disposition."

Now, it appears pretty clear that the conveyancer who drew this charter had never seen the deed of 1764, because he has misdescribed it from beginning to end. In the first place, he calls it a contract of sale, which it is not. Then he says it contains an obligation on George Chalmers, but not upon "his heirs and successors," to free and relieve from burdens, and when he rightly says that the deed contained an obligation to make the public burdens a real burden upon the other lands of the granter, he proceeds, "with the obligement to infeft *a me vel de me*, procuratory of resignation" (and who ever heard of a procuratory of resignation in a feu right?), "precept of sasine, and other clauses contained in the said disposition." That is plainly a bungled title, whatever else might be said of it, and as I said before, it is perfectly clear that the conveyancer had not seen or had misunderstood the nature of the deed of 1764. It is not a contract of sale, it is not a disposition, it contains no obligation to infeft, and no procuratory of resignation. But still further, the obligation of relief is not binding on singular successors, taking the words of the charter, because it is only an obligation upon the said George Chalmers, and no one else — a personal obligation upon George Chalmers—and an obligation to make the public burdens a burden on his other lands. There is not a word of making it a condition of the feu right, or a condition of the superior's being entitled to demand his feu-duty.

Therefore, while the deed of 1814 introduced a certain amount of confusion into the argument, it shows how completely the deed of 1764 has been misunderstood throughout, and it also shows by making reference to no other contract or deed, being a contract of feu, that no feu-contract ever followed upon it.

I have therefore come to the same conclusion as the Lord Ordinary, that there is no obligation of relief such as is here sought to be established.

Lord Mure—I agree in the result arrived at by the Lord Ordinary.

We were referred to the case of the *Duke of Montrose* to the effect that an obligation of relief transmitted to and was enforceable by a singular successor of the vassal against the superior, and did not require express assignation by the vassal to his heirs and disponees. But that decision proceeded on the ground that the original feu right granted by the Duke of Montrose created an obligation in favour of the vassal, his heirs and successors, to relieve them of these burdens, and that that obligation was contained in the feu-contract itself, and constituted by infeftment following upon it; the basis of the judgment being that there was privity of contract between the superior and vassal to the effect that the latter was to be free and relieved of these burdens in all time coming, and the obligation was held to be feudalised against the superior in the lands because it was part of the constitution of the feu right.

In the present case the existing investiture contains no obligations of this description, and we are thrown back to the original title of the pursuer to see whether any such obligation was in the deed then granted. Now, we have not been referred to any deed of the nature of a feu-contract which contains any such obligation on the part of the superior. We have been referred to a contract containing an obligation by Chalmers to grant a feu right, but it appears never to have been granted, probably because it was only to be granted on payment of £600, and the fact that there never was a feu-contract granted leads to the opinion that the £600 was never paid, and that the obligation of relief was never attempted to be enforced against the superior. No such obligation was ever made part of a feu-contract. The charter of 1814 cannot be said to be of that nature. Therefore nothing more in this case can be pleaded against the superior than that the original contract granted by Chalmers laid a personal obligation on him, his heirs and successors, to free and relieve the vassal of stipend and other public burdens. Accordingly, it has never

been attempted to enforce that obligation by legal proceedings since 1764, though the obligation by its terms is to relieve of public burdens in all time coming.

I therefore concur with your Lordship.

LORD SHAND—I am not prepared to say that I have found this case altogether free from difficulty, but after giving it full consideration I have come without difficulty to be of the same opinion as your Lordships. If the document of 1764 had been a feu-contract containing clauses to the effect that the subjects were conveyed on condition of payment of feu-duty, and with an obligation to relieve of public burdens, I should have had no doubt, after the decision to which we have been referred, that it would have been held that the obligation of relief was the counterpart of the obligation to pay feu-duty, but the case falls far short of that. The only case presented on behalf of the vassal is that he can show from a series of titles that the parties accepted this deed as a feu-contract, and looking to the terms of the deed it would require a very clear statement of obligation in the later deeds to operate the result argued for by the pursuers. There is nothing in any deed to which we have been referred which does so operate. It is quite plain that when the document in question was originally granted, it was not intended to be a feu-contract regulating the rights of parties. No doubt the person who desired to have the lands desired to have infeftment and got it, but there was no direct disposition of the lands, and when the obligations were inserted, and, among others, one of relief from public burdens, they were all subject to this undertaking to pay £600. Now, whether that sum was paid or not, as a matter of fact we do not know, but it may fairly be assumed that if it had been paid a feu-contract would have been granted. If it was not paid, what were the terms on which the parties allowed this deed to become the permanent title? If a feu-contract had been prepared the seller might have decided to insert the clause of relief, but he might not, and so, taking the document as we have it, unless it is made clear by a subsequent title that the superior treated this contract as a feu right, not merely as to the title of the vassal, but also as to the obligations *inter se* of the parties, the pursuers cannot succeed.

Now, we have been referred to the charter of 1814. The conveyancer who drew that deed seems to have had very imperfect knowledge of the contract of 1764, but it is to be observed that in narrating the obligation in question he does not treat it as anything but a personal obligation by Chalmers. There is no indication that he looked on it as an obligation on the heirs and successors of Chalmers in the superiority, and one might argue from that that it was probably ultimately arranged that it was not to affect persons taking the title of superior in time coming. That is not a reference which favours the view of the pursuers that the superior is liable to that obligation. The later charters also make no reference back to the conditions of the original deed.

Now, I do not think when a condition contained in an extraordinary deed of this sort is omitted in the subsequent charters we can go back to the original deed to supply it. I say so for the reason that we have no feu-charter here, and in accepting this deed as the title the parties accepted it with the character it had, but I am not prepared to say that they imported all the conditions contained in it into the title, or that they intended to do so.

I am therefore of opinion that the Lord Ordinary has reached a right conclusion.

LORD ADAM—I have no doubt at all that it is lawful to go back to the original investiture to correct an alleged omission in a charter by progress, but I am not aware that it is lawful to correct an alleged omission by reference to anything but the original investiture. It is new to me that it is possible to correct an omission in one charter by progress by reference to another, and if an attempt were made to control a later charter by progress by an earlier, I should say there was no authority for it. I should rather be inclined to say that the later charter by progress must rule or correct the earlier. The insuperable difficulty in the defender's case is that they cannot produce the original grant. They produce a deed called a contract, but it is a mere personal contract. We do not know whether a feu-contract was ever granted, or, if it was, on what terms or conditions it was granted. Therefore the only means of supplying the alleged omission in the charter by progress is awanting, and consequently I think it must be ruled by the later documents.

The Court adhered.

Counsel for the Pursuers—Sir C. Pearson—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Defender—Gloag—Jamieson. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, July 12.

FIRST DIVISION.

MUIR AND OTHERS (MUIR'S TRUSTEES) *v.* MUIR.

Succession—Legacy—Accretion—Residue—Unascertained Class.

A testator directed his trustees to hold the residue of his estate for behoof of and equally among the issue of his only child, to accumulate the interest, and to pay the shares of accumulated principal and interest to sons on their attaining twenty-five years, and on the daughters attaining that age or being married, to hold their shares for them in liferent for their liferent alimentary use allenarly, and their respective children in fee. He provided that if a grandson died before the period of payment without issue his share should accresce to the survivors, but there was no similar provision with regard to the granddaughters' shares. A granddaughter survived the testator, but died before the period of payment without leaving issue. *Held* that the share set free by her death went to form part of the undivided residue of the testator's estate.

William Muir of Inistrynich, Argyllshire, died on

30th May 1880, survived by his only child William Campbell Muir. The deceased left personal estate available for carrying out the purposes of his settlement amounting to £148,414.

His trust-disposition and settlement, dated 16th October 1877, contained the following clauses:—"(*Quarto*) I direct and appoint my said trustees and their foresaids to hold and administer the whole residue and remainder of my means and estate for behoof of and equally among the children of the said William Campbell Muir, and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use allenarly, and their respective children in fee," subject to certain following conditions —"(3) On the death of any of the said daughters of the said William Campbell Muir, and of any husband enjoying a liferent interest in the trust moneys, my trustees shall pay over to their children and the heirs of such children, in equal shares, the fee of their mother's share, held in trust as aforesaid, payable to them respectively, in the case of sons, on their attaining twenty-years of age, and in the case of daughters, on their attaining to that age or being married, whichever of these events shall first happen, until which time the income shall be applied for behoof of the said children respectively; And it is hereby specially provided and declared, that in the event of any of the sons of the said William Campbell Muir dying before the said period of payment, leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life, the issue of my female grandchildren being provided for under the above destination; and in the event of any of the said sons of the said William Campbell Muir or their issue dying before the respective periods of payment of their shares without leaving lawful issue, the share of such deceaser shall fall to and be divided equally among the survivors and survivor of my said grandchildren jointly with the lawful issue of any of them who may have deceased leaving children, such issue succeeding equally among them to the share to which their parent would have been entitled if in life: Declaring that in the event of any share accrescing to any of my said female grandchildren or their issue through the death of any of my grandchildren, such share shall be held for their behoof in liferent, and their children in fee, as is above provided with regard to the original share falling to them."

At the time of the testator's death his son William Campbell Muir had six children, two sons and four daughters, the eldest of whom was born in 1869. Subsequent to 1880 two children were born to William Campbell Muir, and one of his daughters, Annie Elizabeth Muir, died aged seventeen without leaving issue.

A question arose as to the parties entitled to the share of the residue of William Muir's estate provided for Annie Elizabeth Muir, and the present special case was presented for the opinion of the Court by (1) William Muir's trustees, (2) William Campbell Muir, and (3) the surviving children of William Campbell Muir, and himself as their administrator-in-law.

The first and third parties maintained that on a sound construction of the said trust-disposition and settlement no right to a share of the residue of the late William Muir's estate vested in the deceased Annie Elizabeth Muir, but that the share which the first parties would have been bound to set apart for her if she had attained twenty-five years of age or had been married still formed part of the undivided residue of the said trust-estate, to which those children only who should survive the term of payment, or in the case of daughters be married, should that event first happen, should have right.

The second party maintained that on a sound construction of the said trust-disposition and settlement (*a*) the equal share of the residue of the said William Muir's estate provided for the said deceased Annie Elizabeth Muir along with the other children of the said William Campbell Muir alive at the date of the death of the said William Muir became, by her death without leaving issue, intestate estate of the late William Muir, to which he was entitled to succeed as his father's heir *in mobilibus;* or (*b*) alternatively, that he was entitled to one-half of the capital of said share, to be ascertained as at the date of Miss Annie Elizabeth Muir's death, as heir of his daughter, the remaining half devolving on his surviving children as next-of-kin of their deceased sister.

The following were the questions of law—"(1) Did the share of the residue of the late William Muir's estate, which under his trust-disposition and settlement would have been set apart for Miss Annie Elizabeth Muir in liferent, and for her children in fee, had she attained the age of twenty-five years or been married, become on her death without leaving issue—(*a*) Intestate estate of the said William Muir, to which the second party is now entitled to succeed as heir *in mobilibus*, or (*b*) intestate estate of the said Miss Annie Elizabeth Muir, to one-half of the capital of which the second party is now entitled to succeed in terms of section 3 of the Intestate Moveable Succession Act 1855, and the other half of which falls to be paid to her surviving brothers and sisters as her next-of-kin? or (2) Did no right to the fee of a share of the residue of the late William Muir's estate vest in the said Miss Annie Elizabeth Muir, and does the whole of said residue fall to be divided, in terms of the said trust-disposition and settlement, among the other children of the said William Campbell Muir or their issue to the exclusion of the said Annie Elizabeth Muir, or anyone claiming through her?"

Argued for the second party—The events contemplated by the testator and provided for had occurred, as one of the daughters had died unmarried and under twenty-five years. It was provided by the deed by implication that in the case of daughters predeceasing the period of division, there was to be no accretion of their

shares, which accordingly became intestate estate either of the testator or of the predeceasing daughter. In either case the second party was entitled to take. The share of residue did not vest—*Torrie* v. *Munsie*, May 31, 1832, 10 S. 597, as followed in *Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191; *Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566. The deceased daughter's interest in her share was that of a contingent liferent, as she had survived the testator. It was at his death that the class who were to take had to be ascertained, and the question was not affected by the existence of *post-nati*. If the case was not ruled by that of *Fulton*, *supra*, it fell under *Carlton* v. *Thomson*, July 30, 1867, 5 Macph. (H. of L.) 151, and was a case of vesting subject to defeasance, in which case the second party benefited to the extent of one-half—*Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Dalgleish's Trustees* v. *Bannerman*, March 6, 1889, 16 R. 559.

Argued for the first and third parties—The scheme of this deed was that the trustees should administer this fund, and accumulate the interest until the period of division arrived. Because there was accretion in the case of sons it did not follow that the same was to hold in the case of daughters. A daughter was to take only in certain events. If she died before taking, it was as if she had never existed, and the trustees must continue to administer her share for the behoof of the survivors as part of the trust-estate under their charge. The daughter here died before she could have demanded her share, and accordingly her share remained in residue; there was nothing to fall into intestacy, because it has never been taken out of residue. The provisions of the fourth purpose of the deed determined the questions between the parties—*Buchanan's Trustees* v. *Buchanan*, May 26, 1877, 4 R. 754; *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Ross* v. *Dunlop*, May 31, 1878, 5 R. 833.

At advising—

Lord President—The questions in the present case arise upon the construction which is to be put upon certain clauses in the trust-disposition and settlement of the late Mr Muir of Inistrynich dated 16th October 1877.

The testator was possessed of considerable heritable estate, to which his son Mr Campbell Muir, the party hereto of the second part, succeeded, but the settlement which we are now dealing with conveys moveables only, and by its fourth purpose the testator directed his trustees to hold and administer the residue of his estate for behoof of the children of his son. At the time when the testator died Mr Campbell Muir had six children, two sons and four daughters, and since that date two more children have been born, both daughters. Accordingly the testator, in making the provisions which he has done in this deed in favour of his grandchildren, was dealing with an unascertained class, and the directions which he gave to his trustees in this matter were in these terms—"(*Quarto*) I direct and appoint my said trustees and their foresaids to hold and administer the whole residue and remainder of my means and estate for behoof of and equally among the children of the said William Campbell Muir, and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or in case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on their respectively attaining the said age or at marriage (if sooner), their accumulated shares shall be ascertained and set apart, and be held and applied for them respectively in liferent, for their liferent alimentary use allenarly, and their respective children in fee."

By the third head of this fourth purpose there is a provision relating to the death of any of the daughters in these terms—"On the death of any of the said daughters of the said William Campbell Muir, and of any husband enjoying a liferent interest in the trust monies, my trustees shall pay over to their children and the heirs of such children in equal shares, the fee of their mother's share, held in trust as aforesaid, payable to them respectively, in the case of sons, on their attaining twenty-five years of age, and in the case of daughters, on their attaining to that age or being married, whichever of these events shall first happen, until which time the income shall be applied for behoof of the said children respectively: And it is hereby specially provided and declared, that in the event of any of the sons of the said William Campbell Muir dying before the said period of payment leaving lawful issue, such issue shall be entitled, equally among them, to the share to which their parent would have been entitled if in life, the issue of my female grandchildren being provided for under the above destination; and in the event of any of the said sons of the said William Campbell Muir or their issue dying before the respective periods of payment of their shares without leaving lawful issue, the share of such deceaser shall fall to and be divided equally among the survivors and survivor of my said grandchildren jointly with the lawful issue of any of them who may have deceased leaving children, such issue succeeding equally among them to the share to which their parent would have been entitled if in life: Declaring that in the event of any share accrescing to any of my said female grandchildren or their issue through the death of any of my grandchildren, such share shall be held for their behoof in liferent, and their children in fee, as is above provided with regard to the original share falling to them."

It thus appears that as regards the daughters of Mr Campbell Muir they cannot take anything more than an alimentary liferent in their shares of their grandfather's estate, and there is no clause of survivorship applicable to them, while as regards the sons there is in their case a clause of survivorship in the event of any of them or their issue predeceasing the period of payment, and this constitutes one of the peculiarities of the deed.

Annie Elizabeth Muir died in 1887, having survived the testator almost seven years, and the question which we have to determine is, what is now to become of that portion of the late Mr Muir's estate so provided to her in liferent? Her father claims it on the ground, first, that it is intestate succession of his father the late William Muir; or alternatively, that it is intestate estate of his daughter, and that he is accordingly entitled to

one-half of the capital. As to the second alternative, that is clearly impossible; while as to this share being intestate succession of the testator, the terms of the deed are opposed to any such contention. In the case of *Paxton's Trustees*, 13 R. 1191, I made the following observations, which I venture to repeat as having a bearing upon the present case—"When a legacy is given to a plurality of persons named or sufficiently described for identification, 'equally among them,' or 'share and share alike,' or 'in equal shares,' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue, or a sum of fixed amount, or corporeal moveables."

Now, the first condition of the application of that rule is, that the parties to whom the legacy is left are named or can be identified. It is therefore clearly inapplicable in the case of an unascertained class. Each share is a separate bequest, and if the legatee dies his or her share falls into residue. Here the class of persons who are to be benefited is unascertained. Some of the beneficiaries take only a liferent interest, while others again take the fee; in the case of sons, also, there is an express clause of survivorship, and in the event of a son dying prior to the period of payment without issue his share would accresce to the survivors. When once we reach this point any difficulty which may have existed in the case disappears, and it becomes clear that the share of Miss Annie Elizabeth Muir which has been set free by her death goes to form part of the residue of this estate.

When the period of division arrives it will be time enough to determine who the parties are who are to take the benefit of this bequest. All that has at present to be decided is, that the share set free by the death of Annie Elizabeth Muir goes to form part of the undivided residue of the testator's estate.

The result of all this is, that question 1 falls to be answered in the negative, seeing that the share set free by the death of Annie Elizabeth Muir is neither intestate estate of the testator nor of the deceased. With reference to question 2, it falls to be answered in the affirmative.

Lord Mure and Lord Adam concurred.

Lord Shand was absent at the discussion, and delivered no opinion.

The interlocutor of the Court was in the terms above quoted.

Counsel for the First and Third Parties—Jameson—Guthrie. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Second Party—Vary Campbell—Begg. Agents—Forrester & Davidson, W.S.

Tuesday, July 16.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

J. S. VIRTUE & COMPANY (LIMITED) *v.* BROWN.

Process—Reclaiming-Note—Proof—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 27 *and* 28—*A.S., 10th March* 1870, *sec.* 1, *sub-sec.* 5, *and sec.* 2.

An interlocutor by which the Lord Ordinary closes the record and assigns a day "for the adjustment of issues," is not an interlocutor deciding the manner in which proof is to be taken, and cannot therefore be reclaimed against without leave, under the 28th section of the Court of Session Act 1868.

This was an action by John Brown, residing in Glasgow, against J. S. Virtue & Company (Limited), publishers in London and Edinburgh. The purpose of the action was to recover damages for alleged illegal dismissal in breach of an agreement libelled.

Upon 26th June 1889 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"The Lord Ordinary closes the record on the summons and defences, and assigns this day week for the adjustment of issues."

Upon 29th June the defenders presented a reclaiming-note without leave of the Lord Ordinary.

A question was raised by the Court whether the interlocutor was competent without leave of the Lord Ordinary.

The defenders argued—This was a competent reclaiming-note against an interlocutor of the Lord Ordinary giving an allowance of proof. The question had been considered and the same thing done in *Little* v. *North British Railway Company*, July 5, 1877, 4 R. 981. [Lord Young—In that case the defenders objected to any proof being given at all, but that is not the case here.] It was true the defenders here admitted there must be proof, but the Lord Ordinary had already prejudged the question by ordering issues, which showed he intended to have the case tried by a jury. That was giving an allowance of proof, as the test of whether an interlocutor could be reclaimed against or not was the purpose with which it was pronounced and not its form—*Mason & Stewart* v. *Stewart*, February 21, 1877, 4 R. 513. The question in that case arose under the same conditions as here, under the A.S., 10th March 1870, sec. 1, sub-sec. 5, and sec. 2. This was not a proper question to be tried before a jury, as there was no question of character concerned, but the construction of an agreement. The practice was quite settled—*Blair* v. *Macfie*, February 2, 1884, 11 R. 515; *Scottish Rights of Way Society* v. *Macpherson*, October 23, 1886, 14 R. 7; *Cook & Wallace* v. *Wilson*, March 7, 1889, 16 R. 565. If the Lord Ordinary had allowed a proof before himself the pursuer could have reclaimed for jury trial, and the procedure here was just the converse of that.

Counsel for the respondent was not called on.

At advising—

Lord Justice-Clerk—This reclaiming-note may be technically competent, but I do not think this is a mode of procedure which should be encouraged. I think that it would need very strong grounds indeed to lead us to interfere with an interlocutor such as this pronounced by a Lord Ordinary.

This reclaiming-note is pronounced against an interlocutor of the Lord Ordinary ordering an adjustment of issues, and naming a day for that purpose. But that interlocutor does not in the least preclude the Lord Ordinary in the exercise of his discretion when the issues are before him from ordering the evidence in the case to be given in a jury trial or in a proof before himself. That question remains entirely open.

The only result, so far as I can see, if we allowed this method of procedure, would be that we might have two reclaiming-notes in every case; one upon the interlocutor ordering the adjustment of issues, and another afterwards when the issues had been brought forward and either adjusted or refused. I think there has been no ground stated here for holding that the Lord Ordinary should be debarred from exercising his discretion in the matter of how the proof should be taken.

Lord Young—That is my opinion also, and I think that this reclaiming-note should be dismissed.

I abstain from giving any opinion as to the competency of this note, but without any reference to the competency I think that a reclaiming-note against such an interlocutor as this ought at once, and as of course, to be dismissed, for if it is competent, it is only accidentally so, and I think that it should not be allowed.

The provisions of the Act of Parliament were not exactly followed in this case, but substantially they were so. When the record was closed the Lord Ordinary ought to have asked the parties if they renounced probation. They would certainly have said they did not, but supposing that that part of the procedure was unnecessary, then the statute provides by section 27—"The Lord Ordinary shall appoint the cause to be debated summarily at the end of the motion roll on a day to be fixed, before which day the parties shall respectively lodge the issue or issues, if any, which they propose for the trial of the cause, and the Lord Ordinary, after hearing parties, shall on the said day determine whether further probation should be allowed." It was not necessary therefore to appoint a day on which parties should adjust the issues; it would have been more proper to appoint a day on which the case would be summarily argued, and the parties could have lodged their issues if they wished to do so. In this case "this day week" was the day appointed to hear parties, and before which issues were to be lodged. Then the statute proceeds—"If the Lord Ordinary shall consider that it is necessary, he shall determine whether it is to be limited to proof by writ or oath, and if not, whether it is to be taken before a jury, or in whatever manner of way."

Now, supposing that on the day week after closing the record the parties come before the Lord Ordinary with the issues they think proper for the trial of the cause, and he is of opinion that the case ought to be tried by jury trial, and approves of issues to carry out that purpose, what then? The statute provides in the next section to the one I read—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section, except under sub-division (1)"—which does not concern us here—"shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming-note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily." Well then, on that day—in the present case "this day week"—the Lord Ordinary hears parties, and adjusts an issue for the trial of the cause, and there is a reclaiming-note competent to either party, what then is the meaning of this reclaiming-note?

I think it is an extravagant reclaiming-note, and I think we would be doing an injustice to litigants if we gave any countenance to such a course of procedure. The case must go back to the Lord Ordinary. Of course I do not say anything as to what course he may think proper to adopt when the parties are before him with their issue to be adjusted. When he has heard them he may judge whether the case is to be tried by a jury or a proof before himself, and then a reclaiming-note will be competent to either party whatever he should decide. But this reclaiming-note must be dismissed with expenses.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court adhered.

Counsel for the Appellants—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Respondent—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Tuesday, July 16.

SECOND DIVISION.

BOWIE AND OTHERS *v.* PATERSON.

Succession—Power of Appointment.

In an antenuptial contract of marriage the power was reserved to the husband to apportion a sum, which it was stipulated he should provide, as he thought proper among the children of the marriage, and failing his doing so, a similar power was given to the wife should she survive him. Should neither exercise the power of apportionment the sum was to be divided equally among the children. The husband died first, without having exercised the said power. After his death the wife became party to a bond and assignation in security by a son in favour of an assurance company, whereby she apportioned to the said son, his heirs and assignees, a sum of not less than one-fifth part or share of the sum stipulated for in the marriage-contract. She died possessed of considerable moveable property, leaving a trust-disposition and settlement in which she directed the trustees to pay the residue of her whole estate to the children who should survive her, with the exception of one daughter, to whom only a sum of £100 was left, in such shares as she

should appoint by any writing under her hand, failing which in equal shares; declaring that these provisions should be in full satisfaction of any claim competent to them on her death, "whether legally or under my said marriage-contract."

Held that the bond and assignation in security contained a valid appointment to the son therein mentioned to the extent of one-fifth of the estate held in trust under the marriage-contract, and that the remaining four-fifths of that estate fell to be divided equally among the other children of the marriage, or those in their right, the power of apportionment not having been exercised with regard thereto.

Mr William Bowie and Annetta Antonia Louisa Thurburn were married in 1840. By an antenuptial contract of marriage Mr Bowie, *inter alia*, bound himself to provide by insurance on his own life, or otherwise the sum of £4000, and to take the rights and securities thereof to himself and his promised spouse and the survivor, in conjunct fee and liferent for her the said Annetta A. L. Thurburn's liferent use only, and to the children of the marriage and the issue of these children in fee. It was declared that it should be in the power of William Bowie to divide and apportion as he should think proper among the said children or their issue the above provision in their favour, and in case of his death without making any such division, his wife, if she survived him, was to have the same power. In case such power was not exercised by either, the sum was to be equally divided among the children of the marriage. It was also declared that the said provision in favour of the children should be in full satisfaction to them of all bairns' part of gear or legitim.

By mutual disposition and settlement, dated 9th May 1849 and registered 13th March 1857, Mr and Mrs Bowie, on the narrative of the foresaid antenuptial contract of marriage and obligation above mentioned, and that the said William Bowie had effected two policies of insurance on his life, amounting together to £3000, assigned the same to his said wife in liferent in the event of her surviving him, and to the child or children of the marriage who might be alive at the time, in such proportions as he might direct by any writing under his hand; or failing his leaving such writing, then his said wife should have the power of making such apportionment, and failing either of them leaving such writing, then the said sums should be divided among his said children share and share alike. Certain trustees were nominated and appointed to carry out the purposes of the settlement.

Mr Bowie died on 5th January 1856 without having exercised the power of apportionment reserved to him in the marriage-contract. He was survived by his wife, and also by six children, viz., (1) Marizza Bowie or Paterson, (2) John Mure Bowie, (3) Elizabeth Thurburn Bowie or Hopcroft, (4) Annetta Antonia Louisa Bowie or Edwards, (5) Robert Thurburn Bowie, and (6) Henrietta Isabella Bowie.

Mrs Bowie died on 23rd January 1888, survived by the same children, leaving a trust-disposition and settlement dated 12th May 1877, by which she conveyed her whole estate to trustees for certain purposes. *Inter alia*, she directed her trustees to pay her daughter Mrs Marizza Bowie or Paterson the sum of £100, and to pay the residue of her whole estate to her whole children who survived her, other than Mrs Paterson, in such shares as she should appoint by any writing under her hand, failing which in equal shares, and she declared that these provisions in favour of all her children should be "in full satisfaction to them of legitim and executry, and of all claims competent to them on my decease, whether legally or under my said marriage-contract."

Mrs Bowie died possessed of moveable estate to the amount of £9584, 10s. 11d. She left no other testamentary writing, or other writing under her hand dealing with her estate. She had, however, become party to a bond and assignation in security dated 2nd November 1883, granted by her son John Mure Bowie in favour of the Scottish Life Assurance Company for £500, whereby he assigned to the company in security of a loan his whole right and interest to the sums held in trust under the mutual disposition and settlement, and the disposition by Mr Thurburn already referred to, in so far as they might then belong or thereafter become payable to him. The bond and assignation then proceeded—"And I, the said Annetta Antonia Louisa Thurburn or Bowie, having regard to my right of apportionment or disposal of the funds and others held in trust as aforesaid, and considering that I have, for the further security of the said company, agreed to exercise now in favour of my said son the said John Mure Bowie the rights and powers conferred upon me by the said mutual settlement and disposition of the said Robert Thurburn: Therefore I have apportioned and do hereby apportion to the said John Mure Bowie and to his heirs and assignees a sum of not less than one-fifth part or share of the foresaid sum of £4000, and a further sum of not less than one-fifth part or share of the price or value that may be obtained for the said house No. 28 Regent Terrace, when the said house comes to be sold."

On William Bowie's death in 1856 the trustees under the marriage-contract and mutual trust-disposition and settlement entered into possession of the trust-estate. They received payment from the Assurance Companies of the sum of £3790, 7s. 10d., and invested the same along with a sum of £209, 12s. 2d. which was granted by Mr Thurburn, the father of Mrs Bowie, in order to make up the sum of £4000 contained in William Bowie's obligation in the marriage-contract. Mr Thurburn had by a previous disposition conveyed the house 28 Regent Terrace, Edinburgh, to the same trustees, directing that it should be held for Mr and Mrs Bowie's liferent, and that the price of the same, when sold as therein directed, should be applied in the same manner as the sums payable under the policies of assurance. When Mrs Bowie died the sums held in trust under the antenuptial contract and the mutual disposition and settlement were a bond and disposition in security for £4000 over heritable subjects in Aberdeen, and the house in Regent Terrace, Edinburgh.

These funds having become divisible on the death of Mrs Bowie, Mrs Paterson claimed that they should be divided equally among the children of the marriage. The view of the trustees was

that by her trust-disposition and settlement and the bond and assignation in security mentioned above Mrs Bowie had validly exercised the power of appointment reserved to her in the marriage-contract, and that the trust funds should be divided into five shares, one-fifth whereof should be paid to John Mure Bowie, and the remaining shares distributed equally among the other four children of Mrs Bowie, excluding Mrs Paterson. They therefore refused to accede to Mrs Paterson's claim.

In these circumstances this case was presented to obtain the judgment of the Court on the questions which had arisen. The first parties to the case were the trustees under the marriage-contract and mutual disposition and settlement of Mr and Mrs Bowie. Mrs Paterson was the second party, and the third parties were the other four children of Mr and Mrs Bowie or those in their right.

The questions submitted for the opinion of the Court were the following:—"(1) Whether the first parties, the said trustees, are bound to divide the trust-estate mentioned in article 6 of the foregoing case equally among the whole children of the marriage of Mr and Mrs Bowie? or (2) Whether the deeds referred to contain a valid appointment of one-fifth of the said trust-estate in favour of John Mure Bowie, the balance being unappointed? or (3) Whether the said deeds contain a valid appointment of the whole trust-estate to the effect of excluding the party of the second part from any right to a share of the same, and dividing it among the parties of the third part as follows, viz., one-fifth to John Mure Bowie, and four-fifths equally among the other four children of Mr and Mrs Bowie, or those in their right?

The first and third parties argued—Mrs Bowie alone had the power of appointment here as her husband had died without exercising his power of appointment. She had validly executed that power when she joined in the bond and assignation in security granted by John Mure Bowie, as was expressed in the deed itself. That left four-fifths of the trust money undisposed of. But she had provided a scheme of distribution of that sum by her trust-disposition and settlement. If a testatrix possessing power to make a scheme of distribution of a certain part of her estate made a setttlement disposing of her whole estate in a particular manner, by leaving it to an executor, &c., the part over which she had the power of apportionment was divided in the manner provided in the settlement, as it was not necessary to narrate particularly that she was exercising her power of appointment—*Smith* v. *Milne*, June 6, 1826, 6 S. 670 (N. Ed. 685); *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413; *Grierson* v. *Miller*, July 3, 1852, 14 D. 93; *Mackenzie*, 19th June 1874, 1 R. 1050. If the testatrix clearly expressed her intention of leaving the property over which she had power in a certain manner the Court would give effect to her intention—*Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230. It was plain that she had so expressed her intention here. The appointment to John Mure Bowie of one-fifth of the trust-estate was quite plain and valid. Then she left £100 to Mrs Paterson, which was to come out of the general estate, and she directed that the residue of her estate, including the trust funds, should be divided equally among her other children, plainly showing that Mrs Paterson was not intended to participate at all in the scheme of division. If she had meant otherwise she would have granted John Mure Bowie one-sixth only, and not one-fifth of her estate. The recent case of *Whyte* v. *Murray*, November 16, 1888, 16 R. 95, which appeared to be against the contention of these parties, could be distinguished from the present, as the sum there to which the son was found to have no title had originally been the property of the wife, and at the date of the case she was alive and in the enjoyment of the securities. These elements were absent from this case.

The second party argued—No appointment had been made. It was admitted that Mr Bowie had not exercised his power of appointment. Neither had Mrs Bowie. The bond and assignation in security was merely an arrangement with John M. Bowie to enable him to borrow more easily from the insurance company. When it was executed Mrs Bowie was not thinking at all of the shares of the trust funds which were to go to the children. It was admitted that Mrs Paterson's £100 was to come out of Mrs Bowie's own estate, and Mrs Paterson claimed no more from that fund, but she was entitled to get a fair share of the marriage trust funds so far as these had not been disposed of by any deed of apportionment executed by the spouses.

At advising—

Lord Young—I do not think that this is a case of any particular difficulty. The question lies in a nutshell. The funds contained in the marriage-contract of Mr and Mrs Bowie are the only funds with which we are concerned, and by that contract there is given to the wife a liferent of the funds, and the fee to the children of the marriage. She was the survivor, and had no estate in it except a liferent, and the fee was in the children unless the parents directed otherwise. The father died, not having exercised his power of apportionment; the power was then in her, and the only question is, whether she exercised that power? Failing any exercise of that power by her the fund would fall to be equally divided among her children.

Now, the first question is, whether this document which she granted in favour of John Bowie, and which bears to be an exercise of her power of apportionment, is effectual? No doubt it was executed by her at the time it was executed for a particular purpose, but I think it was a good exercise of her power of apportionment of one-fifth of the estate over which that power existed.

Now, is there any further exercise of that power by her? There is no other suggested except her settlement, but her settlement contains nothing of the kind. She gives £100 to one of her daughters, but it was admitted, and even pressed upon us, that that was to be paid out of her own estate, and not out of the marriage-contract funds. Then there is a direction to divide the rest of her own estate among the rest of her children equally. That is not an exercise of her power of apportionment at all. I am therefore of opinion that we should find there has been a valid appointment of the fund to the extent of one-fifth to John Mure Bowie, and the trustees must satisfy his claim, but that there has

been no exercise of the power of apportionment as regards the other four-fifths of the fund, and that it falls to be divided equally among the other children.

LORD RUTHERFURD CLARK, LORD LEE, and the LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"The Lords having considered the special case, and heard counsel for the parties thereon, are of opinion that the deeds therein referred to contain a valid appointment to John Mure Bowie of one-fifth of the estate held by the trustees under the antenuptial marriage-contract, and that the remaining four-fifths of said estate fall to be divided in five equal shares among the parties of the second and the parties of the third part, other than the said John Mure Bowie—that is to say, one-fifth to Mrs Marizza Bowie or Paterson; one-fifth to the trustees and assignees under the indenture and settlement on the marriage of Mrs Annetta Antonia Louisa Bowie or Edwards, wife of William Henry Edwards; one-fifth to the trustees under the marriage-contract of Mrs Elizabeth Thurburn Bowie or Hopcroft; one-fifth to Robert Thurburn Bowie; and one-fifth to Henrietta Isabella Bowie: Find the parties to the special case entitled to payment out of the funds of the said estate of the expenses incurred by them in relation to the case," &c.

Counsel for the First and Third Parties—Jameson—C. N. Johnstone. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Second Party—Sym. Agent—William Fraser, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

HAMILTONS *v.* HAMILTON'S TRUSTEES.

Proof—Secondary Evidence—Skilled Witnesses—Value of Colliery.

In an action of reduction of a *mortis causa* trust settlement and codicil, on the ground of facility and circumvention, the Court granted a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of certain collieries—a large share in which belonged to the trust-estate—the object being to obtain evidence of their value for the purposes of the pursuer's case.

James Hamilton, a large coalmaster in Glasgow, died on 27th August 1888, when he was seventy-five years of age, leaving a trust-disposition and settlement dated 7th April 1874, with two codicils appended dated 7th May 1877 and 18th December 1882. Under these deeds the truster provided for an equal division of the annual proceeds of the undivided residue among his whole children (three sons and three daughters), the issue of a predeceasing child to take their parents' place, and upon the dissolution of the firm of M'Culloch & Company, who owned several collieries, and of which firm the truster was the leading partner, he provided for an equal division of his realised share among his whole children.

By a codicil of 14th June 1888, and a trust-disposition and settlement of 6th July 1888, the truster reduced his daughters' provisions to a mere liferent of a sum of £5000.

The daughters, or their representatives, brought an action of reduction of the last two deeds against the sons, alleging that their father had been induced to sign them by the fraud and circumvention of one of the defenders.

The pursuers stated the value of the truster's estate at the time of his death at £120,000. The defenders stated it at £50,000.

An issue was adjusted, and the cause was set down for trial at the sittings at the close of the summer session.

The pursuers moved the Court for a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of the collieries by two mining engineers, "in order to estimate the value of the said plant, machinery, and collieries."

The defenders opposed the motion, urging that the pursuers would get all the information to which they were entitled from the balance-sheets of the business (some of which the defenders themselves intended to impugn), the inventory of the deceased's personal estate, and the business books of the firm. All that could be reasonably asked or was required at this stage was a general view of the value of the collieries, so as to compare the estimate made of it by the truster and his sons respectively. An inquiry of the kind asked might be competent if the deeds were reduced, but not at the present stage. In any case the working plans ought not to be put into the hands of other parties.

The Court granted the motion.

Counsel for the Pursuers—Murray. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, July 16.

SECOND DIVISION.

CREEVY *v.* HANNAY'S PATENTS COMPANY (LIMITED).

Reparation—Lead Poisoning—Factory and Workshop Act 1883 (46 *and* 47 *Vict. cap.* 53), *sec.* 3 *—White Lead.*

Held (Lord Lee *diss.*) that the provisions of the Factory and Workshop Act 1883 (46 and 47 Vict. c. 53) with regard to the manufacture of white lead applied to carbonate of lead, and did not apply to a salt of lead called white lead used as a substitute for that article, but which was in reality a sulphate of lead.

A workman employed in a factory for the manufacture of Hannay's white lead became ill with lead poisoning, and brought an action of damages against his employers.

Held (Lord Lee *diss.*) that he had failed to show that it was a white lead factory in the sense of the Factory and Workshop Act 1883, or to prove that the injuries sustained by him resulted from any neglect or failure on the part of the defenders to take proper precautions for the protection of their workmen.

James Creevy, 50 Hawthorn Street, Possil Park, Glasgow, brought an action of damages in the Sheriff Court at Glasgow against Hannay's Patents Company (Limited), 67 Great Clyde Street, Glasgow, for injury to his health caused by lead poisoning while in their employment from July 1887 to June 1888. The defenders manufactured a substance called "white lead" as a substitute for the ordinary white lead of commerce. Their product was sulphate of lead, whereas ordinary white lead is carbonate of lead.

By the Factory and Workshop Act 1883 (46 and 47 Vict. c. 53) sec. 3, it is, *inter alia*, provided that a white lead factory shall not be certified to be in conformity with this Act unless the scheduled conditions—that is to say, the conditions specified in the schedule to this Act, as amended by any order of a Secretary of State under this section, and including any conditions added by any such order—have been complied with. The schedule referred to in the section before referred to is as follows:—"(1) The stacks and stoves in the factory must be efficiently ventilated. (2) There must be provided for the use of the persons employed in the factory sufficient means of frequently washing hands and feet with a sufficient supply of hot and cold water, soap, towels, and brushes. (3) There must be provided in addition, for the use of women employed in the factory, sufficient baths, with a sufficient supply of hot and cold water, soap, towels, and brushes. (4) There must be provided for the use of the persons employed in the factory (but not in any part of the factory where any work is carried on) a proper room for meals. (5) There must be provided for every person working at any tank an overall suit with head covering, and a respirator or covering for the mouth and nostrils. (6) There must be accessible to all persons employed in the factory a sufficient supply of acidulated drink."

The pursuer averred that the defenders failed to comply with the conditions required by the said statute and relative schedule under which they alone were authorised to carry on business, and that his illness was the result of the defenders' failure to observe the statutory obligations to keep their factory in a safe and satisfactory condition, and to comply with the conditions specified in the schedule annexed to said statute; or otherwise, "the defenders being engaged in the manufacture of a product similar in appearance to and of the dangerous character of white lead, failed to take such precautions as were necessary to prevent injury to those engaged in the manufacture of such product."

The pursuer pleaded—"The pursuer having been injured in his health while in defenders' employment in consequence of their violation of the conditions laid down in the schedule annexed to the statute founded on for the protection of workmen engaged in white lead manufactories, or in consequence of defenders' failure while engaged in the manufacture founded on of a product similar in appearance to and of the dangerous character of white lead as within condescended on, he is entitled to damages from them therefor."

The defenders explained that they were "a limited company who own and work several patents, and, *inter alia*, they manufacture at their works at Possil Park a white pigment by means of a patented process which is analogous in other respects to the process of smelting lead, and the product which they make of lead, though popularly known as 'white lead,' does not contain the same chemical properties as ordinary white lead. The defenders' product is a pure sulphate of lead, which is a non-poisonous salt of lead and is innocuous;" that they were "not bound to comply with the requirements of the Act in question, but that, as matter of fact, they of their own option have supplied the articles and adopted the precautions which the said Act requires;" and that "any injuries which pursuer received were the result of his own negligence in not following the medical advice and instructions he received, in not observing the precautions enjoined, and making use of the preventatives supplied, and in working while his hand was in a condition rendering him specially susceptible to lead poisoning."

The defenders pleaded—"(1) The pursuer's health not having been injured through the fault or negligence of the defenders, they are entitled to absolvitor. (2) The pursuer's injuries having been caused or materially contributed to by his own fault or negligence, the defenders are not liable to him in damages. (4) The pursuer's statements are unfounded in fact. (5) The defenders not being bound by the conditions prescribed in the Act founded on, are entitled to absolvitor."

The Sheriff-Substitute (SPENS) allowed a proof, the result of which is sufficiently set out in his note, and afterwards pronounced the following interlocutor:—Finds the pursuer was in the employment of the defenders between July 1887 and June 1888: Finds the defenders carry on business at Caledonia Works where the manufacture of a new kind of white lead, under a patent process, is carried on: Finds that while engaged in said work pursuer contracted lead poisoning: Finds, however, under reference to note, that it is not proved that said lead poisoning was due to the fault of defenders, or their foreman, or anyone for whom they are responsible: Therefore sustains the defences, and assoilzies the defenders: Finds no expenses due, and decerns.

"*Note.*—A master is bound to take all reasonable precautions for the safety of men in his employment, and where a statute in connection with the manufacture of a dangerous compound lays down certain regulations as to the way in which such manufacture is to be carried on, these regulations are presumed to be reasonable regulations, and if the master fail to observe them and injury results to one or more of those employed by him in consequence of such failure, the employer may be liable in damages to the person or persons so injured. This action is to some extent based on this theory, on the alleged ground that there has been a violation on the part of defenders of the Act 46 and 47 Vict. cap. 53. At the time of the passing of that Act in 1883 it appears from the

evidence that the white lead of commerce was carbonate of lead. The process of the defenders' manufacture is described in Dr Clark's report—copy of which is No 7 of process, and it is explained in the same gentleman's evidence. The manufacture in which the defenders are engaged is not of carbonate of lead, but of sulphate of lead. The scientific evidence establishes that the chief risk of carbonate of lead arises from its solubility, whereas sulphate of lead is almost insoluble. Dr Clark further explains that the acidulated drinks are employed for the purpose of converting carbonate of lead, if introduced into the body, into sulphate of lead. It is further clear from the evidence that certain of the requirements of the Act above referred to, set forth in the schedule, are unnecessary. I refer to that one providing that the stacks and stoves in the factory must be sufficiently ventilated. It appears from statements made that the Government Inspector of Factories does not consider that the defenders' works fall under the provisions of the Act, and I incline to take the view that this is correct. · This conclusion being arrived at, the defenders cannot be held in any way contravening the provisions of the statute. Nevertheless, this fact does not dispense with the duty on the part of defenders of taking reasonable precautions for the safety of their men. I fail, however, to see that there has been any failure of reasonable precautions. I think it is proved, in the first place, that the manufacture of defenders' white lead does not to any appreciable extent give off noxious fumes in the way the ordinary manufacture does. But apart from this, so far as I can see, and so far as is applicable to their own manufacture, the defenders have complied with the usual precautions taken in white lead factories. It is at all events clear that pursuer has not established that he has been poisoned by fault on the part of defenders. I understand that even where the utmost precautions are taken in the manufacture of white lead there will be cases of white lead poisoning. In this case it seems to me more probable on the proof that if there is fault on the part of anybody in connection with pursuer's illness it is rather pursuer's own fault than that of defenders; but this is one of those cases where pursuer, after first suffering to some extent from lead poisoning, goes back to the employment knowing the risk of lead poisoning. Some constitutions are no doubt more susceptible than others, and probably pursuer is one of those. But if the evidence of Messrs Duncan, Tervet, and Lacy be accepted, there was no neglect in any particular of what could be held the master's duty, even if the Act was applicable, with the sole exception that for a short time there was no proper room for meals, but as pursuer did not take his meals at the works this does not affect the case in any way. I think there is some reason for supposing that pursuer was careless about wearing a respirator, also that he handled white lead, and at one time he seems to have had an injury to his hand through which, I think, it is possible some white lead may have worked into the system. In conclusion, I fail to see either that pursuer has established any fault on defenders' part, or, assuming fault has in some particular been proved, that he has proved his illness was due to such cause, while he must be held to have known that there was a risk incidental to working with white lead of any kind, and that risk he must be held to have accepted as incidental to the employment.

"I did not put the question to defenders whether they wanted decree for expenses in the event of my granting absolvitor? Probably such a decree would be of no value; but anyway, as pursuer has suffered in defenders' employment, I imagine defenders do not care for a decree for expenses."

The pursuer appealed to the Court of Session, and argued—The Act did not define white lead, but it applied to all white lead factories, and this was a white lead factory. When it was passed there was only one kind of white lead, but statutes which applied to a genus included new species, and if they were directed against certain known methods of doing a thing they were held also directed against new methods of doing the thing objected to—Wallace on Statutes (2nd ed.), p. 525; Maxwell on Statutes (2nd ed.), p. 98; *Taylor* v. *Goodwin*, March 25, 1879, L.R., 4 Q.B.D. 228; *Regina* v. *Smith*, June 4, 1870, 1 Crown Cases Reserved, pp. 266, 270; *Lane* v. *Cotton*, 1702, 12 Modern Reports, p. 485. The provisions of the Act had not been complied with, for there was no proper eating-room, there was no proper ventilation, and there was no sufficient supply of the statutory appliances. Even if some of these were inapplicable to this factory, that did not relieve the defenders from observing the others; it merely showed a case for modification by the Home Secretary as contemplated by the Act. In such circumstances, where a workman met with an accident the master was responsible for the omission to supply the necessary appliances—*Murdoch* v. *M'Kinnon*, March 7, 1885, 12 R. 810. Working in lead was always a dangerous occupation, and the defenders had failed to take such precautions for the safety of their workmen as they were bound to take at common law. Even at common law they were bound to see the premises were properly ventilated, and that there was abundance of washing appliances, *e.g.*, soap, brushes, and towels.

Argued for the defenders—*Prima facie* this factory was not under the Act, because it was not a certified factory, although its existence was known to the inspector. No prosecution had ever been instituted against the defenders for not complying with the provisions of the statute. This laid a heavy *onus* upon the pursuer of showing that it was under the Act, and that he had not discharged. But it properly was not under the Act, which was not applicable to the manufacture of this article. Its mere name did not bring it under the Act—converse of *Smith* v. *Lindo*, April 29, 1858, 27 L.J., C.P. 196. It was doubtless called white lead, but that only in a popular sense, and because it was a cheap substitute for the more expensive white lead of commerce. The Act did not regulate the manufacture of a genus—lead—but of a specific article, viz., carbonate of lead, which was dangerous on account of its extreme solubility. This was not carbonate but sulphate of lead. The Act clearly did not regulate its manufacture, for it provided for the supply of sulphuric acid in carbonate of lead factories in order that the insoluble sulphate might be formed. Even if the factory was under

the Act, the pursuer had failed to show that the injury to his health resulted from the failure of the defenders to comply with the requirements of the Act. If not under the Act, the pursuer had failed to show that the defenders had failed to take any reasonable precautions. The utmost that could be said was that occasionally the soap ran done and the towels were dirty, but the pursuer had never complained of the want of such appliances.

At advising—

Lord Young—This is an appeal from the Sheriff-Substitute in an action of damages by a workman in a factory for injury to his health in consequence of neglect on the part of his master to use proper measures in his premises for the health of his workmen. The action is raised both under the Statute 46 and 47 Vict. c. 53, regulating the manufacture of white lead, and also at common law. The Act 46 and 47 Vict. c. 53, requires certain precautions to be taken by those having white lead manufactories, which the defenders are said to have neglected.

There are two questions raised with reference to the statute, as far as this case is based on the statute. The first is, whether the statute is applicable to the defenders' work? and the second is, if it is so, whether the state of the pursuer's health is attributable to the defenders' neglect of its provisions?

The judgment of the Sheriff-Substitute is against the pursuer on both these questions, and it is to the effect that the statute is not applicable, this not being a white lead factory. The article manufactured is a kind of white lead no doubt. It serves as a substitute for it, but the weight of the evidence is, I think, to the effect that this article is not white lead within the meaning of the Act—is not of the character of the white lead to which the Act applies. That is a question on which I should have been unable to form a judgment without the evidence of scientific people, or of people versed in this trade and this article, but the evidence is that this is not white lead, or possessed of those dangerous qualities in its manufacture that the statute contemplates in making the provisions it does applicable to white lead factories.

I therefore agree with the Sheriff-Substitute that the statute is not applicable.

The second question is, whether if the statute is applicable, the injury to the pursuer's health is attributable to a failure on the defenders' part to comply with its provisions? and on that question I agree with the Sheriff-Substitute it is not. I think all the provisions required by the statute were taken by the defenders, and that the state of the pursuer's health is not attributable to neglect on the defenders' part supposing the statute is applicable.

That disposes of the case under the statute, and at common law I am of opinion it is not proved that the damage is attributable to any fault on the defenders' part, or that they neglected any reasonable and therefore proper precautions.

I therefore think the action is unfounded in fact, not being supported by evidence, and that the judgment of the Sheriff-Substitute should be adhered to.

Lord Rutherfurd Clark concurred.

Lord Lee—I think that this case is attended with difficulty, but I have been unable to arrive at the same conclusion with your Lordships.

The facts which I consider to be proved are these—1st, That the work carried on at the defenders' factory is the production from lead of a white pigment which they call "white lead;" 2nd, that the production of this pigment as there carried on is attended with the danger known as "lead poisoning;" 3rd, that the pursuer as well as other men employed in the works suffered from such lead poisoning; 4th, that it is not proved that the pursuer's illness was caused by his own fault, or by any fault to which he materially contributed; 5th, that the lead poisoning of the pursuer is reasonably accounted for, and must, on the evidence, be ascribed to the fault of the defenders in neglecting to observe the provisions of the Factory and Workshops Act 1883, which was considered by the managers, to whom the matter was left, to be applicable.

With regard to the obligations undertaken by the defenders in employing their work-people, I observe that Mr Hannay, the patentee of the process and the defenders' director, states in answer to the question how far the requirements of the Act were carried out at the works—"That has always been left more to the manager and heads of the departments, but I have given general instructions to see that everything was given to the men that they wanted." And Mr Tervet, the manager, states—"I understood then we were compelled by the Act of Parliament and by the special rules to have the respirators, and that the men should wear them. Up to the time the pursuer was injured I was certainly of the opinion that this product of ours fell under the head of white lead." It is also proved by the manager's evidence and by the facts of the case that the product as manufactured at these works is not non-poisonous.

If therefore I could upon any technical ground reach the conclusion that the Act applies only to the production of carbonate of lead, I should think that employers in the position of the defenders, who knew the necessity of precautions and proposed to take them, incurred an obligation at common law to see to the protection of workmen employed by them on the footing that they accepted the responsibility of using such precautions.

But this is a point which in my view does not require to be decided. For I think that the Factory and Workshops Act 1883, on a sound construction, applies to the defenders' factory. The statute makes it unlawful to carry on a "white lead factory" excepting under the conditions required by the Act. These conditions are not merely the scheduled conditions, but such amended, additional, or modified conditions as the Secretary of State under section 8 may see fit to approve of or impose; and it is required further, that special rules shall be adjusted for "every white lead factory" to be approved of by the Secretary of State. These special rules are to be framed and transmitted by the occupiers of the particular factory, and provision is made for the publication and amendment of such special rules in the case of each factory, and also for the enforcement of them against the work-people as well as against the manufacturer.

It is said, however, that the expression "white

lead factory" in the statute applies only to a factory for the production of carbonate of lead. There is nothing in the interpretation clause to support this limited construction of the expression, but it is said that the article known as white lead at the date of the statute was carbonate of lead, and the sixth of the schedule conditions requiring that "a sufficient supply of acidulated drink" shall be accessible to all persons employed is said to prove that carbonate of lead is in view.

I assume that the ordinary white lead of commerce at the date of the Act was carbonate of lead, and that it was specially in view of the Legislature at that time. But in my opinion this is not a sufficient ground for holding that the statute used the expression "white lead factory" in any such limited sense.

The expression "white lead factory" in my judgment requires construction. It may be construed, I admit, as applying only to a factory for the production of what was then commonly called "white lead," viz., carbonate of lead. But it can only be so construed by the aid of evidence that the only white lead of commerce then known was carbonate of lead. I think, however, that the expression by itself is capable of including, and may reasonably be construed as applicable to, any factory for the production of any white lead, the manufacture of which is attended with the risks which were intended to be corrected. My opinion is that to every such factory the enactment is applicable that it shall not be carried on excepting under conditions approved of by the Secretary of State and subject to the statutory inspection.

I apprehend that the general rule is well settled that a remedial statute of this kind is to be interpreted if possible so as to apply to all forms of the mischief against which it is directed. I do not say that the words can be disregarded. But I think that the sense is chiefly to be regarded, and if the words admit of it, that meaning is to be accepted which renders the statute applicable rather than such a limited meaning as would make the statute easily evaded and indeed inapplicable to any but one mode of producing the mischief.

The defenders' white lead, though not carbonate of lead, and not so soluble nor so poisonous, is in my opinion a kind of white lead, the manufacture of which according to their process produces the same injurious consequences, and I think that the principle of construction applied in the case of the *Queen* v. *Smith*, 1 Crown Cases, p. 266, and also in the case of *Taylor* v. *Goodwin*, 4 Q. B. Div. 228, is sufficient to bring it within the scope of the Factory and Workshops Act 1883 as to white lead factories.

It was argued that the evidence negatived this view, because Mr Hannay states that the inspector informed him that he was working under the Factory Act and not under the White Lead Act. Even if the inspector had been examined and had deponed upon oath to his opinion that the statute was inapplicable, I could not myself have attached much weight to his opinion in the absence of cross-examination and of information as to the position of the inspector. If it was merely one of the local inspectors of factories (as to whose qualifications the statutes make no very strict provision) it would be entitled to very little weight either upon the legal or upon the chemical questions which have been raised.

But as mere hearsay by the witness Mr Hannay, I feel bound to reject the statement as altogether incompetent and valueless.

The only other argument against the application of the statute which I think it is necessary to notice is that some of the scheduled conditions are inapplicable to this factory, particularly Nos. 1 and 6. But I think that the third clause of the Act contemplates the case of a factory as to which the Secretary of State may find it necessary to revoke, alter, or modify, "all or any of the conditions specified in the schedule," and to adapt the statutory conditions to the circumstances of the particular factory.

If the Act of 1883 is applicable to the defenders' factory the position of the case is this—that the defenders have carried on the work without enforcing its provisions or obtaining any special rules for the management of the works and the government of their work-people. In such circumstances it appears to me that they are not entitled to blame the work-people for not asking for things, or for not using things which were supplied. Therefore, even if there were more evidence than there is that everything was supplied which could be wanted, I should think that the defenders were in fault in not enforcing the provisions of the Act and in neglecting to provide themselves with the statutory means of doing so, and I should hold, in the absence of any other proved cause of the pursuer's illness, that their negligence in this respect was the cause of the lead poisoning from which the pursuer and others suffered.

But I think it right to say that in my opinion the evidence of the sufficiency of the ventilation of the drying house, and the supply of clothing and of cleansing accommodation, is far from satisfactory. There is a considerable weight of evidence against the defenders on these points.

The attempt to prove that the pursuer's illness must have arisen from an injury to his hand has in my opinion entirely failed.

On these grounds I should have held it proved that the pursuer's illness was caused by the fault of the defenders.

Lord Justice-Clerk—I concur with the majority of your Lordships. At the time the Act was passed on which the pursuer founds there was only one known article of commerce called white lead. That was an article of well-known properties and composition. Carbonate of lead was the only salt of lead which up to that time had been produced in such quantities and at such a cheap rate as to be applicable to the purposes for which white lead is used. We know the properties of that white lead, and the risks accompanying its manufacture on account of its being highly soluble, and in certain parts of the process fuming in a manner highly injurious to the human system. It was therefore thought desirable that regulations should be made by statute to protect workmen engaged in its manufacture. Now, these regulations must have had a bearing upon the chemical composition and properties of the article. That this was so is clear from what is prescribed to be done. For example, in every white lead manufactory there must be supplies, in convenient places in the

works, of acidulated water for the men to drink to counteract any poison they may have taken in by their breath or swallowed, so that the soluble carbonate may be turned into the insoluble sulphate, and thus be rendered innocuous.

It is perfectly plain that where an Act prescribes such precautions having reference to a chemical product it may be not only inexpedient but dangerous to bring under the Act another product which for commercial convenience may be known by the same name but is of different chemical composition. Here the substance produced in the defenders' process is a sulphate, and to supply more sulphuric acid could not only do no good but might do harm. No doubt, as Lord Lee has pointed out, the Home Secretary has power to modify the requirements of the statute in certain cases, but I should be much surprised if he were advised to apply to a new product regulations which he is entitled to make for the old one. I think nothing can be more clear than that the whole legislation dealing with the manufacture of white lead had reference to the manufacture of one particular salt, and should not be applied to a new and different chemical product.

The new article is called white lead, because unless it were so called it would not be bought as a substitute for the old substance. It is called so not because of its composition but to indicate that it may be used as a substitute for the old white lead of commerce. Formerly no one could supply a safe and cheap sulphate substitute for the dangerous carbonate of lead, whereas if such a sulphate were once produced at a cheap rate it would effect not only a saving in price, but would also lessen the danger to those persons who have to use a salt of lead as a pigment. Now, by an ingenious process this sulphate has been produced at a sufficiently cheap rate, and it is called "white lead," with the makers' name in front. That is not conclusive of the question, and I think the majority of your Lordships are right in holding that this is not white lead in the sense of the statute, and that the statute does not apply.

Now, as to the common law, I am not satisfied that in the manufacture of ordinary sulphate of lead there is any risk if workmen take ordinary precautions for themselves. I think the defenders supplied all sufficient appliances except that up to a certain date they had no proper separate room for the men to take their meals in. Had it been the case that the pursuer suffered in health from taking his meals in an unsuitable room it might have been held that the defenders were responsible. But this defect in the arrangements could not have been the cause of any injury to the pursuer, who invariably went home to his meals.

On these grounds I agree with the majority of your Lordships that the judgment in the Court below was right.

The Court pronounced the following interlocutor:—

"Find in fact (1) that the substance manufactured by the defenders is not white lead within the meaning of the Act 46 and 47 Vict. c. 53: and (2) that it is not proved that the injuries sustained by the pursuer in his health and constitution resulted from any neglect or failure on the part of the defenders to take proper precautions for the protection of their workmen; Find in law that the provisions of the foresaid Act are not applicable to the factory of the defenders, and that they are not liable, either under said Act or at common law, to compensate the pursuer for the said injuries: Therefore dismiss the appeal, and affirm the interlocutor of the Sheriff-Substitute appealed against: Of new assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in this Court," &c.

Counsel for the Pursuer—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for the Defenders—Guthrie—Salvesen. Agents—Campbell & Smith, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, July 18.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Rutherfurd Clark.)

HOGGAN *v.* WOOD.

Justiciary Cases — Public-house — Public-Houses Acts Amendment (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 35), *Schedule A, No.* 2—*Breach of Certificate*—"*Unlawful Games*"—*Dominoes Played for a Stake.*

The "form of certificate for public-houses" in Schedule A, No. 2, of the Public-Houses Acts Amendment (Scotland) Act 1862 contains the proviso that the person to whom the certificate is granted "do not suffer or permit any unlawful games" within his premises.

A publican was charged with having permitted a number of persons "to play at dominoes for a stake—un unlawful game"—within his premises, and was convicted. In an appeal—*held* that dominoes is not an unlawful game, and that the expression "unlawful games" does not apply to a lawful game played for a stake, and conviction *quashed.*

Robert Hoggan, publican, Jock's Lodge, Midlothian, was charged at the instance of George Mure Wood, S.S.C., Procurator-Fiscal before the Justice of the Peace Court for the county of Edinburgh, with having been guilty of an offence against the laws for the regulation of public-houses in Scotland, in so far as upon the 8th day of May 1889, or about that time, he did permit or suffer a number of persons unknown to the prosecutor to play at dominoes for a stake—an unlawful game—within his premises at Jock's Lodge aforesaid, contrary to the terms and conditions of his certificate. He was convicted, and took a case. It was set forth in the case that it had been proved that the appellant had permitted certain persons on the date above mentioned to engage in a match at dominoes for a stake within his licensed premises.

The Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. cap. 35), Schedule A, No. 2, "Form of certificate for public-houses," contains the following proviso—"Provided that the said shall be licensed and empowered . . . on the terms and conditions following—that is to say, that the said do not suffer or permit any unlawful games therein" (*i.e.*, within his licensed premises).

The English Licensing Act 1872 (35 and 36 Vict. cap. 94), sec. 17, enacts a penalty upon any licensed person who "suffers any gaming or any unlawful game to be carried on on his premises."

The Act 1621, cap. 14, provides—"That no man shall play at cards or dyce in any common house, town, hostelrie, or cookes houses, under the penalty of forty pounds money of this realm, to be exacted of the keeper of the said inns or common houses for the first fault, and losse of their liberties for the next. Moreover, that it shall not be lawful to play in any other private man's house but where the master of the family playeth himself. And it shall happen any man to winne any sums of money at carding or dycing attour the sum of an hundreth merks within the space of twenty-four houres . . . the superplus shall be consigned within twenty-four houres thereafter in the hands of the thesaurer of the kirk . . . to be employed alwayas upon the poor of the paroche where such winning shall happen to fall out," &c.

Argued for the appellant—Dominoes was not an unlawful game. The only games unlawful in Scotland were "carding and dycing," which were prohibited by the Act 1621, cap. 14. The fact that a game lawful in itself was played for a stake did not make it unlawful. Under the English Acts it had been held that the game of dominoes was not an unlawful game—*The Queen* v. *Ashton*, 1 E. & B. 286. The term "unlawful game" in the English Act had been held to mean games made unlawful by statute—*Bew* v. *Harston*, L.R., 3 Q.B.D. 454 (Cockburn, C. J., 456); *Jenks* v. *Turpin*, L.R., 13 Q.B.D. 505 (Hawkins, J., 524). The cases in which persons had been convicted for permitting the playing of innocent games for stakes in England had been decided upon the meaning of the word "gaming" in the English Act—*Patten* v. *Rhymer*, 29 L.J. (Mag. Cases) 189; *Dyson* v. *Mason*, L.R., 22 Q.B.D. 351.

Argued for the respondent—A lawful game played for money was an unlawful game. The term "unlawful game" in the Scotch statute was equivalent to the term "gaming" in the English statute. There were no games unlawful in themselves by the law of Scotland. The Act 1621, cap. 14, did not prohibit the playing with cards and dice except for money. The expression "to play" in that Act was equivalent to "to game." If the expression "unlawful game" was not equivalent to "gaming" it had no meaning at all. Gaming, if not unlawful by the law of Scotland, was at all events extra-legal—*Calder* v. *Stevens*, 9 Macph. 1074; *Graham* v. *Pollok*, 10 D. 646; *Greenhuff*, 2 Swinton, 236.

At advising—

Lord Justice-Clerk—We heard a very excellent and elaborate argument upon this case, but in the view I take of it the point is a very simple and a very clear one.

It appears that the Scotch Public-House Statutes do not, as the English statutes do, contain any prohibition of "gaming," but only a prohibition of "unlawful games," and accordingly no person can be prosecuted in Scotland under these statutes in respect of any game which he permits upon his premises unless it be a game which is "unlawful" either by statute or at common law.

The contention of the respondents, as I understood it, was that any game, if played for a stake, became thereby an unlawful game. I am unable to come to any such conclusion. To play a game for a bet or wager may be "gaming," but I am unable to see, without any statutory enactment to that effect, that a game which is in itself lawful becomes an "unlawful game" because it is played in connection with some wager or stake. We were referred to a number of cases decided under the English statutes, and particularly to a case in which it was held that the playing of the game of "puff and dart" for a stake constituted "gaming." But that case does not settle that the game of "puff and dart" is an unlawful game, it only settled that putting a stake on such a game was "gaming." And the Scotch statute is so expressed that unless it can be shown that a game is unlawful it cannot be prohibited under that statute, although the playing of it may constitute "gaming."

I wish to add, however, that if a publican permits anything like regular gambling to be carried on within his premises that is an offence which can be dealt with otherwise.

Lord M'Laren—I am of the same opinion. I am quite satisfied that the game of dominoes is not unlawful. I am not certain that by the law of Scotland there are any unlawful games. All that I will say is that the Public-Houses Act prohibits the playing within public-houses of unlawful games, if there be any.

Lord Rutherfurd Clark concurred.

The Court quashed the conviction.

Counsel for the Appellant — Rhind—Baxter. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Respondent—Gloag—Gillespie. Agent—Party.

Thursday, July 18.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Rutherfurd Clark.)

GRAY *v.* DEWAR.

Justiciary Cases—Summary Jurisdiction (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 33), *secs.* 3 *and* 6, *sub-sec.* (*b*)—*Prosecution in Forms Prescribed by Local Police Act—Application of Summary Jurisdiction Acts—Excessive Penalty.*

The Summary Jurisdiction Act 1881 provides, sec. 3—"The provisions of the Summary Jurisdiction (Scotland) Acts 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3rd section of the Summary Procedure Act 1864, and to all proceedings of the like nature

which by any future Act are directed or authorised to be taken summarily . . . provided that where there is a general or local police Act in force, it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms provided by the Summary Jurisdiction Acts." By sec. 6, sub-sec. (*b*) of the same Act it is enacted that in proceedings under the Summary Jurisdiction Acts where the fine does not exceed £20, the alternative imprisonment shall not exceed two months.

A prosecution for shebeening was brought in Dundee in the form prescribed by the Dundee Police and Improvement Consolidation Act 1882 (45 and 46 Vict. cap. 185), and the accused was convicted and sentenced by the Magistrates to pay a fine of £15, or suffer three months' imprisonment, the punishment enacted for the offence by the Public-Houses Acts Amendment (Scotland) Act 1862, sec. 17. In a suspension—*held* that the provisions of the Summary Jurisdiction Act applied to the prosecution, and that the period of imprisonment in the sentence was therefore illegal, and sentence *suspended*.

This was a bill of suspension and liberation brought by Maria Gray, Dundee, of a sentence pronounced by the Police Magistrates of the burgh of Dundee upon her in a criminal libel at the instance of David Dewar, Procurator-Fiscal of Court, whereby the Police Magistrates adjudged the complainer to forfeit and pay the sum of £15 sterling of penalty, and in default of immediate payment thereof, to be committed to the prison of Dundee for the period of three calendar months. The charge on which the conviction and sentence proceeded was that she had on Sunday, 23rd June 1889, in the house in Todburn Lane, Dundee, occupied, rented, or used by her, trafficked in whisky or other exciseable liquor without having obtained a certificate in that behalf, contrary to the Public-Houses Acts Amendment (Scotland) Act 1862," particularly section 17 thereof. The offence charged was a second offence. The complaint was in the form prescribed by the Dundee Police and Improvement Consolidation Act 1882 (45 and 46 Vict. cap. 185).

The Public-Houses Acts Amendment (Scotland) Act 1862 (25 and 26 Vict. cap. 35), sec 17, provides—"Every person trafficking in any spirits or other exciseable liquors in any place or premises without having obtained a certificate in that behalf in terms of this Act shall be guilty of an offence, and on being convicted thereof, shall for each offence forfeit and pay the full penalties provided in the thirtieth section of the said first recited Act (the Act 9 George IV. cap. 58) . . . and in default of immediate payment thereof shall be imprisoned for the entire periods respectively prescribed by the said thirtieth section of the said first recited Act."

The Act 9 George IV. cap. 58, sec. 30, provides that "For the second offence the offender shall forfeit the sum of £15, with the expenses of conviction to be ascertained on conviction; and in case such penalty and expenses shall not be paid within the space of four days next after such second conviction shall have taken place, then the offender shall suffer imprisonment upon his own charge and expenses for a period of three calendar months."

The Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sec. 3, provides—"The provisions of the Summary Jurisdiction (Scotland) Acts 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3rd section of the Summary Procedure Act 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily or under the provisions of the Summary Jurisdiction Acts . . . provided . . . that where there is a general or local police Act in force it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms provided by the Summary Jurisdiction Acts." Sec. 6—"In all proceedings under the Summary Jurisdiction Acts . . . (*b*) where a warrant of imprisonment is granted, whether in default of payment of a penalty, or . . . when the amount adjudged to be paid . . . exceeds five pounds, but does not exceed twenty pounds, the period of imprisonment shall not exceed two months."

The Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. cap. 53), sec. 3, provides—"The provisions of this Act may be applied to . . . (2) All proceedings to be taken before any sheriff, justices, or justice, or magistrate in Scotland for the prosecution of any person who has committed, or is charged with having committed, any offence or act for which, under the provisions of any Act of Parliament, he is liable upon summary conviction before any sheriff, magistrate, justices, or justice, to be imprisoned or fined or otherwise punished."

Argued for the complainer—By virtue of section 3 of the Summary Jurisdiction Act 1881 the provisions of the Summary Jurisdiction Acts were applicable to this prosecution. The proviso at the end of that section permitted the use of the forms contained in any general or local police Act in police prosecutions, but did not in any other way restrict the application of the Summary Jurisdiction Acts to such prosecutions—*Linton* v. *Sherry*, 1 White, 410; *Nicol* v. *M'Neil*, 1 White, 416. The period of imprisonment was contrary to the provisions of sec. 6 of the Summary Jurisdiction Act 1881. It was therefore illegal and ought to be suspended. The Court could not reduce the sentence without entering upon the merits of the case, as the amount of sentence was not a fixed one, but discretionary within certain limits.

Argued for the respondent—(1) This was not a prosecution under the Summary Jurisdiction Acts. It was brought under the Dundee Police and Improvement Consolidation Act 1882, and the application of the Summary Jurisdiction Acts was excluded by the proviso in sec. 3 of the Summary Jurisdiction Act of 1881. The sentence was in exact conformity with the provisions of sec. 17 of the Public-Houses Acts Amendment (Scotland) Act 1862, and should therefore be sustained. (2) Sub-sec. (*b*) of sec. 6 of the Act of 1881 applied only where the power given in sub-sec. (*a*) of the section to mitigate penalties was taken advantage of. (3) In any event, the sentence ought not to be suspended. The Court could correct it by limiting it to two months.

At advising—

Lord Justice-Clerk—It appears from the preamble of the Summary Jurisdiction Act of 1881, which sets forth that in England power has been given to magistrates to mitigate penalties, that one of the objects which the Act was passed to effect was to confer upon the courts of summary jurisdiction the power to mitigate and modify punishments in summary proceedings.

The 3rd section of the Act provides that "the provisions of the Summary Jurisdiction (Scotland) Acts 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3rd section of the Summary Procedure Act 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily." The section then goes on to provide that certain specified classes of cases shall fall within its provisions, and contains the proviso that "where there is a general or local police Act in force, it shall be optional in police prosecutions either to use the forms prescribed by such Act or the forms provided by the Summary Jurisdiction Acts." It is said that if a prosecutor adopts the forms of a general or local police Act he thereby renders nugatory, and is entitled to render nugatory, the provisions in favour of accused persons to be found in the Summary Jurisdiction Acts. That is a result at which we could not arrive without the very clearest warrant in the words of the statute. I find no such warrant. I do not think that because the prosecutor is permitted to use the forms prescribed by other Acts, it is therefore to be implied that the use of these forms shall take away from persons brought before courts of summary jurisdiction privileges given to them by the Act. It would be anomalous and extraordinary if it lay with the prosecutor by his choice of one particular form of procedure, as distinguished from another, to settle what power the magistrate shall have in the matter of punishment.

If it be the case, then, that the proceedings, notwithstanding the form which is adopted, are under the Summary Jurisdiction Acts, sec. 6 of the Act of 1881 applies, and that section, taken along with sec. 3, provides that both in the case of past and future Acts of Parliament, which contain provisions for imprisonment in default of payment of a penalty, the period of imprisonment shall have a certain specified relation to the amount of the penalty.

But I do not think that this question is open. I think the case of *Linton* v. *Sherry* has decided it. In that case a similar prosecution to this was brought under the forms of a police Act before a Sheriff-Substitute, and the Sheriff-Substitute, acting upon his interpretation of the Summary Jurisdiction Acts, modified the penalty which the police Act made imperative. The prosecutor appealed, and maintained that the prosecution having been brought under the forms of the police Act and not of the Summary Jurisdiction Acts, the Sheriff-Substitute had no power to modify the penalty. The Court unanimously refused the appeal without calling on counsel for the respondent, and held that the Sheriff-Substitute had power to modify the penalty. I think that decision is expressly in point. For the reasons already stated my opinion coincides with the result at which the Court arrived in that case. I therefore move your Lordships to suspend the sentence.

Lord M'Laren—It is easy to see without going beyond the words of the statute itself that the Summary Jurisdiction Act of 1881 was enacted as part of a general scheme of policy which the Legislature was then engaged in carrying out. The preamble refers to the provisions of the relative English statute, and throughout the clauses of the Act of 1881 two general purposes can be read, the establishing uniformity of procedure in the inferior courts, and the establishing of a system of sentences in which the period of imprisonment should bear some definite relation to the amount of the unpaid penalty. But for the clause which refers in terms to police prosecutions, I apprehend there could be no doubt that this statute is of universal application to summary prosecutions. I think that so much was decided in terms in the case of *Nichol*, although there the specialty as to the meaning of the exception with regard to police prosecutions did not arise. That is the exception upon which the respondent founds. The question is, whether the clause gives an option to use what are colloquially called the "forms" of the local Acts—I mean those parts of the schedules of the local Acts which prescribe the *formulæ* of complaints, interlocutors, and sentences—or whether the expression the "forms" of the local Acts includes all that relates to the declaration of the offence and its punishment, as well as matters incidental to the prosecution. This is a pure question of construction, and I think that whether we look at the meaning of the language or to the probabilities of the case, we must arrive at a conclusion favourable to the view maintained by the complainer. Looking to the language of the section, if it had been intended to except police prosecutions in general from those provisions of the Act which relate to sentences and the mode of their enforcement, it would have been very easy to do that by appropriate words; but then the proviso would not have been that it should be optional to use the "forms" of these Acts, but that it should be optional to use the "powers" of these Acts or to proceed "under" these Acts. I cannot hold that the use of the word "form" here is unintentional, and I see no reason for giving it a larger construction than the extent naturally suggests. Then as to the probabilities of the case, it seems to me that if it had been intended to treat police prosecutions exceptionally, not only as to forms, but also as to substance, it would have been necessary to deal in some way with the subject of those prosecutions in those provisions relating to punishment which are the chief feature of the Act. And while it is conceivable that the Legislature might have meant to legalise a different scale of punishment in the case of police courts from that existing in Sheriff and other courts, it is in the highest degree improbable that the difference would take the shape of empowering police magistrates to impose heavier sentences than the Sheriffs could impose. The absence of any separate provisions applicable to police cases in the clause which regulates the duration of sentences strongly confirms me in the opinion

that it was not intended that in the matter of sentences there should be any difference between the powers of police magistrates under local Acts, and the powers that were to be exercised by a proper court of summary jurisdiction.

I agree that this point is in substance and almost in terms decided by the case of *Sherry*.

I am also of opinion that we must suspend the sentence simpliciter, because it is impossible for us to know what lesser sentence the Magistrate might have given if he had known that he had the power to mitigate the penalty and the period of imprisonment.

Lord Rutherfurd Clark—I think it important to follow decisions so that the law should be fixed and known. I think that the case of *Sherry* is conclusive of the case which we have heard, and that we must follow that decision. It follows that the sentence must be suspended. On the question whether we can modify the punishment, I quite concur with your Lordships.

Counsel for the Complainer—W. Galbraith Miller. Agent—Robt. D. Ker, W.S.

Counsel for the Respondent—Salvesen. Agent—Party.

VALUATION APPEAL COURT.

Wednesday, June 19.

(Before Lord Trayner and Lord Wellwood.)

SIR ROBERT MENZIES *v.* ASSESSOR OF COUNTY OF PERTH.

Valuation Roll—Reduction of Rent.

Held that in valuing lands actually let no effect ought to be given to a reduction of rent by the landlord, unless when he has taken such steps as make it clear that he is bound to give the reduction.

This was an appeal by Sir Robert Menzies of that ilk, Baronet, against a decision of the County Valuation Committee of the Commissioners of Supply of the county of Perth confirming the valuation of the Assessor of the county of certain lands belonging to the appellant for the year ending Whitsunday 1889. The lands in question were all in the occupation of tenants. The holdings were of four kinds—(1) Formal completed current leases; (2) missives of lease in which the rent and endurance of the lease were specified; (3) expired leases under which the tenants continued in possession on tacit relocation; and (4) missives of lease in which the rent was specified, but no term of endurance, and in which the tenants continued in possession on tacit relocation. The entry to all the farms was at Whitsunday and at separation of crops, and the rents were payable at Candlemas and Lammas after entry. Prior to the collection of rents due at Lammas 1887 the appellant wrote the following letter to his factor:—"*Farleyer, Aberfeldy, N.B.*—Dear Hutchinson,—You can grant ten per cent. reduction on the year's rent for the half-year to the tenants in Appin for the half-year's rent now due, except Glengowlandie, Dull Farm, and Weem Hotel Farm, and the crofters there. This will be twenty per cent. on the year's rent.—Robert Menzies." Effect was given to this letter in the collection of rents at Lammas 1887, Candlemas 1888, and Lammas 1888.

According to the practice of the estate, each tenant had a pass-book in which there was entered on the one side the half-year's rent, and the date at which it was due, and on the opposite side the payments made with their dates. The pass-books were never in the hands of the proprietor or his factor except when presented on a payment of rent about to be made, which as a rule was every half-year about Candlemas and Lammas. No entry of a rent due was made in the pass-book until the tenant brought his book to the factor on making a payment, when the half-year's rent was entered as at the date when due, and the payment made was entered on the other side.

The abatements allowed under the letter of the appellant were given at Lammas 1887 and Candlemas 1888 in the form of repayment, *i.e.*, the rent was entered in the pass-book at the full rent as under the lease or missive, but the abatement was allowed off, and a receipt taken from the tenant therefor. At Lammas 1888 the reduced rents were entered on the debtor side of the pass-book, but except in two cases no explanation was given and no entries made in the book showing permanent reduction. The two excepted cases were Tirnie and Wester Tegarmuchd and Easter Tegarmuchd (Nos. 245 and 249 upon the valuation roll). In these a deduction of 12½ per cent. on the half-year or 25 per cent. for the year was given, commencing at Candlemas 1888, and there was an entry in the tenant's pass-book in each case "Rents reduced for three years to £ ."

The Assessor stated before the Valuation Committee that the letter authorising the reduction would affect the debt collection at Candlemas 1889.

The Assessor entered the lands in the valuation roll at the rents contained in the leases and missives of lease, and the Valuation Committee confirmed the valuation. The appellant sought to have effect given in the valuation to the reduction of rent.

At advising—

Lord Trayner—With regard to the two leases mentioned in the committee's report as Nos. 245 and 249, I think there is sufficient written evidence to show that the rent has been reduced as therein stated, and that accordingly effect must be given to the reduction in the valuation roll. With regard to all the others, I am of opinion that the Commissioners are right, and that the appeal ought to be dismissed.

There are two groups of cases, the first consisting of formal current leases and missives of lease, which are in the same position as formal leases. With regard to the rent stated in these there is absolutely no evidence whatever that the rent stipulated had been reduced. In saying that I am not ignoring the statements of Sir Robert Menzies and his factor nor doubting their statements. But I think it is impossible to accept from them an explanation or statement that rents have been reduced unless some formal

mode be adopted of setting that forth, so as to bind the landlord and not make it a matter of good will merely.

The second group of cases consists of expired leases where the tenants continue to hold on tacit relocation. The only particulars in regard to these cases are to be found in the tenants' pass-books. Now here, except in the two cases I have referred to, where there are notes of the reduction, there is no evidence whatever of any intention or obligation on the part of Sir Robert Menzies to give the reduction referred to. I repeat that where a landlord wishes to get the apparent rent of his tenant reduced upon the valuation roll for the purposes of assessment he must take such proceedings as to put it beyond doubt that he is bound to give the reduction.

Lord Wellwood concurred.

The Court found that in the case of the leases Nos. 245 and 249 the reduction of rent ought to be given effect to in the valuation, and *quoad ultra* that the valuation was right.

Counsel for the Appellant—Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Low. Agent—Party.

COURT OF SESSION.

Tuesday, July 16.

SECOND DIVISION.

[Sheriff of Aberdeen.

SWEDISH MATCH COMPANY *v.* SEIVWRIGHT.

Company—Shares—Condition Appended to Letter of Application, "if Capital all Subscribed for"—Misrepresentation—Proof.

The prospectus of a company formed for the purpose of acquiring and carrying on certain match factories in Sweden set out—"Share capital, £100,000 in 20,000 shares of £5 each: First issue, £80,000 in 16,000 £5 shares." "In addition to the above shares £30,000 of six per cent. debentures, secured as a first charge upon the property and undertaking of the company,"—and further stated that the vendor of the factories was to be paid partly in cash and partly in shares. A party applied for 120 shares, appending to his letter of application the condition, "if capital all subscribed for," and paid the necessary deposit on application.

In an action by the company to enforce payment of the instalments due on the shares allotted to this party—*held* (1) that the "capital" to which the condition in his letter applied was the first issue of 16,000 shares, and (2) that the condition had been purified, as by the day of allotment 13,566 shares had been subscribed for by the public, and the company could allot the remainder to the vendor, who was bound to take them.

Opinion per Lord Rutherfurd Clark that a case of alleged misrepresentation by the pursuers inducing the application for shares could not be inquired into, the defender not having been examined with regard thereto.

In November 1887 the prospectus of the Swedish Match Company (Limited) was advertised in the *Financial News*. The purpose of the company was to buy certain match-making factories in Sweden from a Mr Peterson, and work them as one concern. The prospectus set out, *inter alia*, as follows:—"The subscription lists will open on Saturday the 26th November, and will be closed on or before Tuesday the 29th, for London and country. The Swedish Match Company, (Limited). Incorporated under The Companies Acts, 1862 to 1883. Share Capital £100,000, in 20,000 shares of £5 each. First issue £80,000, in 16,000 £5 shares. 10s. on application, £1, 10s. on allotment, £1, 10s. in a month, and £1, 10s. in two months. In addition to the above shares, £30,000 of six per cent. debentures, secured as a first charge upon the property and undertaking of the company, redeemable at par on the 1st November 1897, or earlier, at the option of the company, by payment of 5 per cent. premium, is offered for public subscription, payable as under:—£5 per cent. on application; and £95 per cent. on December 14th 1887. The debentures will be issued in any multiple of £10. Interest will run from the 1st November 1887, payable half-yearly, on the 1st May and the 1st November. . . . . The consideration to be paid by the company for the whole of the before-mentioned property together with good-will has been fixed by the vendor at £90,000, of which £55,000 is payable in cash, and the balance £35,000 in fully-paid shares, debentures, or cash, or partly in each, at the option of the directors, but the vendor desires to have allotted to him the largest possible number of shares, having regard to the rules of the Stock Exchange relating to quotations. This will leave for working capital, stock and extension of plant, £20,000.

On 28th November this advertisement appeared in the *Financial News*:—"In consequence of the numerous applications received in London alone the first day, it is decided to close the list this day for London, and to-morrow (Tuesday) for the country."

On 29th November John Seivwright, who resided in Aberdeen, sent in an application, through his brokers for 120 shares of £5 each on the usual form. To this letter of application were appended the words "if capital all subscribed for." A sum of £60 was paid as the deposit on application.

Upon the same day the company sent him a letter of allotment for 120 shares, and stating that the balance at that time was £180, payable before 7th December 1887.

Upon 3rd December, Seivwright wrote to the company this letter:—"Dear Sir,—Kindly note that I have received allotment letter for 120 shares in the Swedish Match Company, Limited. I saw the prospectus in *Financial News*, and desiring to invest £120, thought it was a likely good investment, and wired my brokers J. C. & C. W. Morice to apply for 120 shares, thinking they were £1 shares, as most limited companies are. Will you kindly ask your directors to alter this, correcting my mistake, as I have not £500 just now to invest. Let me know also if all the

shares and debentures were subscribed for by the public."

Upon 5th December the secretary of the company wrote that the directors had no power to alter the allotment, and that "all the shares were applied for and allotted." After some further correspondence Seivwright refused to pay the instalments due upon his shares, and the company raised an action to recover them in the Sheriff Court Aberdeen, &c.

The pursuers averred that as the defender had duly made an application for shares, and these had been allotted to him, he was liable to pay the calls.

The defender averred that when the allotment was made to him, the whole of the first issue of £80,009 had not been subscribed for, but only about £67,000, and that the condition in his letter of application had therefore not been complied with. Further, that "the directors of the pursuers' company, in full knowledge that the first issue of £80,000 was not fully applied for, wilfully and without cause circulated, or caused to be circulated prior to the closing of the lists, reports intended to convey the impression that the said first issue was more than fully applied for, on the faith of which reports the defender's application was made."

The defender pleaded—"(2) The application for shares in the pursuers' company having been made by the defender on the faith of statements made by or on behalf of the directors of the said company, which were false or were at least misrepresentations of matters material to the contract, the falsity of which they knew or ought to have known, the defender is entitled to repudiate said alleged allotment of shares following on said application, and to be assoilzied from the conclusions of this action. (3) The defender's said application having been made conditional to the capital being all subscribed for, and this condition not having been fulfilled at the date of said alleged allotment to him, he is entitled to repudiate the said allotment, and to be assoilzied from the conclusions of this action."

The Sheriff-Substitute allowed a proof, which was taken in London on commission. The material facts brought out at the proof were these—That Mr Peterson, the vendor, had induced certain of his friends and clerks to apply for shares, amounting to over 2000, in their own names, but for which he was to find the money, which applications were withdrawn before allotment. On 29th November 1887 13,566 shares had been subscribed for by the public, and by resolution of that date these shares were allotted to the applicants. 2400 were also allotted in part payment to the vendor, but the number so allotted to him were not filled into the minute till considerably later. The remaining 34 shares were retained to meet inaccuracies. The advertisement was made in the *Financial News* by a Mr Humpage, as agent for the vendor in promoting the company. At its date applications had been lodged for 5262 shares, but of these 2695 had been lodged by the promoters, the vendor, and their friends, and were withdrawn the next day.

Upon 12th November 1888 the Sheriff-Substitute (Dove Wilson) issued this interlocutor:—"Finds that the defender applied for shares in the pursuers' company upon the condition that the capital was all subscribed for: Finds that the capital has not been all subscribed for; and therefore assoilzies the defender from the conclusions of the action, and finds him entitled to expenses, &c.

"*Note.*—I have already dealt with the plea of the pursuers, to the effect that the condition attached to the defender's application was to be held as if it did not exist, and I now come to inquire what the meaning of the condition is. The pursuers treat it as if it meant that the shares were to be taken if the whole of the first issue was subscribed for. That is not what it says, and I can see no ground for so interpreting it. It says distinctly, 'if capital all subscribed for,' and the meaning of that is plain. It mattered little to the defender whether the capital was issued in one or half a dozen different issues, but it mattered a good deal to him whether the whole or only a part was taken up. If the whole were taken up it would not be necessary to call up the full amount of each share, whereas it might be if only part were taken up. In the prospectus the capital was distinctly stated at £100,000, and the condition in the application could have reference to nothing except that. It may be argued that the word 'capital' in the condition must be taken as equivalent to first issue, inasmuch as nothing else was being offered at the time for subscription. This argument is insufficient. The words 'capital' and 'first issue' are not equivalent, and the prospectus is silent as to when the second issue was to be made. It was free to the pursuers to deal with the defender's application as they pleased, and if they thought fit to entertain an application conditional upon all the capital being subscribed for, they must abide by the condition. Only £80,000 in round numbers has been subscribed for in place of the £100,000 mentioned in the prospectus. Plainly therefore, if I have rightly understood the condition, it has not been complied with.

"It is unnecessary for me to express an opinion upon the defence founded upon the alleged false statement contained in the pursuers' advertisement of 28th November 1887 in the *Financial News*. It appears to me, however, that there is a want of evidence to show that the statement was untrue. The statement in question bore that in consequence of numerous applications received in London for shares upon the first day of applying it had been decided to close the list at a particular time. It is so much matter of opinion what 'numerous' applications may mean that it is difficult to say that the applications were not numerous, even without entering upon the question whether some of the applications were not made on bad faith for the mere purpose of swelling the list." . . .

The pursuers appealed, and on 18th January 1889 the Sheriff (Guthrie Smith) dismissed the appeal and affirmed the interlocutor.

"*Note.*—The defender in applying for shares made it a condition that he should not be bound to take them unless the 'capital was all subscribed,' and the first question in the case is, What is the meaning of the word 'capital' as used by him in his letter of application? The Sheriff-Substitute has read it 'share capital,' and if such is its meaning I should have thought that it could only relate to shares about to be issued, not the shares which the company was empowered to issue, but which they might never find it necessary to issue.

In other words, the application would mean—'If all the shares which you are now offering to the public are taken up, I am willing to take so many,' and as they all were taken up, the defence would fail. But in my opinion this is not the sense in which 'capital' is used in the documents which have now to be considered. The proposals contained in this prospectus in substance and effect amounted to this—The company were to buy certain match factories in Sweden for £90,000, payable £55,000 in cash, and £35,000 in shares. The shares to be first issued were only for £80,000, and as it would require £10,000 more to pay off the vendor, and £20,000 for working capital, or together £30,000, this was to be raised by debentures which were offered for public subscription in the same prospectus and along with the shares. Unless the promoters were able to raise the whole £110,000 by debentures and shares they would not be able to go on. When therefore the defender stipulated that the whole capital should be subscribed he must have meant both share and debenture capital, and it is in favour of this view, and also of his perfect *bona fides*, that in his letter of 3rd December 1887, acknowledging the letters of allotment, he desires to be informed if all the shares and 'debentures had been subscribed for by the public.' It is not disputed that this was not the case. The shares had been taken, but not all the debentures, and I therefore affirm the Sheriff-Substitute's judgment, although I am unable to agree with him in the grounds on which he has proceeded. The second point made was that the promoters induced the defender to subscribe by the publication of a statement to the effect that the applications for shares were so numerous as to compel them to close the lists for London. When this statement was made they had received application for 5300 shares, but of these 2695 had been lodged by the vendor, the promoters, and their friends, and were withdrawn the second day, so that they knew when the statement was made that considerably under 3000 *bona fide* applications had been received. It is a jury question whether that quantity could be accurately and honestly described as 'numerous,' and so numerous as to force them to curtail the offers previously made to the public when the total quantity offered for subscription was 16,000, or allowing his entire 7000 to the vendor, 9000 shares. In my opinion it could not, and on this ground also the defender is entitled to judgment."

The pursuers having appealed, the question was raised by the Court whether it could be taken that the advertisements in the *Financial News* had had any effect upon the mind of the defender in applying for shares, as he was not examined on the subject, and this minute was lodged for the pursuers and appellants—"YOUNGER, for the pursuers and appellants, stated that the pursuers admit that the defender saw the advertisement of the prospectus of the pursuers' company as contained in the *Financial News* of 28th November 1887, and sometime thereafter telegraphed his brokers in London to send in the application, No. 7 of process. They do not, however, admit that the defender was to any extent induced by the said advertisement to apply for the shares in question."

The appellants argued—The defender was liable to pay the calls on the shares he had applied for, and which had been allotted to him. He had not been deceived by the advertisement in the *Financial News* as to the earlier closing of the lists of applications, which did not contain misrepresentations of the facts. It only showed that such a large number of shares had been subscribed for on the first day that it was probable the shares would be largely over subscribed. As regarded the stipulation in the letter of application, "if capital all subscribed," what was the capital which was to be subscribed for? It was plainly the issue which was being made, viz., the first issue of 16,000 shares, and it did not apply to the 4000 shares which were not issued for subscription at all, so that the view of the Sheriff-Substitute was wrong. The judgment of the Sheriff also was erroneous, because he had held that the £30,000 of debentures must have been subscribed for. But debentures were not capital. They really were a debt due by the company and a burden upon its capital. Taking it that the amount of capital to which the condition applied was the 16,000 shares first issued, the evidence showed that these shares had really been subscribed for at the date of allotment. £13,566 having been allotted to the public, and the balance having been practically allotted to the vendor. The defender was not entitled to read "by the public" into the condition appended to his letter of application. The vendor was bound to take the shares allotted to him as part payment for the transfer of his business. If they were not at once given to him, it was only to allow the transfer to be made.

The defender argued—It was not denied that the defender was entitled to annex the condition he did to his letter of application. The question was, what was the meaning of the word "capital" in that condition? There were three meanings in which the word could be taken—(1) The whole share capital of 20,000 shares, (2) the first issue of 16,000 shares along with the £30,000 debentures, (3) the first issue of the 16,000 shares. The real meaning to be attached to the word was the second of these, the first issue of 16,000 shares and the debentures. The debentures were mentioned in the prospectus, and were the working capital of the company. Nor was it proved that the debentures had been all taken up, and the condition was thus not fulfilled. Even supposing the condition was held to apply only to the 16,000 shares of the first issue, the condition had not been complied with, for it was proved that only 13,566 had been subscribed for by the public, and the condition plainly implied that they should be subscribed for by the public. The vendor, who was said to have got 2400 shares, could not be said to have subscribed for these. Further, he had not been allotted these shares at the necessary time, as the number of shares he was to get was not filled in till the agreement of 1st March was made. The defender was deceived into applying for shares by misrepresentations of the pursuers made in the advertisement of 28th November. It was not true that so large a number of applications had been received as to apprehend that the list would be too full. Considerably over 2000 of these shares were applied for by friends and clerks with small salaries in the promoter's, Mr Peterson's, office, and at his risk. Before allotment these pretended applicants had withdrawn their applications. The

defenders knew that these were not *bona fide* applications, and therefore ought not to have counted them among the applications. If the pursuers had not in this way represented the company as a good one, the defender would not have applied for shares.

At advising—

LORD JUSTICE-CLERK—I regret that I cannot agree with the view that either of the Sheriffs has taken of this case. My view is that the capital to which alone reference is made by the defender in the stipulation affixed to his letter of application, "if capital all subscribed for," applied to the capital of 16,000 shares of £5 each, which are equal to a sum of £80,000.

I cannot accept the view of the Sheriff-Substitute that the capital which he stipulated must be all subscribed for was not merely the amount of the shares which were then being offered to the public for subscription, and that the stipulation could not be carried out, unless the whole shares of the company had been subscribed for. I think the meaning plainly refers to the amount of capital then offered for subscription. Nor can I agree with the view of the Sheriff, who held that the word "capital" was meant to include not only the share capital, but also a large amount of debentures which were offered to the public. These debentures were not capital at all. Sometimes debentures may be talked of as forming part of the capital of the company, but it was not so here. The company merely received money from the public on these debentures in return for a fixed percentage of interest. We must deal with the case on the footing that the capital to which the defender's stipulation in his letter referred was 16,000 shares, and if these were really subscribed for within the time fixed, then the condition was fulfilled, and the defender was bound by his application.

There is no doubt that 13,566 shares were subscribed for by the public before the day of allotment, and as regards the balance the only question is whether the 2400 allotted to the vendor must be held to be shares subscribed for or not. In my opinion they were shares which the company could allot to the vendor at that time. He was not in a position to insist that he should get them, as they might have paid him in cash if they had had the money, but he was bound to take them if they were allotted to him. I think that the pursuers are right in their contention, and that the defender is bound to make payment of the sum sued for.

LORD RUTHERFURD CLARK—I agree. I think that the case of misrepresentation fails utterly from the fact that the defender was not examined to prove there was misrepresentation. It is impossible to inquire into a case of alleged misrepresentation if the defender does not swear that he was deceived.

Then, I think, as to the meaning of the word "capital" there cannot be two opinions, and that the Sheriff is quite wrong.

But the letter of application was accompanied by a condition, and it is said that that condition was not fulfilled. The capital issued for subscription was 16,000 shares, and I think all the capital was subscribed for, because by the day of allotment the company were in a position to issue these 16,000 shares to persons under an obligation to take them. These persons were, first, members of the public who had applied for them in the ordinary way, and second, the vendor, who was bound to take the shares allotted to him. I think that the condition was fulfilled, and that the pursuers were entitled to issue the letter of allotment to the defender.

LORD LEE concurred.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Find in fact (1) that on 29th November 1887 the defender paid to the pursuers' bankers £60, being ten shillings per share on 120 shares of £5 each in the pursuers' company, and made application to the pursuers for an allotment to him of that number of shares in terms of letter of application by the defender of that date, No. 7 of process; (2) that at said date the amount of capital issued by the company was £80,000, in 16,000 shares of £5 each; (3) that it was a condition of the defender's application that the said 16,000 shares should be subscribed for before allotment to him of the shares applied for; (4) that on 30th November 1887 120 shares were allotted by the pursuers to the defender; (5) that at the last-mentioned date said 16,000 shares were subscribed for, and the said condition was thereby purified; (6) that it is not proved that the defender was induced to apply for said shares by misrepresentations on the part of the pursuers; (7) that by his said letter of application the defender undertook to pay the further instalments upon his shares as follows, namely, £1, 10s. on allotment, £1, 10s. in a month, and £1, 10s. in two months: Find in law that the defender is liable in payment to the pursuers of said instalments, with interest from the dates when they respectively became payable: Therefore sustain the appeal: Recal the judgments of the Sheriff and Sheriff-Substitute appealed against: Ordain the defender to make payment to the pursuers of the sum of Five hundred and forty pounds, with interest as concluded for: Find the pursuers entitled to expenses," &c.

Counsel for the Appellants — Jameson — Younger. Agent—John Bell, W.S.

Counsel for the Defender—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Wednesday, July 17.

SECOND DIVISION.

[Lord Fraser, Ordinary.

HAMILTONS *v.* FREETH AND OTHERS.

Cautioner—Relief—Security given by Principal Debtor to Particular Cautioner—Proof of Consent by Co-Cautioner.

A cautioner who has obtained from the principal debtor a special security for the liability he has undertaken is not bound to communicate to his co-cautioners the benefit of that security if he agreed to be cautioner only on the condition of having the security, and if the co-cautioners, when they entered into the cautionary obligation, knew of and consented to that arrangement.

A shipbuilding firm, and the two individual partners thereof, became cautioners in a cash credit bond along with another co-cautioner. In security of the liability which they had undertaken the partners received a disposition of certain heritable property from the principal debtor. His estate having been sequestrated, the firm and the individual partners, on the demand of the bank, paid the debt due under the bond, and took an assignation thereto.

In an action of relief at their instance against the co-cautioner under the bond—*held* (Lord Lee *diss.*) that the defender was liable to relieve the pursuers of one-fourth of the sum paid by them, and that the pursuers were not bound to communicate to the defender the benefit of the security they had received from the principal debtor, in respect it was proved that the security had been granted to the partners with the knowledge and consent of the defender for their benefit only, and to cover any liabilities incurred by them, either through the firm or as individuals, which it was just sufficient to do.

Opinion (*per* Lord Lee) that where one of several co-cautioners, equally bound by the same deed, avers that he has received from the principal debtor a special security for his own benefit with the consent of his co-cautioners, such consent cannot be proved by parole evidence.

In September 1887 James Pettigrew, proprietor of the Rochsolloch Ironworks, Coatbridge, obtained a cash credit from the Clydesdale Banking Company for £5000. There were along with him in the cash credit bond granted to the bank (bound as full debtors and co-obligants, although only co-cautioners) three other persons, viz., John Hendrie, coalmaster, Edward Mather Bell, of the Coatbridge Tin Plate Company, and Job James Freeth, of the Caledonian Tube Company, Coatbridge. Mr Pettigrew operated on this cash credit till October 1880, when Mr Hendrie having got into difficulties requested to be relieved of his obligations under the bond. The bank then insisted on another cash credit bond being executed with another name or names in place of Hendrie. Accordingly on 18th, 20th, and 25th October 1880 a new cash credit bond was executed, in which there were along with Pettigrew (bound as full debtors and co-obligants, although only co-cautioners) Edward Mather Bell and Job James Freeth, two of the parties to the former bond, and besides them William Hamilton & Company, shipbuilders, Port-Glasgow, as a company or firm, and the individual partners of that firm William and John Hamilton.

By disposition dated 11th February 1881, and recorded in the Register of Sasines 24th March 1881, Pettigrew, "for certain good causes and considerations," assigned and disponed "to and in favour of William Hamilton and John Hamilton, both shipbuilders in Port-Glasgow, and coalmasters in Glasgow and elsewhere, equally between them, and their respective heirs and assignees whomsoever, heritably and irredeemably," the Rochsolloch Ironworks, and the ground on which they stood.

Pettigrew operated upon the new cash credit down to October 1887, when he became bankrupt, and was sequestrated. By this time the whole sum for which the credit had been granted, viz., £5000, had been drawn out, and there was besides a considerable sum due to the bank for interest. The bank called upon the Messrs Hamilton to pay the sum due upon the cash credit bond, and on 26th October 1887 they paid as the sum due to the bank £5201, 10s. 9d., and took an assignation of the bond in their favour dated 12th November 1887. They afterwards called upon Mr Freeth to pay the proportion due by him under the bond, and on 28th December a letter of guarantee was granted by Thomas Baker, William Jardine, and Robert Pettigrew to William Hamilton & Company in these terms—"Jointly and severally we hereby guarantee to pay to you the proportion payable by Job James Freeth, of the Caledonian Tube Works, Coatbridge, of the sums, principal and interest, paid by you on 26th October 1887, *videlicet*, £4201, 10s. 9d., under the cash credit bond granted by the Rochsolloch Iron Company, Coatbridge, James Pettigrew, William Hamilton & Company, William Hamilton, John Hamilton, Edward Mather Bell, and Job James Freeth, in favour of the Clydesdale Bank (Limited), dated 18th, 20th, and 25th October 1880, for £5000, and interest, including in this guarantee interest on Mr Freeth's proportion of said sums, from the above named date, until the same is repaid to you at bank overdraft rate."

Edward Mather Bell died insolvent, and nothing could be recovered from his estate.

The present action was raised by William Hamilton & Company and William and John Hamilton on 18th April 1888 against Freeth and the guarantors for payment of £1408, 18s. 6d., being one-third of the sum paid by the pursuers on 26th October, after deduction of certain contributions from Pettigrew's estate.

The pursuers pleaded—"(2) The pursuers are not bound to communicate the benefit of the disposition referred to, in respect the same was specially taken for the pursuers' security only; *et separatim*, the defenders knew this at the time; *et separatim*, the defenders agreed to this being done."

The defenders pleaded—"(2) The pursuers having received from the principal debtor a security over his estate in relief of their obligations under the cash credit bond, are bound to communicate the benefit of such security to their co-cautioners in all questions of relief against

them. (3) The averments as to the agreement of the defenders to the special security being granted in favour of the pursuers are only provable by writ or oath. (4) Under the circumstances, the liability of Job James Freeth is for one-fourth of the whole sums paid."

The Lord Ordinary (FRASER) allowed a proof. The evidence given was of a contradictory character, but in the opinion of the Lord Ordinary and the majority of the Judges of the Second Division it was established that the Hamiltons had become parties to the cash credit bond of October 1880, on the condition of obtaining the security over the Rochsolloch works granted to them by the disposition of February 1881 to cover any liability which they might incur either through the firm or as individuals, and that this agreement was known to Freeth, and agreed to by him.

The parties put in a minute, by which it was agreed (1) that the letter of guarantee signed by Thomas Baker, William Jardine, and Robert Pettigrew, was obligatory on them, and (2) that the value of the security conveyed by Pettigrew to the pursuers by the disposition already mentioned was £2850.

Upon 18th January 1889 the Lord Ordinary pronounced this interlocutor:—"Finds that the disposition of the Rochsolloch Ironworks granted to the pursuers was a security for their own behoof, and that they are not bound to communicate the benefit thereof to the defenders until their own claim is satisfied: Finds that in settling the liability of the cautioners the defender Freeth and his guarantors are only bound in one-fourth; and with these findings appoints the pursuers within eight days to lodge a state in process, bringing out arithmetical results as to the liabilities of the parties; and reserves all questions of expenses.

"*Opinion.*—James Pettigrew, an iron and coal master at Coatbridge, obtained a cash credit with the Clydesdale Banking Company in the year 1877. There were along with him in the cash credit bond (bound as full debtors and co-obligants, although not co-cautioners) three other persons, viz., John Hendrie, coalmaster, Edward Mather Bell, of the Coatbridge Tin Plate Company, and Job James Freeth, of the Caledonian Tube Company, Coatbridge. Pettigrew operated upon this cash credit from 1877 down to October 1880, when one of the co-obligants, viz., John Hendrie having become somewhat embarrassed in his circumstances the bank insisted upon another cash credit bond being executed with another name or names in room of Hendrie.

"Such a bond was executed on the 18th, 20th, and 25th of October by Pettigrew, the co-obligants being Edward Mather Bell and Job James Freeth, two of the parties to the first bond, and the fresh names were the pursuers of the present action William Hamilton & Company, shipbuilders, Port-Glasgow, and William and John Hamilton, the partners of that firm. Pettigrew proceeded to operate upon this new cash credit, and continued to do so down to the date of his sequestration in October 1887, at which time the whole sum for which the credit was granted, viz., £5000, had been drawn out, and there was, besides, a considerable sum for interest due to the bank. The co-obligant Bell died insolvent, and nothing can be got in the shape of a contribution from his estate. The only two solvent persons to the bond of 1880 were the pursuers and Freeth. The bank demanded payment from the pursuers, and on the 26th of October 1887 they paid, as the sum due to the bank under the cash credit bond, £5201, 10s. 9d., and took an assignation of the bond from the bank with all rights of diligence against the co-obligants.

"Freeth upon being applied to for payment of his share was unable to meet the demand, but he got certain of his friends (the other defenders in the action) to grant a guarantee in the following terms:—'Jointly and severally, we hereby guarantee to pay to you the proportion payable by Job James Freeth, of the Caledonian Tube Company, Coatbridge, of the sums, principal and interest, paid by you on 26th October 1887, *videlicet*, £5201, 10s. 9d., under the cash credit bond granted by the Rochsolloch Iron Company, Coatbridge, James Pettigrew, William Hamilton & Company, William Hamilton, John Hamilton, Edward Mather Bell, and Job James Freeth, in favour of the Clydesdale Bank (Limited), dated 18th, 20th, and 25th October 1880, for £5000 and interest, including in this guarantee interest on Mr Freeth's proportion of said sums from the above-named date until the same is repaid to you at bank overdraft rate.' This action is now brought against Freeth and the guarantors, and certain questions have arisen as to the amount (for liability is not disputed) of the contribution which must be made by Freeth or on his behalf.

"The first question has relation to a demand made by the defenders to the effect that the pursuers shall communicate to them the benefit of a disposition which the pursuers obtained from Pettigrew of property belonging to the latter. The property consisted of the Rochsolloch Ironworks, the business of which was carried on in the name of the Rochsolloch Iron Company, Coatbridge, of which Pettigrew was the sole partner. The disposition, which is absolute in its terms, is admitted to have been a security. By this deed, dated the 11th of February 1881, Pettigrew, for 'certain good causes and considerations,' assigns and dispones to William and John Hamilton, both shipbuilders in Port-Glasgow, and their respective heirs and assignees whomsoever, heritably and irredeemably, all and whole the Rochsolloch Ironworks, with all the steam-engines, boilers, rolling-mills, &c., in and upon the ground, and specified in an inventory. This disposition was duly recorded in the Division of the General Register of Sasines applicable to the county of Lanark, and the pursuers William and John Hamilton now stand invested with the apparent absolute ownership of the works.

"The defenders contend that any collateral security of that kind obtained by one cautioner cannot be appropriated for the covering of his own liability. It is certainly law that where cosureties are equally bound by the same deed, and one of them obtains a separate security or advantage from the principal, he is bound to communicate the benefit of it equally with them. For this doctrine there are several express decisions which are noted in Bell's Principles (section 270), and the general rule cannot be disputed. But then this general rule must be taken with its qualifications. There is nothing wrong in a surety stipulating, before he under-

takes the obligation of cautionary, that he shall obtain a collateral security so as to cover himself, and if he takes the proper precautions of making his co-sureties perfectly aware of what he is doing, and they acquiesce in it, then there can be no call upon the cautioner who has so obtained the separate security for his own behoof to communicate the benefit of it to his co-sureties. Professor Bell, in his Commentaries (Bell's Comm. i. 349), makes the following observations:—'As to the cautioner, who alone has stipulated for security, it is more difficult to determine whether he shall, to his own prejudice, be obliged to communicate the benefit of that security. A near relation or confidential friend may not think himself entitled to require security, while a stranger may be well justified in refusing to engage without it. And there seems to be no equity in obliging the latter to communicate the benefit of his precaution to one who would not himself have stipulated for it. At least, where such a difference has been openly made between cautioners, and with the knowledge of each other, it is probable that the Court would not communicate the security. But where, the cautioners being originally equal, one gets an advantage over the rest on the demand being likely to arise, or where the security to one is secret, the principal which rules the case is, that the co-cautioners are bound to act, or held to have acted, for the general benefit, so that what is given for the relief of one is to be communicated for the benefit of all.' Here Professor Bell deals with the case of an open avowed obtaining of the security by one of the cautioners for his own behoof, and indicates his own opinion very plainly as to how it would be decided, which it does not seem to have hitherto been. Now, this is the very case disclosed by the proof here. It is proved not merely that Pettigrew called upon the pursuers, beseeching and entreating them to become cautioners in room of the retiring Mr Hendrie, but also the defender Freeth did so. He denies this, but the Lord Ordinary does not believe him, nor does he believe the statements on this subject by Pettigrew, who seemed to give his evidence very much at random. Freeth repeatedly urged the Hamiltons to be cautioners, using as an argument the fact that they would get sufficient security in the Rochsolloch Ironworks, so as to protect them against loss; urging further, that he Freeth had no security of his own and did not want it, and could not demand it because he and Pettigrew and Bell were all mixed up in bill accommodations. He was very much afraid that if the Hamiltons did not come forward and give the additional name demanded by the bank that he, Freeth, would be called upon to pay up, and this he could not do because all his capital was embarked in his works. Freeth never took up the notion that the disposition (the existence of which he professed not to know anything about until a recent period) was one in which he could claim any interest until this was put into his head by Pettigrew, just when Pettigrew's bankruptcy was impending. 'I became bankrupt,' says Pettigrew, 'about the middle of October 1887. I told Mr Freeth in May 1887 about my having granted the security over the ironworks, because I was trying at that time to carry through a cash credit which subsequently fell through. I was wanting Mr Freeth to become cautioner for me again. (Q) And as an inducement to him to do that that he was secured on the other bond? (A) No; I told him that if I could not obtain this credit I would have to collapse, and he said he had paid one cash credit and he could not pay this. I then told him that he was quite safe—that the works were secured to the cautioners. That appeared to be news to him; I knew it was because I had never told him before. He was relieved a bit when I told him that.' Now, Freeth being saved by the intervention of the Hamiltons from being obliged in the year 1880 to stop his works and pay up the cash credit debt which neither Pettigrew nor the other co-obligants with him could do turns round and pleads the general rule of law against the carrying out of a fair bargain. Pettigrew untruly represents the Hamiltons as being very willing at once to become cautioners, whereas the real state of the case was that it was with the utmost reluctance they did so, and upon the distinct understanding and condition that they were to have, for themselves alone, the benefit of the security so far as it would go in repaying any moneys they required to disburse as debtors under the bond.

"The second point in this case is as to whether, Bell being dead and bankrupt, there are here only two co-obligants or four. The obligation in the bond is very explicit. It runs as follows:—'We, the Rochsolloch Iron Company, Coatbridge, as a company or firm, and James Pettigrew, Cairnhill, by Airdrie, the sole partner of said firm, as such partner and as an individual; William Hamilton & Company, shipbuilders, Port-Glasgow, as a company or firm, and William Hamilton and John Hamilton, both shipbuilders there, the individual partners of said company or firm, as such partners and as individuals.' These are the words which were made the subject of construction in the case of *Macbride* v. *Clark, Grierson, & Company, &c.* 24th November 1865, 4 Macph. 73, and the Lord Ordinary is unable to distinguish the two cases. The obligation of the firm was held to have had superadded to it the obligation of each of the partners as individuals, and such being the case, the defenders here can only be liable for one-fourth. The firm of William Hamilton & Company is one person, William Hamilton is another person, and John Hamilton is the third person; the defender Freeth making the fourth."

Upon 1st February the Lord Ordinary having considered the state which had been lodged, and decerned against the defenders for £1070, 0s. 10d., found them liable in expenses.

The defenders reclaimed, and argued—It was not competent to prove by parole evidence that the security taken by the pursuers was for themselves alone. The liability of the cautioners rested on the cash credit bond. The rule of law was that any benefit of a security must be communicated to the co-cautioners. Assuming, however, that it was competent, it must be admitted that sureties or co-cautioners might in some cases obtain securities for themselves which they were not bound to communicate to the other sureties, but the proof of this must be very strong to overcome the presumption of the ordinary rule of law. Further, it was quite clearly laid down in the passage from Bell's Commentaries, quoted in the Lord Ordinary's

note, that any security to be valid for the protection of one person alone must be granted to him with the full knowledge and agreement of his co-cautioners. That was not the case here. No doubt the Hamiltons deponed that at a certain meeting they had insisted on this security being granted to them as a condition of their becoming Pettigrew's cautioners, but Pettigrew and Freeth denied it, and the facts showed that it was not so, as the disposition was not granted until some months after the date of the bond. Again, supposing that the Hamiltons were not bound to communicate the benefit of the security to their co-cautioners, the firm of Hamilton & Company could not take any benefit from it, but only the individual partners. The Lord Ordinary has found the number of co-cautioners was four, and that was understood to be admitted by the pursuers. The sum in the security was much larger than the sum necessary to cover the obligations of the two Hamiltons, and the surplus ought to be divided equally between Freeth and the company. Freeth's liability would thereby be considerably reduced —*Steel* v. *Dixon*, March 29, 1881, L.R., 17 C.D. 825; Bailey on Securities, p. 311; *Humble* v. *Sym*, February 8, 1872, Hume's Dec. 83.

The respondents argued—It was competent to have parole proof here to explain the circumstances under which the disposition was granted, for the pursuers averred that this disposition had been granted to them as a security for themselves only, and the defender, while admitting that the disposition was granted to them in security of the bond, averred that it was for the benefit of all the cautioners. If parole proof was not competent the defenders had no case, because the deed was *ex facie* an absolute conveyance. As regarded the question whether the deed was granted for the Hamiltons' security alone, the Lord Ordinary had found it proved that it was so. The evidence could be read no other way. All the pursuers' witnesses were consistent, and the Lord Ordinary did not believe the evidence of the defenders. It was admitted that the number of cautioners was four, and that the firm must be taken as one, but the security was given not for the benefit of the Hamiltons as individuals only, but also of their firm. That was proved by the evidence. The disposition no doubt did not say it was for the firm, but that was merely due to a conveyancing difficulty, as the firm could not hold heritable property. On the whole matter the defenders were liable to pay one-fourth of the debt paid by the Hamiltons to the bank, and were not entitled to have the benefit of the security communicated to them.

At advising—

Lord Rutherfurd Clark—I need not resume the facts of the case. They are fully and clearly stated by the Lord Ordinary.

The first question is, What is the proportion for which each of the solvent cautioners is liable under the cash credit bond? The Lord Ordinary has held that there are four cautioners, on the ground that the firm of Hamilton & Company is to be counted as one in addition to the partners. In this finding the pursuers acquiesce, and therefore we may take it as fixed that the liability of each cautioner is for a fourth of the entire debt.

The pursuers hold a security over certain heritable property which belonged to Pettigrew, the principal debtor. It is in the form of an absolute disposition in favour of William Hamilton and John Hamilton, the sole partners of Hamilton & Company. Though the disposition is absolute the pursuers admit that it is a security only. But this admission is under the qualification that it was granted to cover any liability which they might incur under the cash credit bond. They further aver that they would not have become parties to the cash credit bond unless they had obtained this security, and that Pettigrew and Freeth agreed that they should have it.

The pursuers have paid the whole debt due to the bank. They propose to apply the security to cover their share of it, and it is just sufficient for that purpose. At the same time they have raised this action to recover the share due by the defender Freeth which has been guaranteed to them by the other defenders.

In answer the defenders maintain two propositions—first, that the pursuers are bound to communicate to them the benefit of their security so that it shall be applied in the reduction of the total debt, with the effect that they shall be liable for no more than a fourth of the balance; and second, that at least it shall be applied only to cover the liability of William and John Hamilton as individuals to the exclusion of the company. In the latter view they claim that the balance of the security should be applied in equal portions to the reduction of the share due by Hamilton & Company and by Freeth.

I do not doubt the general doctrine that when co-cautioners are equally bound under the same deed, and when one of them obtains a separate security over the estate of the principal debtor, such cautioner is bound to communicate the benefit of the security equally to all. Nor did the pursuers dispute this proposition. Their case is that they are not within the rule, inasmuch as it was agreed between them on the one hand, and Pettigrew and the defender Freeth on the other, that they were to have the sole benefit of the security in so far as requisite to cover their liability.

The defenders have stated a plea that an agreement for such a special security can only be proved by writ or oath. If that plea was well founded they should have opposed any allowance of proof. But they did not do so, nor did they offer any argument in support of their plea. On the contrary, they admitted in the most precise terms that if in the opinion of the Court the agreement was proved by the oral evidence their case necessarily failed.

In my opinion the defenders were quite right in making this admission. The parole evidence is not adduced for the purpose of contradicting or altering the conditions of any written document, but to prove a separate agreement which was acted on, and which was the condition of the pursuers becoming parties to the cash credit bond. An agreement so made and so acted on can in my opinion be proved by parole.

The obligation to communicate the benefit of such a security does not arise from the deed by which the co-cautioners are bound, which does nothing more than fix the proportions of the debt for which they are respectively liable. It depends on an equity to which the Court in the

absence of agreement to the contrary will give effect. But the rule cannot be applied so as to defeat a special agreement.

I do not pursue this topic. It is sufficient for me that the defenders did not maintain the plea to which I have referred, and, as I have said, I think that they were right in not offering any argument on it.

The question then comes to be, whether the agreement has been proved? In this inquiry it is material to observe that the cash credit bond on which this action is founded was not the first to which Pettigrew and the defender Freeth were parties. There was a previous bond which the bank would have enforced owing to the embarrassed circumstances of one of the cautioners unless the present bond had been granted. In becoming parties to the new bond the pursuers were guaranteeing an already existing debt for which Freeth was liable. The form in which the bond is expressed debars them from taking benefit from this circumstance, nor indeed do they desire to do so. But they found on it as showing that it was natural that they should stipulate for a special security, and that Freeth should be willing that they should have it. So far, it seems to me that they are right. The alleged agreement was in the circumstances a very natural and reasonable arrangement.

When I turn to the proof I cannot doubt that the agreement is established. The Lord Ordinary is clearly of that opinion, and I agree with him. I do not think it necessary to examine the proof. If the evidence of the pursuers is believed the case is clear. The Lord Ordinary has believed it, and has not believed the evidence of the defenders. On a mere question of credibility I should in any case have great hesitation in differing from him. In this case my opinion entirely coincides with his.

There remains the question whether under the agreement the benefit of the special security was limited to William and John Hamilton as individuals, and did not extend to their firm. Again I have no difficulty. I think that it is plain that the Hamiltons stipulated that they should have the benefit of the security to cover any liability which they might incur under the bond either through their firm or individually. Any other interpretation would defeat the evident purpose of the agreement.

Lord Lee—1. I think that the questions raised in this case are attended with more difficulty than the Lord Ordinary appears to have felt, and I desire to explain the view upon which I am unable to reach the same conclusion.

The general rule of law is well stated by the Lord Ordinary, "Where co-sureties are equally bound by the same deed, and one of them obtains a separate security or advantage from the principal, he is bound to communicate the benefit of it equally to them."

This rule is founded on principles of equity which are too obvious to need explanation, and it implies that no one who undertakes a suretyship jointly with others, and by a deed which binds them all in like terms, is entitled to obtain from the principal debtor, and therefore to the prejudice of his co-obligant's rights of relief, a collateral security for himself alone, unless he does so with the consent of his co-cautioners.

The opinion of Professor Bell, to which the Lord Ordinary refers, appears to me to be to this extent clear. His only hesitation appears to be as to the efficiency of an unequal arrangement though "openly made between cautioners." Upon that point I see no reason to doubt that if the arrangement is clear, and is proved by competent evidence, it must receive effect. For there is nothing unlawful in an arrangement whereby one of the cautioners with the consent of all concerned shall receive a special security.

I must, however, give it as my opinion that the consent of the co-cautioners to an arrangement which is so greatly at variance with the ordinary obligations and rights of relief among cautioners, cannot be proved by parole evidence. It is said that the plea on this subject was not maintained to the effect of excluding proof. But the interlocutor shows that proof was only allowed after the discussion in the procedure roll before answer. And when I asked a question on the subject during the discussion, it was stated by counsel that the point was not given up, although it seemed to be thought unnecessary to argue it. Such proof was disallowed in the case of *Macphersons* v. *Haggart*, 9 R. 306, where the allegation was that a cautioner who had become bound by a separate obligation subsequently to the other cautioners had interposed for relief of two of the original cautioners who were alleged to have granted their obligation as matter of arrangement merely until the new cautioner should attain majority and undertake for himself. This decision proceeded on the view that the effect of the documents was to make them all co-cautioners, and on that assumption I think that the judgment stands on a clear principle. In the Outer House I had taken a different view of the documents, and had allowed a proof, which was set aside.

I think that the question of evidence in this case arises much more directly. For the pursuers here did not come in by any separate obligation. They interposed by becoming parties to a new bond by which they along with the principal debtor and two of the parties to the old bond all bound themselves, conjunctly and severally, in like terms for the cash credit.

The legal import and effect of the bond in this case was in my opinion to put all the parties, other than the principal debtors, *in pari casu*. Each has a claim of total relief against the principal debtor, and among themselves those who were truly cautioners have presumably the ordinary rights of relief and the ordinary duties of contribution—that is to say, each is liable in a question with his co-sureties only *pro rata*.

Such being the legal position of the cautioners towards each other, I think it incompetent to prove by parole evidence that one of them renounced or discharged his claims of relief in favour of another, and in the present case I think it incompetent to admit parole evidence to show that the defender agreed that the security subsequently obtained by the Hamiltons under the *ex facie* absolute disposition should be granted to them for their own behoof alone to the exclusion of their co-cautioners.

To allow such proof is to allow parole proof in contradiction of the obligations arising under the bond. For nothing in my opinion can be more inconsistent with the obligations incurred by co-

cautioners towards each other, or more prejudicial to the defender's right of relief against the principal debtor than to allow parole proof that the principal debtor granted with the defenders' consent the *ex facie* absolute disposition of his property in favour of the pursuers and for their sole benefit.

2. The next question is, if the parole evidence is competent whether it is sufficient? I have examined it oftener than once, and I can only say that in my opinion it is unsatisfactory.

The Hamiltons appear to have been in partnership with the principal debtor in the Springhill Coal Company, and they must have known his position as well as any body. If they stipulated for a security to themselves alone over the Rochsolloch Ironworks, and Mr Freeth agreed to this, nothing could have been simpler than to get a letter to this effect before signing the bond. In point of fact, the disposition was not granted for six months after the bond, and bears no reference to it. If their statement is correct that it had been stipulated for before the new bond of credit was granted, it would have been natural to expect that Freeth's written consent should have been asked to a conveyance whereby the principal debtor liable to him in relief divested himself of his whole property in the Rochsolloch Ironworks in favour of the Hamiltons. I cannot say that it is clearly proved that there was such a stipulation.

The fact that the pursuers did not examine the agents, or produce any of the correspondence which is said to have passed with relation to the disposition, is to me very strange. For I do not think that any intelligent and respectable agent who was informed that the deed was granted in fulfilment of a stipulation assented to by the other cautioners would have prepared the deed without making it clear that the co-cautioners were consenting parties and acknowledged the stipulation.

To hold the pursuers' allegation proved, in the face of a denial both by the principal debtor and by the co-cautioners, is in my opinion far from satisfactory.

3. Another question was raised as to the application of the surplus. The pursuers William and John Hamilton do not now maintain that there are fewer than four cautioners. In answer to a question they declined through their counsel to dispute the soundness of the Lord Ordinary's view. But they contend that they are entitled to apply the surplus towards extinction of the liabilities of their firm (the fourth cautioner), and to withhold it entirely from the defender.

My opinion is that there is no more difficulty in holding it proved that the security was stipulated for the benefit of the firm than there is in holding it proved to have been for their own benefit exclusively. If the stipulation is proved at all, I see no reason why it should not be sustained to this effect also.

Lord Justice-Clerk—I concur in the opinion of Lord Rutherfurd Clark. I do not think that there is any question as regards the kind of proof on the point whether the co-cautioners renounced or discharged their right to share in the security given to the pursuers.

This is a case where a bargain was made before the cautioners entered into the cash credit, and as a condition that the pursuers should become cautioners. I think it is sound law that where several persons become co-cautioners in a bond, and some security is afterwards given to one of them, he becomes bound to share it with his other co-cautioners. But I think there is no ground for holding that where a security has been given to one of the co-cautioners with the knowledge of the others, to protect himself, he is bound to communicate it to his co-cautioners. This is a strong case as an example of that rule, because in this case the Hamiltons had entered into this cash credit bond for the benefit of Freeth to prevent his business being ruined by having to pay up the debt which Pettigrew owed to the bank. There was nothing contrary to that view decided in the case of *Macpherson* which was cited to us. It was not proposed here by the evidence to contradict the bond or to change the conditions upon which the bond was granted. In the case of *Macpherson* the evidence was disallowed because it was intended to direct it with the object of altering the conditions attaching to the cautioners in the bond. There is nothing of that kind here. This is a case such as is referred to by Professor Bell in the passage quoted by the Lord Ordinary in his opinion—that is to say, such a difference as is spoken of there is alleged to have been here made between the cautioners with the knowledge of each other, namely, that the pursuers should be protected by this security against any evil results happening from the failure of Pettigrew, so that they need not communicate the benefit of the security to their co-cautioners. I think there is nothing to prevent us holding that such a condition might be made between the co-cautioners if it is proved.

Well then, has that condition been proved to have been made by the pursuers? I very distinctly concur in the expressions of the Lord Ordinary when he says that he believes the evidence of the Hamiltons, and does not believe the evidence of Freeth and Pettigrew, and I therefore think that the pursuers have proved that this condition was made.

As regards the other question, I do not think it necessary to add anything to what has been said by Lord Rutherfurd Clark, that the advantage of the security was given to the firm as well as to the individual members.

Lord Young was absent.

The Court adhered.

Counsel for the Pursuers—M'Kechnie—Low. Agent—William B. Glen, S.S.C.

Counsel for the Defenders—Jameson—Watt. Agents—J. & A. Hastie, S.S.C.

Wednesday, July 17.

SECOND DIVISION.

GRAHAM AND OTHERS (CAMPBELL'S TRUSTEES) *v.* CAMPBELL AND OTHERS.

Succession — Repudiation of Provisions under Settlement — Forfeiture — Intestacy — Fee — Liferent.

A testator directed the trustees under his settlement to pay over a sum of £2000 to his son, or in the event of their seeing fit to do so, to retain the said sum in their hands for his behoof, and pay him the interest, to hold the residue of his estate for behoof of his two married daughters in liferent, and their "heirs and successors equally amongst them" in fee; declaring that these provisions should be in full to them of any claims they might have against his estate after his death, "and that in the event of any of my children creating any dispute in regard to these presents the child so acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share in the event of it being that falling to my son in the same manner as I have appointed in regard to the residue of my means and estate, and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or to retain same for his behoof as aforesaid." By a codicil he appointed his trustees, instead of paying over to his son the sum of £2000, "or any other or further sum which may happen to fall to him," to retain said sum in their own hand for his behoof, and pay him the interest annually, such interest to be purely alimentary, and he appointed his trustees at his son's death to pay and make over the said sum of £2000 to his heirs and successors equally among them.

One of the daughters repudiated the provisions in her favour, and claimed legitim. *Held* (1) that the repudiation implied a forfeiture both of her own rights under the settlement and also those of her heirs and successors, and (2) (Lord Rutherfurd Clark *diss.*) that with regard to the share of residue so forfeited by the daughter, the son was entitled to the fee of one-half of it, subject to the directions contained in the codicil, and that the trustees were bound to hold the other half for behoof of the other daughter in liferent, and her heirs in fee.

Mr Duncan Campbell, sometime of Stirling, died on 18th March 1887. He was survived by one son James Campbell, settled in Australia, and by two married daughters, Mrs Mackenzie and Mrs Irons. His estate consisted wholly of personalty, amounting to £11,029, 2s. 8d.

He left a trust-disposition dated 10th March 1881, and a codicil of date 5th July 1884.

The deed provided—"*Third*, on my means and estates having accumulated as aforesaid, or as soon thereafter as my trustees may find convenient, I direct and appoint my trustees to pay, convey, and make over to my son James Campbell, presently residing in New South Wales, and his heirs, executors, and representatives whomsoever, the sum of £2000 sterling, declaring, as it is hereby specially provided and declared, that my trustees, should they see fit, and deem it necessary to do so, shall retain said sum in their own hand for behoof of the said James Campbell, and pay him the interest annually derived therefrom in such portions and at such time or times in the year as they see proper, and of which they shall be the sole and only judges; declaring further, as it is hereby specially declared, that in the event of my trustees retaining said sum for behoof of my said son as aforesaid, the interest to be derived therefrom shall be purely alimentary, and shall neither be liable for the debts of my said son, nor subject to the diligence of his creditors. *Fourth*, I direct and appoint my trustees to hold the whole rest and residue of my means and estate, heritable and moveable, real and personal, for behoof of my daughters Elizabeth Campbell or Mackenzie, spouse of Daniel Mackenzie, lessee of the Drummond Arms Hotel in Crieff, and Mary Campbell or Irons, spouse of James Hay Irons, station-agent of the Caledonian Railway Company at Edinburgh, equally between them in liferent for their respective liferent uses allenarly, and on the death of either of my daughters shall pay and make over the fee applicable to such daughter's liferent to her heirs and successors, equally among them, share and share alike. . . . Declaring, as it is hereby specially provided and declared, that the provisions herein conceived in favour of my children are in full to them of all claim competent against my estate, and that in the event of any of my children creating any dispute in regard to these presents, the child so acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share, in the event of it being that falling to my son, in the same manner as I have appointed in regard to the residue of my means and estate; and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or retain same for his behoof as aforesaid."

In the codicil the testator directed his trustees "in place of paying, conveying, and making over to my son James Campbell, before designed, the sum of £2000 sterling, or any other or further sum which may happen to fall to him in virtue of my said trust-disposition and deed of settlement, to retain said sum in their own hand for his behoof, and pay him the interest annually derived therefrom in such portions, at such time or times in the year as they see proper, and of which they shall be the sole and only judges; declaring that the interest to be derived from said sum shall be purely alimentary, and shall neither be liable for the debts of my said son, nor subject to the diligence of his creditors; and at his death I appoint my trustees to pay and make over the said sum of £2000 sterling to his heirs and representatives whomsoever, equally amongst them, share and share alike."

After her father's death Mrs Mackenzie claimed her legitim, and received in payment thereof the sum of £1750, 4s. 2d., with interest from his death.

Doubts having arisen as to the true construction of these deeds in view of the repudiation by Mrs Mackenzie of her rights under the settlement, the present case was presented for the judgment of the Court by (1) the testamentary trustees of Duncan Campbell; (2) James Campbell; (3) Mrs Mackenzie and her husband; (4) Mrs Irons and her husband; (5 and 6) the minor children of Mrs Mackenzie and Mrs Irons respectively, with advice and consent of their curators, and also the tutors of such of their respective children as were still in pupillarity.

The second party contended that on a sound construction of the trust-deed and codicil Mrs Mackenzie's children had no separate or independent interest in the share of residue directed to be liferented by her, but only a contingent and derivative interest in so far as they might happen to be her heirs and successors at her death, and that such interest had fallen or been forfeited by their mother's election to claim her legal rights, and that in consequence he was entitled to one-fourth of the residue over and above the special provision of £2000. Alternatively, he contended that he was entitled to be paid the income of one-fourth of the residue during Mrs Mackenzie's life over and above the said special provision.

The fourth and sixth parties contended that on a sound construction of the said fourth purpose of the trust-deed Mrs Mackenzie's children had no separate or independent interest in the share of residue directed to be liferented by her, but only a contingent and derivative interest in so far as they might happen to be her heirs and successors at her death, and that such interest had fallen or been forfeited by their mother's election to claim her legal rights, and that consequently the first parties were bound to hold one-half of the share of residue so forfeited for behoof of the fourth party in liferent, and to pay the fee of the same to her heirs. At all events, they maintained that if the said rights had not been so forfeited the income of the share of the residue destined to Mrs Mackenzie and her heirs and successors vested in the first parties during her lifetime, and fell to be applied by them in compensation of the legitim received by her; or otherwise, that one-half of the said income fell to be paid by the first parties to the fourth party during her life; and further, that the said share of the free residue must contribute to satisfy Mrs Mackenzie's claim of legitim.

The fifth parties contended that on a just construction of the fourth purpose of the trust-deed the prospective rights of Mrs Mackenzie's children were not forfeited by the action of their mother in electing to claim her legal rights, and that the income of the share of residue destined to her and her heirs and successors fell to be accumulated by the first parties during her lifetime for the benefit of the other beneficiaries who had suffered by Mrs Mackenzie's election of her legal rights, in so far as their respective rights had been diminished in consequence of her election, and, *inter alia*, for the fifth parties.

The third parties maintained that if such forfeiture had taken place the fee of the one-half of the share of residue, destined by the trust-deed to Mrs Mackenzie, of which James Campbell, in consequence of her election, would have the liferent, must be held to have fallen into intestacy of the said Duncan Campbell, and fell to be divided amongst his next-of-kin as at the date of his death, including Mrs Mackenzie.

The following questions were, *inter alia*, submitted to the Court:—"(1) Are the children of Mrs Mackenzie entitled to have the share of residue directed to be liferented by her set aside for behoof of her heirs and successors at her death, notwithstanding that she has elected to claim her legal rights? (3) If the first question is answered in the negative, is the second party entitled to the fee or the liferent of the half of the residue forfeited by Mrs Mackenzie, and are the first parties bound to hold the other half of the residue so forfeited for behoof of the fourth party in liferent and her heirs in fee?"

James Campbell (the second party) argued—(1) The forfeiture incurred in consequence of the repudiation by Mrs Mackenzie of the provisions under the will did not extend only to her own share in the provisions of the will, but undoubtedly included also the fee provided to her heirs and successors. In *Fisher* v. *Dixon*, and the other cases following upon that decision, it had been held that the repudiation affected only the person so repudiating, but the words of the settlement in this case were different from the words under consideration in those cases. In this case also it was to be noticed that the fee was not to be paid to her children, but to her "heirs and successors," who had not a separate and independent, but only a derivative succession through Mrs Mackenzie. If, then, by her repudiation she lost all right in the provisions under the will so did her heirs and successors—*Fisher* v. *Dixon*, November 24, 1831, 10 S. 55; *Jack, &c.* v. *Marshall*, January 21, 1879, 6 R. 543; *Snody's Trustees*, February 9, 1883, 10 R. 599. (2) As regarded the share of half the residue which fell to be accounted for by the repudiation of Mrs Mackenzie, it could not be allowed to fall into intestacy, so that the daughter who had taken her legitim and repudiated the provisions of the will could still obtain a benefit from her father's estate by making the will invalid. One-half of that share went in fee to James Campbell as provided in the will—*Gillies* v. *Gillies' Trustees*, February 28, 1881, 8 R. 505. If intestacy resulted Mrs Mackenzie could claim no benefit therefrom, as it was the result of her repudiating the provisions in the settlement.

Argued for the fourth parties—(1) These parties accepted the argument of the second parties on the first point. (2) The result, however, of the forfeiture of Mrs Mackenzie's share was not only that Mrs Mackenzie could not claim her share, but also that James Campbell could not claim any share either. The wording of the codicil showed that that was the true meaning. The change made by the codicil was to prevent the trustees paying to James more than the interest of the £2000 formerly set apart for him—*Nisbet's Trustees* v. *Nisbet*, December 6, 1851, 14 D. 146.

Argued for the third parties—(1) No doubt Mrs Mackenzie's repudiation of the conventional provisions prevented her from claiming under the will, but the share which she had forfeited went to her children in fee, and the income had to be

kept up until they were entitled to claim the capital. Alternatively, her share went into intestacy, and she was entitled to her share of the residue. The case of *Gillies* was distinct from this in point of fact.

At advising—

Lord Lee—The first question in this case is, whether the children of Mrs Mackenzie, who claimed her legitim in preference to taking the benefit of her father's settlement, are entitled to have the fee of the share appointed to be liferented set aside for her heirs and successors?

It was not disputed that unless the deed provides otherwise the fee which is directed to be paid to her heirs and successors is not forfeited by the daughter's repudiation of her liferent. The cases of *Fisher* v. *Dixon* and *Snody's Trustees* leave no room for doubt on that point.

But it was contended that the directions of the deed in this case provide for the case which has happened in such a manner as to defeat the interest of the heirs and successors of the daughter who has repudiated.

The declaration is that the child creating any dispute shall forfeit all claims under the deed, "and my trustees are hereby directed to deal with such child's share" . . . in the event of its being "in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and to pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or retain the same for his behoof as aforesaid."

I think it impossible to doubt that a daughter's share is here dealt with as including the interest of her heirs and successors. For the fee previously appointed to be paid to them is here directed to be otherwise disposed of in the event contemplated. If therefore Mrs Mackenzie has so acted as to create a dispute under the deed (which appears to me to be the case), there is in the event which has happened no direction to pay the fee to her heirs and successors on her death. The original direction to that effect has been superseded. I think therefore that the first question in the case must be answered in the negative.

2. But a further question is raised as to that portion of the forfeited share which was by the original deed directed to be paid or made over to the son and his heirs, "or retained for his behoof as aforesaid." The difficulty arises in consequence of a codicil executed by the testator on 5th July 1884. It is clear that under the original deed the son took a fee in his portion of the forfeited share, just as he took a fee in the £2000 which was to be paid to him in his own right, subject to certain power of retention. The effect of the testator's original directions as to his interest in the forfeited share are that it was either to be paid to him or retained for his behoof in like manner as the £2000 was to be paid or retained. But the effect of the codicil is to take away from the trustees, both as to the £2000 and also as to the son's half of the forfeited share, the power of paying the money to the son, and to direct them to retain the amount in their own hands for his behoof. The words of the codicil are, that in exercise of his powers of alteration, "I," the testator, "do hereby direct and appoint my trustees, in place of paying, conveying, and making over to my son James Campbell, before designed, the sum of £2000 sterling, or any other or further sum which may happen to fall to him in virtue of my said trust-disposition and deed of settlement, to retain the said sum in their own hands for his behoof, and pay him the interest annually derived therefrom, in such portions, at such time or times in the year, as they see proper, and of which they shall be the sole and only judges; declaring that the interest to be derived from said sum shall be purely alimentary, and shall neither be liable for the debts of my said son nor subject to the diligence of his creditors, and at his death I appoint my trustees to pay and make over the said sum of £2000 sterling to his heirs and representatives whomsoever, equally amongst them, share and share alike."

It is noticeable that there is no express revocation of the fee conferred on the son by the original deed, and no declaration that the capital sum is not to be subject to his deeds. Nor is there any direction that the capital shall be dealt with at his death in a manner inconsistent with the fee being vested in him.

The direction is only that the sums shall be retained for his behoof to the effect of making the interest available for his aliment.

Now, I think that there is no repugnancy between such a direction and the vesting of a fee. And the result is that there being no revocation express or implied of the fee conferred by the deed it remains vested in the son.

I am the more easily induced to reach this conclusion by the consideration that it avoids partial intestacy. For such would be the result of holding that the codicil had the effect of revoking the fee conferred by the deed so far as the sum falling to the son as a part of the forfeited share is concerned.

The fact that the codicil contains an express direction to pay over the £2000 at his death to the son's heirs and representatives whomsoever, is not sufficient in my opinion to imply a revocation of the fee of any further sum happening to fall to him under the trust-deed.

It was not then known that any sum would so fall to him; and the testator appears therefore to have left such sum unencumbered by any direction except that it was to be retained so that the interest might be paid to him annually. This therefore, I think, is a question which falls within the principle which we found applicable in the case of *General Christie's Trustees*, decided the other day [July 3, 1889, 26 S.L.R. 611].

3. In my view therefore no question arises concerning the disposal of the son's half of said residue. It is disposed of by being vested in the son. But if it had not been so vested, I should have had difficulty in avoiding the conclusion that it formed an intestate portion of the succession in which Mrs Mackenzie would have been entitled to share. The case of *Gillies*, 8 R. 505, to which we were referred does not appear to me to be applicable.

I am for answering question 1 in the negative; question 3, that the second party is entitled to the fee subject to the directions contained in the codicil, and that the second part of the question should be answered in the affirmative; and by declaring the questions *quoad ultra* to be superseded.

Lord Rutherfurd Clark — Mrs Mackenzie claimed her legal rights and repudiated the provisions made for her by her father's trust-disposition and settlement. It is clear that in consequence she forfeited not only her personal provisions, but also the provisions made for her heirs and successors. In coming to that result I proceed entirely upon the deed itself, and I can read the clause in the deed as meaning nothing else than that repudiation of the provisions made for any of the daughters should lead to the forfeiture of the provisions to that extent. I do not proceed upon the cases of *Fisher* v. *Dixon*, and the other cases cited to us, because I think even if they were applicable they would not necessarily be conclusive the other way, while I think the words of the deed are conclusive as to the view I have expressed.

As respects the share of the estate which becomes free by the forfeiture of Mrs Mackenzie in view of her repudiation of her legal rights, I have great doubts whether Lord Lee's construction of the codicil is the right one according to a sound construction of the deed. On the contrary, I think the effect of the codicil is to restrict the interest of James Campbell to an alimentary liferent only. I do not think the deed can bear any other interpretation.

As regards the next question, what would become of the fee of the sum which in my opinion is liferented by Campbell, whether it falls into residue or into intestate succession? I desire to exercise my privilege and not express an opinion at all, as I do not think it necessary to do so in view of the opinion your Lordships hold of the primary right.

Lord Justice-Clerk—I think it is quite plain that if Mrs Mackenzie chose to repudiate the provisions made for her in the will and claim her legal rights, she has thereby forfeited all claims under her father's settlement, both as regards herself and also as regards her children. It is clearly laid down in the settlement—"In the event of any of my children creating any dispute in regard to these presents, the child so acting shall forfeit all claims competent to him or her under the same." That is a plain declaration that by her repudiation the fee of her share is absolutely taken away from her and from her heirs.

On the other question I have come to be of the same opinion as Lord Lee. I think if we read the will and the codicil together they do not import a deprivation of the son James of the share coming to him through Mrs Mackenzie's repudiation of the provisions made for her. By the will the trustees were directed to pay over to James Campbell the sum of £2000, and the alteration in the codicil is to the effect that instead of paying over that sum they are to retain the capital and pay him the interest. There is a confusing direction at the end of the codicil, no doubt—"And at his death I appoint my trustees to pay and make over the said sum of £2000 stg. to his heirs and representatives whomsoever." But I do not think that that interferes with our opinion as to where the fee of Mrs Mackenzie's share is to go after her repudiation. There is no direction in the codicil except this, that if any sum should come to him from the repudiation of the provisions by any one of the children, the trustees are to retain the sum in their hands, and pay him the interest annually. Consistently with the case of *Christie's Trustees*, which we decided a short time ago, there may be a fee in a person, although the sum may remain in the hands of trustees, who can only pay him over the interest annually. I take it that this case is ruled by that of *Christie's Trustees*. The questions will be answered as provided in Lord Lee's opinion.

The Court pronounced this interlocutor:—

"Answer the first of the questions therein stated in the negative; and with reference to the third question, are of opinion that the second party is entitled to the fee of the half of the residue forfeited by Mrs Mackenzie, subject to the directions contained in the codicil of 5th July 1884; and that the first parties are bound to hold the other half of the residue so forfeited for behoof of the fourth party in liferent, and her heirs in fee," &c.

Counsel for the First and Second Parties—G. R. Gillespie. Agents—Dundas & Wilson, W.S.

Counsel for the Third and Fifth Parties—Sir C. Pearson—Dundas. Agents—W. B. Wilson, W.S.

Counsel for the Fourth and Sixth Parties—Gloag—Boyd. Agents—J. Pringle Taylor, W.S.

Wednesday, July 17.

SECOND DIVISION.

[Lord Trayner, Ordinary.

SHIELLS *v.* THE SCOTTISH ASSURANCE CORPORATION (LIMITED).

Insurance—Condition in Policy—Act 44 and 45 Vict. cap. 62.

The owner of a Clydesdale stallion insured it "against death from natural disease or accident." By the conditions annexed in the policy it was stipulated that in case of the death of any animal notice in writing should be sent to the office of the insurance company within twelve hours of the death, either accompanied by or followed within a reasonable time by a full report in writing from a qualified veterinary surgeon, and that as soon as might be thereafter a claim should be given in with particulars of the loss, and the report of a qualified veterinary surgeon. Notice to an agent of the company was not to be a sufficient compliance with this condition. The horse was found at 7 o'clock on a Saturday morning suffering from a compound comminuted fracture of a foreleg, and was destroyed on the advice of a veterinary surgeon, who was not, however, registered as such under the Act 44 and 45 Vict. cap. 62. The same afternoon the owner telegraphed to the local agent of the company that the horse had broken its leg and had been condemned by a veterinary surgeon. This telegram was handed to the manager of the company the same night.

On Monday the veterinary surgeon sent a certificate to the company that the horse had been destroyed by his orders, and on the same day the manager of the company telegraphed to the owner of the horse "if horse killed without written consent, company no liability."

In an action by the owner against the company to recover the insurance money—*held* (Lord Rutherfurd Clark *dub.*) that the defenders were liable, in respect (1) that the injuries sustained by the horse necessitated its immediate destruction; (2) that the pursuer had sufficiently complied with the conditions in the policy as to giving notice; and (3) that the company were barred from raising any objections on the ground of defects in the subsequent procedure required by the policy, these having been caused by the position assumed by the company in repudiating all liability.

Opinion (*per* Lord Trayner) that the veterinary surgeon who ordered the horse to be destroyed was not a "qualified" veterinary surgeon in view of the terms of the Act 44 and 45 Vict. cap. 62.

The Scottish Assurance Corporation (Limited), having their office at 119A George Street, Edinburgh, insured live stock against death from disease or accident. James Shiells, Haddington, insured a dark brown Clydesdale stallion with the company for £100 on 19th May 1888. At 7 o'clock on the morning of Saturday 4th August 1888 Shiells found the horse had broken one of its forelegs. The fracture was a compound comminuted fracture of the metacarpal bone. Shiells at once sent for a veterinary surgeon, and Mr Wishart, of Bannatyne, & Wishart, Haddington, came and inspected the animal. He considered that the injury was incurable, and ordered the animal to be destroyed, which was done. The body of the horse was taken to a tanner, and skinned and buried the same day. The leg was kept for inspection by anyone who might be sent on behalf of the company. At 2·15 on the same day Shiells sent the following telegram to Mr Luke, the agent of the defenders' company at Haddington—"Horse leg broken; condemned by Wishart and Bannatyne."

Upon 5th August Luke wrote to Sheills acknowledging receipt of the telegram, and continued—"I at once went to the other side of the town to see the secretary, and he arranged that as it was now too late to do anything, I should see the manager to-day, and ask him to meet him this afternoon and arrange immediately what is to be done. I have just left the manager, and he will wire you later what course they are to take, so that you may rely that there will be no delay or want of attention by the company."

On Monday morning 6th August Sheills sent a letter to Luke confirming his previous telegram, and on the same day Wishart sent a certificate to the company's head office in these terms—"This is to certify that I examined Mr Sheills' horse on Saturday morning, and found compound fracture of off foreleg, when I ordered him to be destroyed." On the same day at 11 A.M. the manager of the company telegraphed to Sheills as follows—"Telegram Luke received. Not liable broken leg. Veterinary coming to-day. If horse killed without written consent, company no liability." Upon the same day Mr Wood, Shiells' agent, wrote to the company asking if it was necessary that the claim should be made upon any particular form, and requesting to be supplied with the same if that was necessary. The company in the meantime had sent down their own veterinary surgeon, who had seen and inspected the leg of the horse, and upon 7th August the manager wrote—"In reply to your letter of yesterday, I beg to inform you that there is no claim whatever under the above proposal, in respect that the insured has violated the conditions of his policy, and rendered it entirely null and void. The corporation's veterinary surgeon was sent to Mr Shiells yesterday, but was astonished to find the animal had been killed without either the sanction or knowledge of the company. Our policies do not cover broken legs, only death; and this is distinctly shown in the proposal signed by Mr Sheills." The condition under the policy to which the manager referred was the 9th stated in these terms—"Immediately upon any animal or animals hereby insured becoming ill, or upon any indication of approaching illness, or upon their receiving any injury, the insured shall have the said animal or animals at once attended to by a qualified veterinary surgeon, and shall forward to the company, addressed to their office at 119A George Street, Edinburgh, within twelve hours from such illness, ailment, or injury being brought to his knowledge, full particulars of the same, accompanied by the written report of the veterinary surgeon attending. In the event of the death of any animal or animals hereby insured, notice thereof in writing shall be sent to the office of the company as before mentioned within twelve hours after said death occurs, accompanying such notice by a full report in writing from a qualified veterinary surgeon, or sending the said report as speedily thereafter as possible, and as soon as reasonably may be after such notice, shall deliver to the company a claim for the loss or damage sustained, containing, as far as may be reasonably practicable, the particulars and the estimated amount thereof, and in support of such claim the insured shall give all such proofs and explanations as may be reasonably required, including the report and certificate of a qualified veterinary surgeon, together with, if required, a statutory declaration of the truth thereof, and in default thereof, no claim in respect of such loss or damage shall be payable, unless such notice, claim, particulars, proofs, and explanations respectively shall have been given and produced, and such statutory declaration, if required, shall have been made. It shall not be a sufficient compliance with this condition if such notice as aforesaid shall be only given to an agent, inspector, or veterinary surgeon of the company."

The company refused to admit liability, and Shiells brought this action for recovery of the sum for which the horse had been insured.

The defenders pleaded—"(2) The horse no having died from natural disease or accident within the meaning of the policy; *et separatim*, the horse having died from wilful injury, negligence, mismanagement, or wrong-doing on the part of the pursuer within the meaning of condition No. 2, the defenders are entitled to absolvitor, with expenses. (3) The pursuer having

failed to perform and observe the conditions of the policy in the manner specified in the defences, is not entitled to recover thereunder from the defenders."

The Lord Ordinary (TRAYNER) allowed a proof, from which it appeared that Wishart had been in practice as a veterinary surgeon for many years, and was known as a skilful man in the district but he was not a registered veterinary surgeon. His partner Bannatyne was a registered veterinary surgeon. Wishart was the nearest surgeon who could be got. It was clearly proved that the injury was of an incurable character, and that it was proper and necessary to destroy the horse at once. As regarded the notice the pursuer deponed—"I thought I was giving them full enough information by saying that the horse's leg was broken, and that the animal had been condemned." Luke also deponed—"It is not unusual for me to get communications direct from the insurers. I informed the secretary as early as possible."

Upon 29th January 1889 the Lord Ordinary sustained the defenders' third plea-in-law, and assoilzied them from the conclusions of the summons.

"*Opinion.*—By the policy of insurance founded on in this action it is provided that the conditions on the back thereof, which are to be taken as part of the policy, shall be, so far as they are to be performed and observed by the insured, conditions precedent to his right to recover thereunder. By article 9 of these conditions it is stipulated (1) that upon the animal insured receiving any injury the insured shall have the animal at once attended by a qualified veterinary surgeon; (2) shall forward to the company, addressed to their office at 119A George Street, Edinburgh, within twelve hours from such injury being brought to his knowledge, full particulars of the same, accompanied by the written report of the veterinary surgeon attending; (3) in the event of the death of the animal, insured shall send notice to the office of the company as before mentioned within twelve hours after said death occurs; and (4) that it shall not be a sufficient compliance with this condition if such notice as aforesaid shall be only given to an agent, inspector, or veterinary surgeon of the company.

"The pursuer failed to observe these conditions. He sent no notice whatever of the injury which his horse had sustained, or of its death, addressed to the office of the company; the notice he did send to Mr Luke, the agent of the company, was not sufficient compliance with the conditions; and even the notice to Mr Luke was not accompanied by the written report of the veterinary surgeon attending. Further, the horse was not attended by a qualified veterinary surgeon, for in view of the terms of the Act 44 and 45 Vict. cap. 62, I cannot hold Mr Wishart (however experienced) to be 'qualified.'

"The conditions in question appear to me to be reasonable conditions for the protection of the defenders' company, and their observance on the part of the pursuer having been made by contract a condition precedent to his right to recover under the policy it follows that his failure to observe the conditions deprives him of the right which by this action he seeks to enforce."

The pursuer reclaimed, and argued—It was undoubtedly proved by all the witnesses, including those for the defenders, that this horse was in such a condition that it had to be killed at once. Assuming that, there were only the three following points to be considered—(1) As to notice—The notice given to the company was sufficient under the conditions of the policy. It was sent in the afternoon of the day on which the accident occurred. The telegram said the horse had been condemned, which implied that it would be necessary to kill it at once. Though the notice had been sent to an agent it reached the manager of the company the same night, while in ordinary course of post the information could not have reached the head office till Monday. (2) As to the surgeon's report—This must be treated as a case of death, and in these circumstances the report of the veterinary surgeon had only to be sent to the company within reasonable time. It was sent off within forty-eight hours of the accident, and as the intervening day was a Sunday, that was sufficient compliance with the condition. The certificate stated that there was compound fracture of the leg, and that the horse was ordered to be destroyed. These were all the particulars which it was necessary for the company to know. Even if the report ought to have been fuller it was not in the mouth of the defenders to raise that objection, because from the very first they treated the case as one in which they intended to repudiate liability—Bell's Comm. i. 673, 4; *Mason* v. *Harvey*, June 1, 1853, 8 W. H. & G. 819; *London Guarantee Company* v. *Fearnley*, June 27, 1880, L.R., 5 App. Cas. 911. The objection founded on the fact that Mr Wishart was not a registered veterinary surgeon could not be sustained. He was qualified in the sense that he was a man of approved knowledge in the treatment of live stock. The pursuer could not be expected to ask Mr Wishart to show him his diploma before he called him in to look at the injured horse. Cases might arise of animals insured in this company being injured and killed in places where no registered veterinary surgeon could be got. Mr Wishart's partner, Mr Bannatyne, was a registered veterinary surgeon. By calling in Mr Wishart the pursuer had satisfied the condition in the policy. All that the Act, upon which the defenders founded, insisted upon was that there must be no misrepresentation. If a veterinary surgeon was not registered in the meaning of the Act he must not say that he was, but he might be a qualified practitioner for all that.

The defenders argued—Assuming that the horse had to be killed as the result of the injury which it had sustained, the pursuer had failed in carrying out the conditions of the policy. (1) The pursuer had not called in a qualified veterinary surgeon as he was bound to do. There was only one meaning of the word "qualified" when used in the way it was used in this policy, and that was, qualified to practise according to some recognised standard. The statute regulating the qualification of veterinary surgeons was the Act of 1881 (44 and 45 Vict. cap. 62). It was admitted that Mr Wishart was not qualified under that Act, and therefore he did not fulfil the conditions of the policy. It was a most reasonable provision, as the company could not be expected to take proof as to the opinion of the countryside of the abilities of a man called in to examine an animal insured under their policy. (2) This case must

be treated, primarily at least, as one of injury to the horse, and the pursuer had not complied with the necessary conditions. He had had the animal killed and buried before any surgeon sent by the company could make an inspection to see if the animal had been properly treated. (3) But even assuming that this was to be treated as a case of death, the pursuer had not complied with the conditions of the policy. Notice was not properly given to the company. A telegram was sent to an agent, but that was not notice sent to the company. The notice was in itself defective, as it did not tell that the horse had been killed, or what had been the nature of the injury. The certificate of the surgeon was also defective, and it was not sent until forty-eight hours after the death of the animal, and it did not give the necessary particulars of the injury. All these were conditions precedent to the pursuer recovering under this policy, and they had not been observed. The most literal fulfilment of conditions precedent had been enforced in all the cases—*Standard Life Assurance Company* v. *Weems, &c.*, August 1, 1884, 11 R. (H. of L.) 48; *Life Association of Scotland* v. *Foster and Others*, January 31, 1873, 11 Macph. 351; *Patten* v. *Employers Liability Assurance Company*, January 28, 1887, Irish L.R., 20 C.P.D. 93; *Gamble* v. *Accident Assurance Company*, June 18, 1870, Irish Rep., 4 C.L. 204; *Cassel* v. *The Lancashire and Yorkshire Insurance Company*, May 19, 1885, 1 Times' Rep. 495; *Cowley* v. *The National Employers Accident Insurance Company*, February 8, 1885, 1 C. & E. 597. The only case in which conditions had not been enforced strictly was where they were not held to be conditions precedent—*Stoneham* v. *The Ocean, Railway, &c., Insurance Company*, June 16, 1887, L.R., 19 Q.B.D. 237.

At advising—

Lord Justice-Clerk—The pursuer's horse was insured in the defenders' company. The horse was found on Saturday 4th August with its leg broken, and in such a state that in the opinion of all who saw him, who were by knowledge qualified to speak on such a matter, although perhaps not "qualified" in the technical sense, he ought to be immediately killed.

The policy under which this horse was insured in the defenders' company rendered them liable only in case of the death of the animal. The policy prescribed certain procedure in two different events. In the first place, it prescribed procedure in case of the illness or injury of the animal, and in the second case procedure in case of death.

Now, as regards the first of these, the procedure in case of injury to the animal, it has no application to this case. The object of it is to give the company an opportunity of regulating the treatment, and of observing the progress of the injury towards recovery, or otherwise, in order to protect themselves if evil results should follow from an unsatisfactory mode of treatment.

This was a case of death, and all we have to look to is the procedure in the case of death. It was admitted that in the circumstances here the right thing to do was to accelerate the inevitable end; it was a hopeless case, and humanity demanded that the animal should be put out of its misery. The pursuer under this policy, if he takes the course of killing the animal after it has received an injury, takes also the risk of proving that the injury was such that it ought to have been killed. If he fails, then he loses his case If he succeeds in showing that the only result of the injury would be the death of the animal, then we must take the case as if the horse had been immediately killed by the injury. The first question then is, Has the pursuer proved that that was the case here? I do not doubt that he has. I think it is proved by the evidence of his own witnesses, who were quite able to give advice in such a matter, that the horse was in such a condition that the only proper course was to put it to death. But if any doubt remained, it is settled by the evidence of the defenders' own witness Mr Gray, a qualified veterinary surgeon. When the question was put fairly to him, "Do you think any veterinary surgeon of experience would have expected that leg to mend?" he answered, "No I don't think it." The pursuer then was justified in looking upon this injury as incurable, and in killing the animal. The case standing thus upon the facts, it is plain that if the pursuer complied with the forms prescribed by the policy for giving notice he is entitled to recover the value from the company.

It is important to notice that from the first the defenders' company treated this as a case of death, and not of injury.

On the day of the accident the pursuer sent a telegram to Mr Luke, the agent of the company with whom he had effected the insurance, in these terms—"Horse leg broken; condemned by Wishart and Bannatyne." Luke replies to this next day, showing what he had done on the receipt of the telegram—"I at once went to the other side of the town to see the secretary, and he arranged that as it was now too late to do anything, I should see the manager to-day, and ask him to meet him this afternoon and arrange immediately what is to be done. I have just left the manager, and he will wire you later what course they are to take, so that you may rely that there will be no delay or want of attention by the company." So that the pursuer on receiving this letter from Luke got information that his notice had reached the head office, and was in the knowledge of the secretary and manager. Now, what did the company do on receipt of this notice? They sent off this telegram dated 6th August—"Telegram Luke received. Not liable broken leg. Veterinary coming to-day. If horse killed without written consent, company no liability." That telegram very plainly shows that they thought the horse must be killed, and they say they repudiate liability if it was killed without their consent. In my opinion they were not within their right in taking up that position, but the importance of the telegram is that it shows the view of the defenders as to the nature and the only possible result of the injury. On the same day, the 6th August, Mr Wood, the pursuer's agent, wrote to the defenders' manager—"With reference to the loss and claim under this policy, if you require the claim to be made in a form prescribed by the company, be so good as furnish me with a copy; or if in sufficient form as already made, kindly say so. I am Mr Shiells' legal adviser." The only reply to this was—"In reply to your letter of yesterday, I beg to inform you that there is no claim whatever under the

above proposal, in respect that the insured has violated the conditions of his policy, and rendered it entirely null and void. The corporation's veterinary surgeon was sent to Mr Shiell's yesterday, but was astonished to find the animal had been killed without either the sanction or knowledge of the company. Our policies do not cover broken legs, only death; and this is distinctly shown in the proposal signed by Mr Shiells." So that the company at once took up the position that the pursuer's claim was bad, and that they were prepared to fight it.

Now, what is the condition in the policy on which the defenders found? It is in these terms:—"In the event of the death of any animal or animals hereby insured, notice thereof in writing shall be sent to the office of the company as before mentioned within twelve hours after said death occurs, accompanying such notice by a full report in writing from a qualified veterinary surgeon, or sending the said report as speedily thereafter as possible, and as soon as reasonably may be after such notice, shall deliver to the company a claim for the loss or damage sustained," and so on; and then the notice concludes—"It shall not be a sufficient compliance with this condition if such notice as aforesaid shall be only given to an agent, inspector, or veterinary surgeon of the company."

Now, in the first place, it may be noticed that the defender is barred from objecting that notice was not properly given under the last clause of the 9th condition. It is true that the pursuer only sent his notice to Luke, an agent in Haddington, and took the risk of the notice reaching the head office, but in point of fact the notice reached the secretary the same day. The fact being so, I think that is sufficient compliance with the requirements of the 9th condition with regard to notice. Again, it was said by the defenders that the notice was not accompanied by a full report from a qualified surgeon. Now, it is not made essential that a report should accompany the notice, but that it should either accompany or be sent within a reasonable time after. By the time that the pursuer would have been able to send in the full report with his claim the company had taken the position that they repudiated all liability, and that all his rights under the policy had gone, and all negotiations were at an end. In these circumstances I am of opinion that the defenders are liable to the pursuer in the value of the animal on the following grounds. In the first place, the accident which happened to the animal meant its death; in the second place, that the company received notice of the death on 4th August 1888; in the third place, I hold that any objection which the company may take to defects in the formal procedure after the death of the horse are rendered useless by the position taken up by them in at once repudiating all liability.

Lord Rutherfurd Clark—I am very glad to think that your Lordship has been able to propose such a judgment as you have indicated. I doubt very much if I can reach it. Indeed I doubt seriously whether such a judgment is not depriving the company of the benefit of the stipulations contained in the policy, but the conclusion at which your Lordship has arrived is so reasonable that I will not say anything against it.

Lord Lee—I agree in thinking that the case as proved was from the first a case of death caused by the horse breaking its leg. It was found in the morning in such a condition that it had to be immediately destroyed. I think that this should be found as matter of fact. If this be the true view, no question arises as to fulfilment of the conditions applicable to mere illness or injury.

The only question is, whether the pursuer fulfilled the conditions, or failed to fulfil the conditions applicable in case of a death?

Here I think the defenders put themselves in the wrong. They knew that the telegram referred to the injury as fatal, or possibly fatal. For they answered—"If horse killed without written consent of company, no liability." That was a plea-in-law, which I think was good or bad according to the true view of the facts. If the injury was such as rendered necessary the immediate destruction of the horse, it was clearly bad.

In this view of the facts it was unnecessary to give two notices, first notice of injury, and a second of the killing. The notice given was in my opinion sufficient notice of death, and was so dealt with.

But it is said that the notice was not accompanied by a veterinary surgeon's report. The conditions here in question do not require that such report shall in all cases accompany the notice. They provide that it may be sent "as speedily thereafter as possible." The pursuer by his agent wrote next day asking to be furnished with a form for making a claim, but the defenders answered this by telling him that there was no claim, and practically refusing to receive any claim or any report. After their manager's letter of 7th August it would have been absurd to send any report. The question was reduced to one of law, whether killing without the sanction of the company deprived the pursuer of all claim?

I think, as I have said already, that this question of law depended on a question of fact which the company refused to inquire into, but which has now been inquired into, viz., whether it was necessary to kill the animal, looking to the condition in which he was found.

Now, it was not disputed before us; it was conceded that the pursuer had established the necessity of putting an end to the horse's sufferings.

The conditions of the policy are not so framed as to exclude a claim in such a case. The manager seems to have thought otherwise, but he was wrong, and his mistake has caused the whole difficulty. What the company were entitled to require, and ought to have given the pursuer an opportunity of furnishing, was, in addition to the notice of death, (1) a report by a qualified veterinary surgeon, (2) a claim with particulars, (3) such proofs and particulars as may reasonably be required, including the report and certificate of a qualified veterinary surgeon.

In the view I take of the case it is unnecessary to decide whether or not the expres ion "qualified veterinary surgeon" means the same thing as the expression used in some cases, "qualified and registered veterinary surgeon."

I desire to reserve my opinion on that question.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Lord Ordinary: Ordain the defenders to make payment to the pursuer of the sum of One hundred pounds stg., with interest thereon at the rate of five pounds per centum per annum from the 2nd day of October 1888 until payment: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—Shaw—Forsyth. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—W. Campbell. Agent—Robert C. Gray, S.S.C.

Wednesday, July 17.

SECOND DIVISION.

WRIGHT & GREIG *v.* GEORGE OUTRAM & COMPANY AND GUNN & CAMERON.

Slander—Issues—Newspaper Report of Judicial Proceedings—Counter Issue as to Fairness and Accuracy of the Report.

A firm of merchants brought an action of damages against the proprietors of two newspapers for slander contained in the reports of proceedings in the London Bankruptcy Court during which a former agent of the pursuers was reported to have said "that they were very hard up, and he had financed them from time to time" by means of accommodation bills. They proposed as an issue . . . "whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers had been or were in financial difficulties, and had been or were being financed by accommodation bills . . . to the loss, injury, and damage of the pursuers."

The defenders averred on record that the report was a fair and accurate one of judicial proceedings, and as such privileged, and that the pursuers were bound to raise the question of its fairness in their issue; or alternatively, that they were entitled to raise that question before the jury by means of a counter issue.

The Court (*aff.* Lord Kyllachy) approved of the issue and disallowed the counter issue, holding that the question sought to be raised by it was a matter for the direction of the Judge at the trial.

Messrs Wright & Greig, wholesale wine and spirit merchants in Glasgow, brought actions for slander in the Court of Session against George Outram & Company, proprietors and publishers of the *Glasgow Herald* newspaper, Glasgow, and against Gunn & Cameron, proprietors and publishers of the *North British Daily Mail* newspaper, Glasgow, respectively, concluding in each case for £3000 as damages.

The pursuers had had in their employment as a traveller, and also as their London agent, a person named Smyth, whom they had dismissed on the ground of misconduct, and against whom they had obtained decree for £630 in consequence of which he became bankrupt. He afterwards applied in the London Bankruptcy Court for his discharge, and this application was opposed by Wright & Greig.

The reports in these newspapers of the proceedings in the Bankruptcy Court were the occasion of the present actions of damages. They contained, *inter alia*, the following passages —"In examination by Mr Wilde, the bankrupt stated that he came to London in 1884 as traveller for Messrs Wright & Greig of Glasgow. He remembered giving them a bill for £619. He did not know that that represented moneys received by him and not handed over. All he knew was that they were very hard up, and he had financed them from time to time. It was not right for Mr Wilde to make the wide allegations he had done against him." . . . "The bankrupt, in addressing the Court, said that there was not the slightest truth in the allegations made by the petitioning creditors. It was a matter of account, he having made advances to them from time to time to enable the business to be carried on, being repaid when the accounts came in."

The pursuers averred—"The said paragraph gives a false and misleading account of the proceedings which took place in the London Court of Bankruptcy on the occasion in question. The bankrupt did not say, as is represented in the said paragraph, that the pursuers 'were very hard up, and he had financed them from time to time.' Nor did he say, as is represented in the said paragraph, that he had made advances to the pursuers from time to time to enable their business to be carried on. These statements were utterly false and calumnious, and in point of fact were not made by the bankrupt." They also averred that the report in certain specified particulars was false, misleading, and calumnious, and that it was not fair and impartial, but incorrect and one-sided, and they pleaded—"(1) The defenders having slandered the pursuers by printing the said false and calumnious statements, are liable in reparation and damages as concluded for. (2) The defenders having slandered the pursuers by the publication of a garbled, partial, and one-sided report of the said proceedings in the London Bankruptcy Court as condescended on, are liable in reparation and damages, as concluded for. (3) In respect that the paragraph complained of does not contain a fair and accurate report of the proceeding referred to, the defenders are not entitled to plead privilege."

The defenders explained that they published the reports in good faith in the ordinary course of business, knowing nothing of the persons or matters referred to beyond what the report itself disclosed, and believing it to be a fair and accurate report of the proceedings in question.

They pleaded, *inter alia*, that the notice being a fair summary of the proceedings in a public Court, and having been published without malice was privileged.

The pursuers proposed the following issue—"Whether, on or about the 23rd January 1889, the defenders published in the *Glasgow Herald* an article or paragraph in the terms of the schedule hereunto annexed: Whether the statements therein set forth are of and concerning the pursuers, and falsely and calumniously represent that the pursuers had been or were in financial difficulties, and had been or were being financed by means of accommodation bills and

advances of money by a person named Smyth, to the loss, injury, and damage of the pursuers?"

The defenders proposed as a counter issue the following—"Whether the statement printed in the schedule hereto is a fair abridgment of the proceedings in the Court of Bankruptcy in London on 22nd January 1889?"

The Lord Ordinary (KILLACHY) allowed the issue but disallowed the counter issue.

"*Opinion.*—In these cases of Wright & Greig against the *Glasgow Herald* and the *North British Daily Mail*, I have considered the argument which was submitted to me the other day, and I have come to the conclusion that the pursuers' issue may stand as proposed; and further, that no counter issue is necessary.

"I think it clear that the innuendo in the issue is relevant—the innuendo being that the reports in question represented 'that the pursuers were in financial difficulties, and were being financed by means of accommodation bills and advances of money by a person named Smyth.' I cannot doubt that it is defamatory to make and publish such a statement with respect to a commercial firm, and I do not consider that the case of *Robertson*, upon which the defenders relied, raised any question at all analogous to the present. I further think it is not doubtful that the innuendo is borne out by the reports complained of. In point of fact, the innuendo is almost a literal echo of certain expressions in the report. And with respect to the defenders' criticism upon the pursuers' record, it may be true that the record should, as matter of pleading, have not only set out the report complained of, but should have also set out in terms the proposed innuendo. But I do not consider that that is matter of substance. The record might easily be amended to make it square with the issue, but I cannot see that that is necessary. I therefore think that the action lies, and that an issue must be granted; and, moreover, that this issue sets out quite a relevant and proper innuendo.

"But then comes the question whether the terms of the issue otherwise are such as are suitable to a case of this description. The defenders contended that upon the pursuers' statement it sufficiently appears that this was a newspaper report of a public proceeding—that it was therefore *prima facie* privileged—and, that being so, that the pursuers were bound to put in issue and to prove that the report was not fair and accurate. Now, I am not of that opinion. I do not consider that any privilege attaches to a newspaper report as such; neither am I aware of any presumption either in law or in fact that a newspaper report is fair and accurate. The privilege attaching to a newspaper report only, I think, arises where the report is fair and accurate, and the fairness and accuracy of the report must be proved, and cannot be assumed; although no doubt when the fairness and accuracy of the report is proved, the privilege becomes an absolute privilege, and is a complete defence to an action. I am therefore of opinion that the pursuers are not bound to take any other issue than the ordinary issue, putting the question whether the report contains false and calumnious statements to their damage.

"That leaves only the question of the necessity of the counter issue, and I do not think that either party pressed seriously for such an issue; and I am very unwilling to introduce into this department of practice a complication for which it is admitted there is no precedent. For my own part, I do not consider that a counter issue is in a case of this kind appropriate. In the general case where a slander is published or circulated the person who publishes or circulates the slander is held to adopt it, and is constructively in the same position as the slanderer. But the case of a fair and accurate newspaper report is different. There the newspaper is neither actually nor constructively the slanderer, and the newspaper's defence, I think, quite fairly arises by way of denial of the pursuers' issue. In that view no counter issue is necessary. The Judge who tries the case will be bound to tell the jury that, if it appears that the report is a fair and accurate report of a public proceeding, the pursuers have failed to prove their issue, and the defenders are entitled to a verdict. I shall therefore approve of the issue in each case as proposed. I understand that the case of the *Scotsman* has been settled, so that I have only to deal with the two Glasgow newspapers."

The defenders reclaimed.

The Court ordered the pursuers to put the innuendo into the record. For this purpose they proposed to alter the last line of condescendence 4 to read as follows:—"These statements were utterly false and calumnious, and falsely and calumniously represented the pursuers to be persons who were in financial difficulties, and had been or were being financed by means of accommodation bills and advances of money by the said Smyth."

This amendment having been allowed, the reclaimers argued—There was no fair case to set before a jury. (1) The words did not bear the innuendo sought to be put upon them by the pursuers. The report must be read as a whole, and when so read it did not mean that the pursuers had been financed by accommodation bills as alleged by them. The words were clearly those of a discredited man. (2) The words were not libellous. It was not libellous to say that at some past time a firm had been in financial difficulties—*M'Laren* v. *Robertson*, January 4, 1859, 21 D. 183. (3) There was no libel here, because the report complained of was a fair report of proceedings in a court of justice, and as such privileged—*Richardson* v. *Wilson*, November 18, 1879, 7 R. 237 (Lord President, 241); *Riddell, &c.* v. *Clydesdale Horse Society*, May 27, 1885, 12 R. 976. (4) The pursuers were bound to raise the question in their issue whether the report was a fair and accurate one or not, and if their issue was allowed as it stood, the defenders should be allowed their counter issue so as to put the matter clearly and sharply before the jury.

Argued for pursuers and respondents—(1) It was a question for the jury to say whether the words would bear the innuendo put upon them. (2) If they would they were plainly libellous, for nothing could be more injurious to a business firm than to say of it that they were in straits, and required to be financed from time to time by accommodation bills. (3) A counter issue was entirely out of place. What the defenders sought to accomplish by it ought to be left to the direction of the Judge at the trial.

At advising—

Lord Justice-Clerk—In this case I agree with the Lord Ordinary that there is no need for a counter issue, and I am of opinion that the issue adjusted by the Lord Ordinary is a sufficient issue for the trial of this case.

I am decidedly against putting into any issue what is not necessary—pressing in points to which the jury's attention is desired to be drawn. All such matters are more properly left to the direction of the Judge.

Lord Rutherfurd Clark—I also think that there is no necessity for a counter issue.

Of course if the notice complained of is only a true report of the proceedings the defenders must necessarily prevail. It would be impossible to hold in that case that the publication is false or calumnious, but that I agree is a matter of direction for the Judge at the trial, and not for the issue.

Lord Lee—I do not differ at all. With regard to not putting anything unnecessary in the issue I entirely concur, but I think we may decide there should be no counter issue, on this ground alone, that the issue for the pursuers, as now framed' is sufficient to raise the question whether the words were falsely and calumniously reported, not merely that they were false and calumnious in themselves. But on the understanding that that question is raised by the issue, it is unnecessary to put in anything more.

The Court approved of the issue and disallowed the counter issue.

Counsel for the Pursuers—Graham Murray—Ure. Agents—Smith & Mason, S.S.C.

Counsel for the Defenders Outram & Company—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders Gunn & Cameron—Comrie Thomson—Wm. Campbell. Agents—J. & J. Galletly, S.S.C.

Wednesday, July 17.

SECOND DIVISION.

DUTHIE'S TRUSTEES *v.* FORLONG.

Succession—Trust—Direction to Hold or Invest—Right of Beneficiary to Immediate Payment.

A lady in her trust-disposition and settlement left the residue of her estate to certain persons, named equally—"The said shares of residue to vest at my death; declaring that the share falling to any of the said residuary legatees who are females, and may be married at the time of my death, shall be held by my said trustees, or invested for their behoof, exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors."

Held that the shares of female married residuary legatees vested in them, and that the trustees were not entitled to retain such shares, the declaration above quoted being void for repugnancy.

Miss Elizabeth Crombie Duthie died on 30th March 1885, leaving a trust-deed of settlement dated 7th July 1877 with several codicils thereto. By one of these codicils of 27th September 1877 Miss Duthie, after directing her trustees to pay certain legacies, bequeathed the residue of her estate to a number of individuals named equally, the said shares of residue to vest at the death of the testatrix, "declaring that the share falling to any of the said residuary legatees who are females and may be married at the time of my death shall be held by my said trustees, or invested for their behoof, exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors."

In winding up the estate a question arose as to the effect of this declaration regarding the shares of the residue falling to the females who were married at the time of the death of the testatrix, and a special case was accordingly presented.

The second party, who was one of such female residuary legatees, maintained that it imported an absolute right of fee, which became vested in her, exclusive of the *jus mariti* of her husband, as at the death of the testatrix, and that she was consequently entitled to have the capital sum falling to her at once paid over in cash.

The trustees, who were the first parties, considered that they were not in safety to comply with the demand of the second party, but that they were bound to hold or invest the shares of residue bequeathed to female married legatees for their behoof, and to pay over to them only the annual produce of such shares respectively during the lifetime of the party entitled thereto.

The following were the questions—"(1) Are the parties of the first part entitled or bound to make immediate payment in cash to the party of the second part of the share of residue bequeathed to her under the said trust-deed of settlement and codicils? Or (2) Are the parties of the first part bound to hold the capital of the said share of residue until the death of the second party, paying to her in the meantime the annual proceeds, and on her death to make over the capital to her heirs or executors?"

Argued for the first parties—The case was ruled by the recent case of *Christie's Trustees*, July 3, 1889, *supra* p. 611. It was true that there was here an alternative given to the trustees, either of holding or of investing the shares of married female residuary legatees, but the alternative of investing was ruled adversely to the second party by the former case of *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858. There was here no direction to pay, nor anything that could be construed into a direction to pay, and consequently the case was not within the rule of *Allan* v. *Allan's Trustees*, December 12, 1872, 11 Macph. 216, and the recent case of *Jamieson* v. *Lesslie's Trustees*, May 28, 1889 *supra* p. 538.

The second party was not called on.

At advising—

Lord Justice-Clerk—I think that this case is ruled by that of *Jamieson*, not that of *Christie*.

Lord Young—I am of the same opinion. I think that this lady must have her money, but I am not surprised that the trustees should have brought this case into Court. Indeed it was their duty to do so. It is a very nice question. A very small difference of expression determines the point whether a direction intended for the benefit of the proprietor shall be disregarded as repugnant to the truster's intention, or whether it is operative and may be carried out. If the property is given to anyone, any direct mode of dealing with it would generally be void for repugnancy. It is generally repugnant to the benefit given. On the contrary, there are cases, of which *Christie's* may be taken as an example, although not by any means a perfect one, where the giver may constitute a protection by keeping the fund out of the hands of the object of his bounty, and putting it under the care of managers of his own appointment. There are such cases in which it would certainly be operative, but here there is no operative restraint upon the proprietor. I think the property is here distinctly and absolutely given, and that the restriction as to exclusion of *jus mariti* and preserving the capital for the beneficiaries' own heirs and executors are not operative, and cannot be given effect to. They are repugnant to the gift proper.

Lord Rutherfurd Clark and Lord Lee concurred.

The Court pronounced this interlocutor:—

"Answer the first of the questions stated in the case in the affirmative, and the second question in the negative: Find and declare accordingly."

Counsel for the First Parties—Dundas. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Second Party—Jameson—Fraser. Agent—F. J. Martin, W.S.

Thursday, July 18.

SECOND DIVISION.

(WHOLE COURT.)

HARINGTON STUART *v.* HAMILTON.

Superior and Vassal—Non-Entry—Casualty—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94)—*Composition—Relief.*

John Hamilton of Rodgerton, who was entered with the superior, in 1804 disponed these lands to James Hamilton, who, when summoned to enter, tendered the heir of the disponer, John Hamilton of Greenbank, who was infeft on a precept of *clare constat*. James Hamilton died in 1854, leaving a settlement of the lands in favour of James Dunlop Hamilton, the second son of John Hamilton of Greenbank, and the trustees under the settlement when called upon to enter tendered the heir of the last entered vassal, John Hamilton junr. of Greenbank, who was infeft on a precept of *clare constat*.

John Hamilton junr. conveyed the lands with an *a me vel de me* holding to his brother James Dunlop Hamilton, who held base of his brother down to the passing of the Conveyancing Act 1874. John Hamilton junr. died in 1877. James Dunlop Hamilton died in 1886, leaving a settlement of the lands in favour of his brother William Dunlop Hamilton, who was infeft thereon, and who was the heir-at-law both of the disponer and of John Hamilton junr., the last entered vassal who paid a casualty.

In an action against him by the superior—*held*, by a majority of the whole Court (following the case of *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738), that a new investiture came into existence with the implied entry of James Dunlop Hamilton in 1874, and that the defender was liable in a casualty of composition.

Robert Edward Stuart Harington Stuart of Torrance, Lanarkshire, as superior of the lands of Wester Rodgerton and Highflatt in that county, sued William Dunlop Hamilton, his vassal in these lands, for payment of a casualty of composition in consequence of the death on February 27, 1877, of John Hamilton of Greenbank, Mearns, the vassal last vest and seised in the lands.

The late John Hamilton of Rodgerton, grandfather of the defender, and holding the lands in question of and under the pursuer's predecessors as their vassal, disponed the lands to James Hamilton, writer in Glasgow, by a disposition dated 27th January 1804. James Hamilton was never infeft on the said disposition. When called upon to enter with the pursuer's immediate predecessor as his superior he induced the eldest son of John Hamilton of Rodgerton, John Hamilton of Greenbank, Mearns, to enter in his stead as heir-at-law, and he was infeft upon a precept of *clare constat* in 1838.

James Hamilton died in 1854, leaving a trust-disposition and settlement dated 19th July 1854, the purpose of which, so far as regarded these lands, was to convey them to James Dunlop Hamilton, writer in Glasgow, the second son of John Hamilton of Greenbank. John Hamilton being also deceased, the trustees acting under said trust-disposition and settlement, instead of completing a feudal title in their own persons, induced his eldest son and heir-at-law, the late John Hamilton the second of Greenbank, to enter in the lands. He accordingly obtained a precept of *clare constat*, and was infeft thereon.

John Hamilton second of Greenbank, as heritable proprietor feudally vested in the lands, and in implement of the first named disposition, and of James Hamilton's trust-disposition and settlement, conveyed the lands to his brother James Dunlop Hamilton by a disposition dated 8th and recorded 9th August 1860.

James Dunlop Hamilton died upon the 31st May 1886, leaving a general disposition and settlement in favour of William Dunlop Hamilton, his brother, the defender, dated 28th May and recorded 8th June 1886. The defender was infeft in the lands conform to notarial instrument in his favour.

The pursuer averred that in virtue of the disposition by John Hamilton to James Dunlop Hamilton in 1860, and of the provisions of the

Conveyancing (Scotland) Act 1874, James Dunlop Hamilton had an implied entry in the lands, subject to payment of the casualty of composition due by him to the superior as a singular successor of the disponer John Hamilton when it should become exigible on the death of the latter. The casualty became exigible on the 27th day of February 1877, being the date of the death of the said John Hamilton second of Greenbank. The pursuer further maintained that in virtue of the defender's title, and of the provisions of the Conveyancing (Scotland) Act 1874, he was entered vassal with the pursuer in the lands, and was liable in payment of the casualty which had become due.

The defender explained that at the date of the disposition in 1860, and down to the death of John Hamilton in 1877, James Dunlop Hamilton was the heir-at-law of John Hamilton, his brother, and that the casualty payable by him was the casualty of relief exigible from him as John Hamilton's heir. He further explained that he was the heir-at-law both of John Hamilton and James Dunlop Hamilton, his brothers, and that he was only liable in the casualty of relief.

He pleaded—"(3) The pursuer is not entitled to claim a casualty of composition from the defender, in respect that the latter is the heir-at-law of the said James Dunlop Hamilton, and also of the said John Hamilton, and as such is liable only in the casualty of relief."

On 20th December 1887 the Lord Ordinary (KINNEAR) sustained this plea, and assoilzied the defender.

"*Opinion.*—The question in this case is whether the casualty which is admittedly payable to the pursuer is relief or composition.

"The defender's grandfather John Hamilton of Rodgerton was duly entered with the pursuer's predecessor as his immediate superior. On his death in 1838 his eldest son and heir-at-law John Hamilton of Greenbank completed his title and entered in his place by infeftment on a precept of *clare constat*. On his death in 1855 his eldest son John Hamilton the second of Greenbank was entered in like manner by infeftment on a precept of *clare constat*. This second John Hamilton of Greenbank died on the 27th of February 1877. The casualty which the pursuer now seeks to enforce is that which became due upon his death; and the ground in fact, as set forth in the summons, is that he was the vassal last vest and seised in the estate. I think this is a correct statement of the true ground of action, because although there have been two implied entries since that of John Hamilton, no casualty has been paid in respect of either, and in terms of the statute they are not pleadable in defence to this action. For the purpose of the present question, therefore, between the superior and the proprietor now infeft, John Hamilton the second must be considered as the last entered vassal.

"The defender, who is now entered by virtue of the Conveyancing Act, is the brother and heir-at-law of John Hamilton the last vassal. But he is not entered in that character, but by virtue of a singular title derived from his grandfather John Hamilton of Rodgerton. The grandfather had disponed the estate to James Hamilton, who was never infeft, but who disponed to trustees with directions to convey to James Dunlop Hamilton, the second son of John the first of Greenbank. The trustees completed no feudal title, but John Hamilton the second of Greenbank having entered, as already explained, in 1855, he, in implement of his grandfather's disposition and of the trust-disposition, conveyed the estate to his younger brother James Dunlop Hamilton, by a disposition which was recorded in the Register of Sasines on the 9th of August 1860. On the passing of the Conveyancing Act of 1874 the mid-superiority which was left in the elder brother John the second was extinguished, and James Dunlop Hamilton was entered with the superior by force of the statute.

"No casualty was paid or demanded during his life, and on his death in 1886 he left a disposition and settlement in favour of the defender, who is now infeft, and who is heir-at-law both of John Hamilton, the last vassal duly entered under the old law and of James Dunlop Hamilton, the last vassal entered by force of the statute.

"In this state of the title the defender maintains on the authority of *Mackintosh* v. *Mackintosh*, 18 R. 692, that the casualty exigible from him is not composition but relief, and I think his plea is well founded. It is said that the case of *Mackintosh* is inapplicable, because in 1860, when the title, confirmed by the Act of 1874, was completed, James Dunlop Hamilton could not have been entered as heir to John because John was still in life. But the claim cannot be determined by reference to the state of rights in 1860, because at that time there was no casualty due. The lands were not in non-entry, and the action for casualties under the Act of 1874 is competent only when, but for the Act, the superior would have been in a position to sue an action of declarator of non-entry against his vassal's successor. If such an action had been brought in 1877 against James Dunlop Hamilton he would have been entitled, upon the principle established in *Mackintosh* v. *Mackintosh*, to say that he was in fact the heir of the last vassal, and therefore liable only for relief notwithstanding that he had already completed a title as a singular successor. It is said that the decision applies only where the vassal is in a position to enter as heir, although he has chosen to complete his title as a singular successor. But this is not consistent with the judgment. Both in the case of *M'Kenzie* and of the *Marquis of Hastings* it would have been impossible for the disponee, who was in fact the heir of the last investiture, to effect an entry in that character. The Lord President points out in explaining the case of *M'Kenzie* that 'the form of entry was necessarily that applicable to a singular successor or disponee. Nevertheless the Court decided that he was entitled to the full benefit of his character as heir, and must be entered on payment of relief duty only.'

"This would not aid the defender if he also were not the heir of the former investiture. But he is in fact the heir-at-law of both his brothers, and the action is brought against him in accordance with the provisions of the statute as the successor in the lands of the elder brother, who was the vassal last vest and seised in these lands, and whose death gives rise to the claim for a casualty.

"The fallacy of the pursuer's argument appears to me to lie in the assumption that a

casualty becomes exigible in respect of every implied entry, and therefore that its amount must be determined in the same way as if the vassal had demanded a charter of writ of confirmation under the old law at the date of his infeftment. It becomes exigible under the statute in respect of the lands being in non-entry, or more correctly, in respect of their being in the position which under the old law would have entitled the superior to a declarator of non-entry; and it arises against the person who is then the last vassal's successor in the lands whether he is infeft or not. No implied entry is pleadable in defence, and therefore the intermediate entry of James Dunlop Hamilton creates no obstacle to the pursuer's demand against the defender for a casualty which became due in consequence of the death of the last entered vassal in 1877. But the amount of the casualty must depend upon the relation of the defender to this last vassal. If he is a singular successor only he must pay composition. If he in fact unites the characters of singular successor and heir he is liable only for relief whatever be the form of title upon which he is infeft."

The pursuer reclaimed.

After hearing counsel the Second Division remitted the case to the whole Court on minutes of debate.

The reclaimer argued—"In view of the facts the question for decision is not, it is thought, materially different from what it would have been if raised with James Dunlop Hamilton in 1877. The defender cannot, it is thought, claim to be in a better position than James Dunlop Hamilton. The pursuer, on the other hand, cannot contend that, if relief duty had been the appropriate casualty in 1877, composition is now payable in respect of the subsequent *mortis causa* transmission from the deceased James Dunlop Hamilton to his heir-at-law. Such being the condition of the question the pursuer contends that the casualty payable was clearly a composition. In 1874, when James Dunlop Hamilton, infeft on a singular title, became by force of statute entered with the superior, John Hamilton (2), his brother, was still in life; James could not then have served heir to him. He was merely at best his heir-presumptive—a very different relation from that of heir-apparent. Propulsion of a tailzied fee to an heir-presumptive is incompetent, and would doubtless infer an irritancy, as an alienation of ward lands to such heir would have inferred the casualty of recognition. By accepting an *inter vivos* conveyance an heir-presumptive does not incur the passive title *præceptio hæreditatis—Craigie* v. *Craigie*, December 4, 1817, F. C.; Stair ii. 11, 18; Ersk. ii. 5, 16. 'A disposition by one brother to another, or to a brother's son, the disponer for the time having no children, will not infer this title'—Stair iii. 7, 5; Ersk iii. 8, 90. The necessary result of the implied entry of James Dunlop Hamilton was to evacuate, once and for all, the mid-superiority which stood in John Hamilton's person. In other words, the implied entry of 1874 operated a change of the investiture. A new investiture was created, excluding the issue of John Hamilton, *per* Lord Brougham in *Stirling* v. *Ewart*, 3 Bell's App. 240. So also the law was stated by Baron Hume. Accordingly, when John Hamilton died in 1877, his brother James Dunlop Hamilton could no longer have served heir to him in the lands. He could no longer connect himself with the old investiture, which had become extinct in the lifetime of his brother. There was no estate left in the deceased to which he could have served. He could not, in fact, resort to the device familiar under the law as it stood prior to 1874, and which had been successfully resorted to in the previous stages of the present history, viz., that of tendering himself to the superior for entry as the heir of his brother, on payment of relief duty. If therefore this action had been raised in 1877, after the death of the said John Hamilton, the casualty payable by James Dunlop Hamilton, who was then alive, would, it is submitted, have been a year's rent of the lands. And the case may, as has been said, be treated as if action had been taken in 1877. . . . With regard to the Lord Ordinary's ground of judgment—It is true that by the statute implied entries are not pleadable in defence; but it is submitted that the converse, which is involved in the Lord Ordinary's reasoning, is not legally tenable, viz., that the pursuer may not (to the effect of extinguishing all prior investitures and preventing recourse to any extinguished investitures for the purpose of defeating the superior's claims) regard or plead upon implied entries of persons between the vassal who last paid a casualty and the defender in the action. . . . The restriction of the superior's full right goes no further than this, that his right to demand payment is postponed till the death of the vassal who last paid a casualty. It seems undoubted that a fee is filled by virtue of an implied entry, and that no change in the feudal relations of the superior and vassal necessarily takes place upon the death of the person who last paid a casualty—the period to which the payment of the casualty was postponed has arrived, and that is all. Where there have been intervening implied entries, one or more, no feudal relation whatever continues thereafter to subsist between the person sued and the vassal who last paid. The first implied entry swept away every vestige of estate or interest which the vassal who last paid had in the lands." . . . The pursuer claimed that the cases he relied on went to establish that "the effect of the implied entry introduced by the Act of 1874 is to extinguish the barren mid-superiority, so as to make it impossible thereafter for the person so entered to serve heir to the mid-superior, even though this should result in his having to pay a higher casualty to the superior than if the Act had not been passed. In other words, the cases establish that an implied entry is the same to every legal effect as an express entry by charter or writ of confirmation under the old law and practice, subject to two equitable restrictions (1) the implied entry is not to entitle the superior to demand his casualty sooner than he could have done under the old law, and (2) it is not to be pleadable by the vassal in defence to the superior's claim for a casualty—*Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738. Bayley was in a position precisely similar to that occupied by James Dunlop Hamilton in 1877, when the mid-superior, to whom (but for his implied entry in 1874) James Dunlop Hamilton might have served heir, died, and the superior's

claim for a casualty emerged—*Rossmore's Trustees* v. *Brownlie*, November 23, 1877, 5 R. 201; *Lamont* v. *Rankin's Trustees*, February 28, 1879, 6 R. 739 . . . After the case of *Lamont* v. *Rankin's Trustees* had been decided by the Court of Session, but before the appeal came on for hearing in the House of Lords, an interlocutor was pronounced by Lord Curriehill, as Lord Ordinary, in a case of *Sturrock* v. *Carruthers' Trustees*, July 15, 1879, not reported, to which his Lordship added an elaborate and learned opinion. The case of *Sturrock* did not, as regards the point now in question, go to the Inner House, but the opinion of Lord Curriehill was laid before the House of Lords at the hearing of the appeal in *Lamont's* case, and is referred to in the judgments of the Lords. The appeal in the case of *Lamont* v. *Rankin's Trustees*, February 27, 1880, 7 R. (H. of L.) 10, was unanimously dismissed by the House of Lords—See also the opinion of Lord Shand in *Mounsey* v. *Palmer*, 12 R. 236, 246. The result of the decision in each case was to subject the defender in a singular successor's composition. The principle of law involved in all the decisions seems to be that the vassal once infeft, and impliedly entered on a singular title, under circumstances inferring liability for a singular successor's composition, if for some special reason he had then found it necessary to tender a casualty, is liable to pay a composition when the superior's claim emerges, notwithstanding that he may in the meantime have become the heir-at-law of the last person who paid a casualty. Applying this principle to the present case the pursuer submits that the decisions establish that James Dunlop Hamilton, infeft on a singular title in 1860, and impliedly entered with the superior in 1874, could not on his brother's death in 1877 have evaded payment of a composition by pleading that he had then become the heir-at-law of the deceased. It will not serve a vassal to plead merely that he is heir-at-law of the person who last paid a casualty—in order to his claiming successfully the privileges of an heir he must be able to point to an investiture in respect of which a casualty has been paid, subsisting at the time of his succession, and to show that, by virtue of that investiture, he is the heir, in the lands, of the person who last paid a casualty. The question is entirely one of investiture. A complete stranger in blood to the last entered vassal is entitled to be entered on payment of relief duty provided he be heir under an enfranchised investiture—'Where a proprietor entails his lands the superior is not entitled to the composition of a year's rent from every successive heir of entail who is not heir of line to him who stood last infeft, on pretence that he is a singular successor. The heir of the last investiture cannot be called a singular successor'—Ersk. ii. 7, 7; see also Lord Brougham in *Stirling* v. *Ewart*, 3 Bell's App. 242. The converse of this doctrine holds equally true—if the defender is not heir of an enfranchised feudal investiture subsisting for the time he must pay composition as a singular successor. If the above principle of law be not sound, the defender Mr Brownlie (in *Rossmore's* case) or the trustees (defenders in *Lament's* case) might have escaped payment of a composition by disponing to the heir, and obtaining him infeft, and so impliedly entered, on his disposition; while in the case of *Ferrier's Trustees*, the defender George Bayley would have been entitled to insist *de plano* on his casualty being limited to a relief duty, on the ground that he was the heir-at-law of his deceased uncle. . . . Much reliance is placed by the defender and by the Lord Ordinary on the recent case of *Mackintosh* v. *Mackintosh* (the *Dalmigavie* case), March 5, 1886, 13 R. 692, as an authority, to the effect that the amount of the casualty must depend on the relationship of the vassal to the person who last paid casualty. The pursuer submits that that case decides no more than that the law prior to 1874, viz., that the superior was bound to receive, on payment of an heir's relief duty, the heir of investiture claiming an entry by confirmation, still holds good as regards such heir's implied entry by confirmation. . . . The implied entry in *Mackintosh's* case operated no change in the investiture. The investiture was in favour of the heirs whomsoever of Æneas Mackintosh. The testamentary disposition which came into operation and was impliedly confirmed after the death of Æneas Mackintosh was simply a disposition in favour of those heirs whomsoever. It would have been a different matter if Æneas Mackintosh had by an *inter vivos* deed disponed to his heir-presumptive and his heirs whomsoever and that disposition had been impliedly confirmed in his lifetime. In that case there would have been, as in the present case, a change of investiture, and composition would certainly have been due. . . . It is respectfully submitted that the cases of *M'Kenzie*, July 4, 1777, M. App. Sup. and Vassal, No. 2, and of *Marquess of Hastings* v. *Oswald*, May 27, 1859, 21 D. 871, do not help the defender's argument in this matter. In both these cases the vassal was an heir of entail. In a question, therefore, with the succeeding heirs of entail, he was no doubt in a sense bound to make up title, as was done, in conformity with the entail. But with this the superior had no concern. As between the superior and vassal the latter might quite well, had he chosen to do so, have made up title by service instead of under the entail, and indeed had he done so, and unchallenged possession of the estate for the prescriptive period had followed, the fetters of the entail might have been worked off, and the estate come to be held in fee-simple—*M'Dougal* v. *M'Dougal* (*Mackerston* case), 1739, M. 10,947; *Earl of Glasgow* v. *Boyle*, January 28, 1887, 14 R. 419, and cases there."

The respondent argued—"Two dates stand out as of chief importance, namely, 1877 and 1886. In 1877 John Hamilton second of Greenbank died. In the words of the pursuer's summons he was the vassal last vest and seised in the estate of Rodgerton. In 1886, again, the succession to the estate opened to the defender William Dunlop Hamilton. The defender is the heir-at-law of both his brothers—John Hamilton second of Greenbank and James Dunlop Hamilton—and he proposes to submit that it does not affect his claim in the present case which of these dates is taken for the purpose of ascertaining the extent of his liability to pay casualty to the pursuer. Under the precept of *clare constat* granted by the *curator bonis* of Miss Christian Anne Stuart of Torrance in favour of John Hamilton second of Greenbank dated 23rd February 1855 there is

contained this obligation—'And the heirs of the said John Hamilton, doubling the said feu-farm duty the first year of their entry to the said lands of Wester Rodgerton.' The defender is the heir of the said John Hamilton, and as such has always been willing to pay to the superior the casualty prescribed in the above precept. . . . The defender prefers to consider the question first, on the footing that there had been no intermediate implied entry. As already pointed out, this is the footing on which the summons proceeds. The declaratory conclusion narrates that John Hamilton second of Greenbank was the vassal last vest and seised in the lands, and seeks to make the defender liable in the casualty payable in respect of his death. The summons makes no reference to the intermediate implied entry of James Dunlop Hamilton but correctly connects the defender immediately with the vassal last vest and seised. The form adopted by the pursuer is that contained in the Schedule B of the Act, and its correctness is strongly shown by the decision in the case of *Mounsey* v. *Palmer*, 12 R. 236. . . . The pursuer founds on the terms of the 4th section of the Conveyancing Act 1874, but the defender submits that the pursuer's claim does not receive support from any of the four sub-sections into which that section is divided. The 1st sub-section provides for the abolition of renewals of investiture. By the 2nd sub-section it is provided that infeftment shall imply entry with the superior. This implied entry is to be 'to the same effect as if such such superior had granted a writ of confirmation according to the existing law and practice . . . but such implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu-right of the lands, or in the last charter, or other writ by which the vassal was entered therein.' The pursuer assumes that confirmation, according to the old law and practice, necessarily inferred, first, a title which was not only in form but also in substance and effect a singular title; and second, the payment of composition. This is a mistake. For example, it sometimes happened that a father disponed the family estate *inter vivos* to his eldest son. In such a case the son held what was in form a singular title, but if he went to the superior to have it confirmed he, being the heir, paid only relief duty. In short, the question between payment of relief and composition depended not on the form of the title, but on whether the person proposing to enter was or was not the heir of the previous vassal. This principle was the ground of decision either express or necessarily implied in the cases to be afterwards referred to of *M'Kenzie* v. *M'Kenzie*, 1777, M. App. *voce* Superior and Vassal, No. 2; *Brown* v. *Magistrates of Musselburgh*, 1804, M. 15,038; *Stirling* v. *Ewart*, 1344, 4 D. 684, *per* Lord Moncrieff, p. 735; *Marquess of Hastings* v. *Oswald*, 1859, 21 D. 871; and *Mackintosh* v. *Mackintosh*, 1886, 13 R. 692. By the 3rd subsection it is provided that 'such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties, which may be due or exigible in respect of the lands at or prior to the date of such entry.' The effect of this section is to preserve entire the rights and remedies previously competent to the superior, so far as the same may not have ceased to be operative in consequence of the provisions of the Act or otherwise. The pursuer, however, seeks to read this sub-section and the other sub-sections as if his rights were thereby enlarged. There is no warrant for any such construction of the Act. By the fourth sub-section, in place of the old declarator of non-entry, it is provided that the superior may raise against the successor of the last vassal 'an action of declarator, and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action.' In this case the defender is not seeking to plead either his own implied entry or that of his predecessor James Dunlop Hamilton in defence to the action. But he objects, as will presently appear, to the pursuer founding on James Dunlop Hamilton's implied entry with the view of making the defender liable in payment of composition rather than relief. Under this sub-section the point of time to be considered is the period when the action is raised, and the superior's right to relief or composition must be determined by the relation which the person sued bears to the vassal who has last paid. The standing investiture, which alone is known to the superior, is that of the last vssal. Now, in the present case, the last vassal was John Hamilton second of Greenbank, and the defender is admittedly his heir. The defender submits therefore that he is bound only in payment of relief. Turning now from the recent Act, it is necessary to consider what was the effect of a writ of confirmation according to the law and practice in existence in 1874, when the Act was passed. Was it the law and practice that in every case a writ of confirmation involved payment of composition, or was it not rather the law and practice that in each case, notwithstanding the form of the entry, the casualty payable depended on the relation between the person seeking entry and the previous vassal; relief only if there existed the relation of ancestor and heir between them, and composition if there was no such relation? This precise question was very recently before the First Division of the Court in the case already mentioned of *Mackintosh* v. *Mackintosh*, March 5, 1886, 13 R. 692, following the cases of *Mackenzie*, M. App., Superior and Vassal, No. 2; *Marquess of Hastings*, 21 D. 871, and the *Magistrates of Musselburgh*, M, 15,038, therein referred to. In the case of *Mackintosh*, as in the present case, there was an implied entry on what was *ex facie* a singular title. In *Mackintosh's* case the pursuer maintained that 'the defender was entered on a singular title, and that could not be undone. If the heir was to claim an entry on payment of relief he must come in that character, but the defender could never again assume that character. . . . There was nothing here now for the heir to take up.' That argument was repelled in *Mackintosh's* case . . . The defender does not in any way question the decision in the cases of *Rankin's Trustees* v. *Lament*, and *Rossmore's Trustees* v. *Brownlie;* he only disputes their application to the present case. In both these cases the question was whether proprietors who had made up titles which were not only in form but also in substance singular titles, were en-

titled to put forward the heir of the last entered vassal for entry with the superior. If they could have done so the heir would have taken up a mid-superiority, and they would have held from him as their mid-superior. But it was held both in the Court of Session and in the House of Lords that the effect of an implied entry under the Conveyancing Act of 1874 was to extinguish the mid-superiority so that there was nothing for the heir to take up, and no means therefore for interposing him or anybody else between the superior and the two proprietors. But in this case the defender does not propose or desire to interpose any person, or to shelter himself behind any person. He is content to meet the superior face to face, if only the superior will recognise him in his true character, namely, that of heir. The defender therefore submits that even if James Dunlop Hamilton, had the action been raised against him, would have had to pay composition on account of his title in 1860 having been made up at a time when he was not in the proper sense his brother's heir, it is clear that the defender is liable only in relief, the true and only question under the Act being what is the defender's relation to John Hamilton, the last entered vassal. So far, the case has been dealt with as if there had been no intermediate implied entry in the person of James Dunlop Hamilton. It remains to consider whether the implied entry effected by him can be treated as in any way varying the liability of the defender. The pursuer maintains that the implied entry of James Dunlop Hamilton must be taken into consideration, and that his implied entry enables him to distinguish the present case from that of *Mackintosh*, and to assimilate it to that of *Ferrier's Trustees* v. *Bayley*, on which he founds. But in that case the beneficial interest in the estate had passed to the defender's father, the son-in-law of the previous proprietor, and not his heir-at-law; in this case no stranger to the original destination has ever had a beneficial interest in the estate. In this case there has been no instance of a proper singular successor, because the defender, the heir of James Dunlop Hamilton, was infeft on the settlement of James Dunlop Hamilton, who again was the heir of John Hamilton the last entered vassal. But in truth the question raised in this case and in the case of *Mackintosh* was not brought under the notice of the Court in the case of *Ferrier's Trustees*. The best proof of this is that neither in the opinion of the Lord Ordinary nor in the opinions delivered in the Second Division are the cases of *Mackenzie* and the *Marquess of Hastings* mentioned. The sole question was whether George Bayley could enter to a mid-superiority. The Court thought it sufficient to hold that the defender's infeftment had destroyed the mid-superiority, which it was therefore a legal impossibility for him to take up. They did not consider the question whether the prior investiture was thereby affected. The defender therefore submits that if the question had arisen under a claim made against James Dunlop Hamilton at any time between 1877 and his death in 1886 he would have been clearly entitled to have escaped with payment of relief duty. If so, it necessarily follows that the defender, who is the heir-at-law of James Dunlop Hamilton, and also the heir-at-law of John Hamilton second of Greenbank, is not bound in any higher payment. If the question be taken as at 1877, then the defender is entitled to found upon the fact of his relation to James Dunlop Hamilton as his heir, and of James Dunlop Hamilton's relation as heir to John Hamilton, on the principle *heres heredis est meus heres*. If it be taken as at 1886, then at that date the defender was himself the heir of John Hamilton.

The consulted Judges returned the following opinions:—

Lord President—The facts of this case are few and simple. Prior to 1860 John Hamilton was owner of the *dominium utile* of the lands in question, and was entered with the superior. In 1860 John Hamilton disponed to his brother James, *on a me vel de me* holding, and James took infeftment but never was entered with the superior, and held base of his brother John down to the passing of the Statute of 1874. Between 1860 and 1874 therefore there were three estates in the lands—the pursuer's estate of superiority, John Hamilton's estate of mid-superiority, and James Hamilton's *dominium utile*. But after the passing of the statute there were but two estates—the pursuer's estate of superiority and James Hamilton's estate of *dominium utile*—and between the owners of these two estates there existed the direct relationship of superior and vassal, John Hamilton's estate of mid-superiority being extinguished *vi statuti*. In these circumstances the pursuer as superior became entitled to a casualty (composition or relief) for the entry of a new vassal, but was precluded by a clause of the statute from demanding payment until the death of his last-entered vassal, John Hamilton, the owner down to 1874 of the mid-superiority. James Hamilton, who had been the entered vassal of the pursuer in the *dominium plenum* since 1874 died in 1886, leaving a settlement of the lands in favour of his brother William Hamilton the defender, who took infeftment, and thus became and is now the entered vassal of the pursuer.

The right to the casualty which accrued to the superior in 1874 on the implied entry of James Hamilton has never been paid, nor has the defender paid any casualty in respect of his entry, and consequently a casualty is now demanded from him.

The only question is, whether the pursuer as superior is entitled to a composition or to relief duty only?

As regards the facts, this case is admitted to be on all fours with *Ferrier's Trustees* v. *Bayley*, 4 R. 738. *Mutatis nominibus* the facts are identical.

In that case Lord Curriehill found the defender, who corresponds to the present defender William Hamilton, liable in a composition, and the Second Division by a majority adhered to his judgment. This judgment has been recognised as settling the law in several subsequent cases, and in particular in *Rankin's Trustees* v. *Lamont*, which was appealed to the House of Lords. The noble and learned Lords who advised the House, in affirming the judgment of this Court, reviewed all the cases on the subject, and determined, after the fullest consideration, that the rule adopted in one and all of them was sound law.

But I understand the Lord Ordinary and the Judges who agree with him to say, that in *Ferrier's Trustees*, as distinguished from the other cases which followed, the heir of the last vassal tendered for entry with the superior was the individual who had been impliedly entered under the statute, or, in other words, that he was at once proprietor of the *dominium utile* and heir of the deceased owner of the extinguished mid-superiority. This is quite true, but the fact was prominently in view of the Court in giving judgment, and the distinction was clearly stated by Lord Curriehill who thought the case all the more important, because if a person in the position of the defender were entitled to offer *himself* as heir, it would be very difficult to refuse to another vassal impliedly entered the right to offer the last vassal's heir for entry though the last vassal was a stranger to him. In like manner Lord Ormidale, one of the Judges of the Second Division who affirmed Lord Curriehill's judgment, very pointedly states that "there is no longer any room or opportunity for the defender tendering himself or any one else as heir to a mid-superior whose right and title are entirely gone."

It seems to be thought that this distinction was not sufficiently pressed on the Court. But I am not prepared to disparage the authority of a careful and well-considered judgment on the ground that the case was inperfectly argued.

I am therefore of opinion that we are bound to alter the Lord Ordinary's judgment on the authority of *Ferrier's Trustees* v. *Bayley*.

But assuming the question to be open I am of opinion that the pursuer is entitled to the composition for which he sues.

When the Act of 1874 came into operation, James Hamilton, who had previously held of his brother John as his immediate superior, was at that date converted into the vassal of the pursuer, and that immediately by the operation of the statute. The postponement of the term of payment of the casualty did not and could not keep alive the estate of mid-superiority in John Hamilton, which was immediately extinguished. James was no doubt heir-presumptive of his brother John, but he could take nothing in that character while John was in life; and on John's death in 1877 John had no estate in the lands in question to which James could succeed. He was heir so far as regards propinquity of blood, and he might have served heir in general to John, but there was no estate which he could take up by special service, and if he had asked the superior to enter him by precept of *clare constat*, he would have been met with the conclusive answer that he was already entered with the superior *vi statuti*, and could not be entered a second time, and in a different character.

The existing investiture prior to 1874 was created by an entry obtained by the defender's grandfather in favour of himself and his heirs general, and the estate thereafter passed through a series of heirs in terms of the destination, which was enfranchised by the superior when he entered the defender's grandfather. John Hamilton, who died in 1877, was the last heir who held under that investiture, for he had been deprived of the estate before his death by the operation of the statute, and nobody could take up the succession as heir to him, or (consequently) as heir of investiture. A new investiture therefore necessarily came into existence with the implied entry of James Hamilton in 1874 requiring to be enfranchised, which of course can only be done on payment of a composition.

The Lord Ordinary's judgment proceeds very much on the supposed application to the present case of the judgment of the First Division in the case of *Mackintosh* v. *Mackintosh*. But the principle of that judgment is in my opinion entirely inapplicable here. It was settled law before the Statute of 1874 that if the person entering with the superior was the heir of the existing investiture, he was entitled to be entered on payment of relief only, although he had made up his title to the estate in a form properly applicable to a singular successor. The form of his title was held not to deprive him of his character of heir. The same rule was in the case of *Mackintosh* held to be applicable in implied entries under the Statute 1874. But the important fact in that case was that the person impliedly entered was the heir of an existing investiture, and might have served heir in special under the investiture. Mr Æneas Mackintosh, the last entered vassal, made a *mortis causa* disposition of his estate in favour of his nephew Mr Keir, who was one of his two heirs-portioners. Mr Keir naturally made up his title by taking infeftment on his uncle's conveyance, because one-half of the estate he could take only by virtue of the conveyance, and not as heir. But as regarded the other half *pro indiviso*, he held the character of heir of the vassal last entered, and heir of the existing investiture. He was, by taking infeftment on the conveyance, impliedly entered with the superior as disponee, but his character as heir entitled him, according to the judgment, to pay relief duty only as regards one-half *pro indiviso* of the estate which his uncle left him. Nothing occurred in that case to affect the position of the uncle as last-entered vassal and as heir of investiture, and his right as such passed (*quoad* one-half *pro indiviso*) by the operation of the law of succession to the defender as his heir.

The case of *Mackintosh*, for these reasons, appears to me to stand in clear contrast to the present, because it was attended by none of the difficulties arising from the operation of the Statute 1874.

Lord Mure—I concur in the opinion of the Lord President.

Lord Shand—The question in this case being whether the pursuer is entitled to payment of composition, or is only entitled to relief duty, it is essential to bear in mind the rule or principle which determines in the case of each entry with a superior, whether the superior has right to the larger or only to the smaller payment.

That rule may be stated in this way—Where the entry, which before the Statute of 1874 was given by a deed under the superior's hand, was merely a recognition or renewal of the existing investiture, the vassal was only liable in payment of relief duty; but where the superior was called upon to enfranchise a new investiture—that is to say, to grant a deed which not merely recognised and admitted the heir of the existing investiture, but admitted a singular successor—then the new vassal, as the condition of the

enfranchisement of this new investiture, was liable to pay a composition of a year's rent of the subjects.

The Statute of 1874 did away with the necessity for writs or charters by progress, for the infeftment of an heir or purchaser of any property held under a superior was thereby declared to be duly entered with the superior, to the same effect as if the superior had granted a writ of confirmation. But that statute made no change on the rule of payment I have just stated. It is not maintained by anyone that if the entry of the vassal which results from his taking infeftment is an entry not under the investiture which the superior last sanctioned or renewed, but is a new investiture, the vassal can only be required to pay relief duty. Composition in that case must be paid as the appropriate condition or price of the confirmation, or it may be of the creation of the new investiture. Even in the series of cases terminating with that of *Lamont* v. *Rankine's Trustees*, 6 R. (H. of L.) 10, in the House of Lords, no view to the contrary of what has now been stated was suggested. It was not maintained in these cases that if the vassals were unable to get behind the statutory entry with the superior resulting from infeftment they could resist the claim for composition, for the vassals entered were all singular successors. The struggle was entirely to get rid of the effect of the entry by bringing forward the heir of the vassal under the last investiture recognised by the superior, and so to make the payment to the superior that of relief duty only. On that question, the decision of which has an important bearing on the argument in this case, it was held that, after an entry taken by infeftment constituting a new investiture, the vassal could no longer adopt the device or course of bringing forward the heir under the former investiture, either to take any place in the title or to take away the superior's claim to composition and reduce it to a claim for relief.

The decision, then, of this case seems to me to depend entirely on this consideration:—Is the entry which the defender, the vassal, has obtained by virtue of his infeftment, the enfranchisement or recognition by the superior of a new or different investiture from that which the superior last recognised, and in respect of which he obtained payment? If it be, then according to the law, which has not been in any way affected by the statute of 1874, composition is due. If, on the other hand, the entry is only that of an heir under the investiture last recognised by the deed of the superior, then relief duty only is exigible.

The facts are very simple. The position in the title of three persons only requires to be considered.

1. John Hamilton (called second of Greenbank) was the last entered vassal in respect of whose entry a payment was made to the superior. He was never the owner of the property, but he had been put forward by the true owner, and had by agreement taken a place in the title in order to save the true owner a payment of composition,—as his father has also come forward on a previous occasion. This John Hamilton, as his father's heir, in February 1855 obtained a precept of *clare constat* from the superior on payment by the true owner of relief duty, and he was infeft in June of that year.

2. John Hamilton in 1860 conveyed the property to his immediate younger brother James Dunlop Hamilton, who was infeft on the conveyance in August of that year. This deed was granted at the request of the true owners of the property, who held the right of property on *de me* holdings, and indeed in implement of certain deeds granted by them, which are narrated in the conveyance, and mentioned in articles 2 and 3 of the condescendence. James Dunlop Hamilton was heir-presumptive only, and of course not heir-apparent of his brother John Hamilton, the last entered vassal. On the passing of the Act of 1874, he became the entered vassal in virtue of his infeftment in 1860. John Hamilton survived till 1877, when the superior's claim to composition or relief duty emerged, although payment has not been demanded or sought to be enforced till recently.

3. In the meantime James Dunlop Hamilton having died in May 1886, leaving a general disposition and settlement in favour of his immediate younger brother William Dunlop Hamilton, he in his turn took infeftment on that deed in August 1886, and so entered with the superior. He is not only the heir-at-law of James Dunlop Hamilton, from whom he derived the property, but it so happens that, as his brother John in 1877 also died without issue, he is heir-at-law also of John, the last entered vassal, who paid for an entry.

These being the facts, the question recurs—Is the entry for which a payment is now demanded that of a successor under singular title—has the superior impliedly recognised and enfranchised a new investiture, or, on the contrary, is the succession that of an heir of the vassal last entered who paid a casualty, and has the superior under the statute merely recognised or renewed the investiture existing when he received the last payment for entry?

The payment became exigible on the death of John Hamilton in 1877, but the demand was not made against James Dunlop Hamilton then, or during his survivance to 1886, and now his brother, the defender, is in the position of vassal infeft. The claim therefore is properly made against him as the proprietor in possession of the lands, and it is so made in respect of his own entry by the infeftment he took. This is, I think settled by the case of *Mounsey* v. *Palmer*, 12 R. 236. It is true that between 1877, when John Hamilton died, and 1886, when James Dunlop Hamilton died, the superior might have claimed a payment from the latter for his entry by infeftment, followed by the Statute of 1874, but he omitted to make that claim, and the entry to be now paid for is that of the defender. The state of the facts was entirely similar in the case of *Mounsey*, in which the opinions were unanimous to the effect that though the superior might have made a claim, for a time, against an intermediate vassal who survived the vassal who had last paid a casualty, yet as another vassal had been entered in consequence of the infeftment he had taken, the claim must be made against him, and as for his own entry.

I have come to the conclusion, differing from the Lord Ordinary, that the defender is liable to the pursuer in payment of composition and not of relief only, for I think it is clear that the claim for a payment is made not in respect of an

entry under the old investiture which the superior had recognised, obtained by an heir taking or entitled to take an entry under that investiture, but in respect of a new investiture which under the statute the superior must be taken as having recognised and confirmed.

The investiture on which the last casualty was paid was in favour of John Hamilton and his heirs, and if James Dunlop Hamilton, the intermediate vassal, had taken the property not by a *de presenti* conveyance in 1860, but by service to John Hamilton, or under his *mortis causa* deed in 1877 when he died—and the defender in his turn had taken the property as the heir of James Dunlop Hamilton—then there would have been a continuance of the old investiture, and the appropriate payment would have been relief duty. But what occurred was quite different. James Dunlop Hamilton did not take as his brother's heir, and was not so entered when the Act of 1874 passed. He was then entered, but he was not then his brother's heir. This is clear, for his brother might have had issue after that date. He was an heir-presumptive only, not an heir-apparent, and the entry he obtained by virtue of the conveyance in his favour, granted in the circumstances already explained, was clearly an entry on a new investiture. From 1874 till 1877, during his brother's lifetime, he possessed the property as an entered vassal, not as his brother's heir to whom he had succeeded, because his brother was still alive, nor as his brother's heir to whom the succession under the existing investiture had merely been propelled, for he was not his brother's heir-apparent during that time. It is therefore, I think, not doubtful that if after John Hamilton's death in 1877 the superior had demanded a payment from James Dunlop Hamilton as for his entry composition would have been due for the change of investiture. It would have been no good answer to the demand to say, John Hamilton having died without issue, it had turned out that James Dunlop Hamilton had on that event become his heir of line. The entry had been obtained in 1874. The investiture then was a new one, and the superior's right to a composition arose from the implied statutory confirmation of that investiture, although he was not entitled to demand payment of that composition "sooner than the death of the last entered vassal." By the fact of entry the new investiture was established and confirmed, and the vassal who had been so entered for three years could not on his ancestor's death thereafter successfully seek to undo the entry he had got as a singular successor, and either in fact or in theory enter as an heir under the old investiture, on payment of a casualty only, as if he had taken the property as his brother's heir of line. Such a proposal or suggestion, if made, could not have been successful, for it would have been open to the same answer on the part of the superior as was made in the series of cases ending with that of *Lamont*, already referred to. In these cases, after the various defenders had been themselves entered under the statute as vassals, they proposed to put forward the heir under the former investiture as willing to enter, and so to revert to the old investiture—or at least to do so in theory—and thus reduce the payment of composition to that of relief. It was held that this proposal was inconsistent with the entry which had been already taken in each case. So by clear analogy it follows that James Dunlop Hamilton on the death of his brother could not present himself as heir of his brother under the old investiture, because from 1874 to 1877 he had been in fact entered on a singular title and under a new investiture.

Then, is the defender in any different position? I think clearly not. He no doubt has taken the estate as the heir of his brother James Dunlop Hamilton, on whose death he succeeded, and if his brother had by a payment of composition, as on his entry, obtained an enfranchisement of the new investiture, then of course as an heir of that investiture the defender would have paid relief only for his own entry. In that case the superior would have received first a payment of composition, and now a payment of relief, in place of the single payment of composition to which I think he is now entitled. But the payment now demanded is the first that is asked since and in respect of the new investiture. The defender cannot plead his character of heir under the old investiture, because the title which his brother James Dunlop Hamilton and he have made up, and of which they have already under their infeftments obtained confirmation precludes this. Indeed, if the view already stated be sound, neither the late James Dunlop Hamilton, nor anyone taking as his heir, could do otherwise under the new investiture after 1874, when it was confirmed by the statute, and so I am unable to see how the defender can now revert to the old investiture, and claim the benefit of a payment of relief only as an heir under it.

In one way, and in one way only, could the payment be reduced to relief, and that is by obliterating from the title as an element in the decision of this question the intermediate conveyance and infeftment in favour of James Dunlop Hamilton, and the superior's confirmation of these effected by the Statute of 1874. If this could be done, then it might be maintained that, looking only on the one hand to the person who was last entered and who paid for an entry, and on the other to the person who is now last entered and from whom a payment is demanded, if the latter should happen to be the heir of line of the former, relief only shall be exigible, even although there have been one or more intermediate transmissions, with infeftments following on transactions of purchase and sale. I understand that if other arguments fail this view is contended for by the defender, who also pleads that the decision in the case of *Mackintosh*, 13 R. 692, enables him to maintain successfully that the mere fact of his entry under a title by conveyance will not preclude him from taking the benefit he can claim in his character of heir, and that the payment demanded will depend on his relationship and character of heir of line of the person who last paid a casualty.

Laying out of view for a moment the case of *Mackintosh*, the contention of the defender would, I think, lead to extraordinary and novel results in the law applicable to casualties—results which it would be most difficult to show that the provisions of the statute have brought about. Take the very case in hand, and suppose that the entries of James Dunlop Hamilton and of the defender had taken place, as they did, not by virtue of the statute, but by charters of confirma-

tion of the infeftments, I apprehend it to be too clear for argument that the pursuer must be entitled to a composition, and if the confirmation had only been asked by the defender of both infeftments at the same time he must have paid the composition. The superior's right would have arisen because of the new investiture confirmed. The only way in which that result could be avoided would have been by not so taking an entry at all. The authorities have now, however, firmly settled that if an entry with its benefits be obtained by infeftment taken it must be accompanied by any disadvantages which attend it, such as the exclusion of the right to bring forward an heir under the former investiture, or (what is the same thing) a person already entered under a new and confirmed investiture seeking to set up his character of heir under the old and sopited investiture so as to reduce the payment of relief to composition.

The argument in favour of the contention that when the question of payment for an entry arises the intermediate entries between that of the person who last paid a casualty and the person against whom the demand is made shall all be disregarded is founded, I understand, on the provisions of the statute, sec. 4, sub-sec. (3), providing that "such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering," and sub-sec. (4) that "no implied entry shall be pleadable in defence" against an action of non-entry and for payment of any casualty exigible at the date of such action. It is argued that the result of these enactments is not only that the superior can make no claim in respect of intermediate entries till the death of the person who last paid a casualty, but that however numerous these entries may be, and even of purchasers on singular title, yet if when the death of the vassal who last paid occurs his heir of line happens to have repurchased the property and become the last person infeft, relief only is due. The contention is said to be supported by the provision that "no implied entry shall be pleadable in defence," and the argument is said to derive some force from the provisions of sub-sec. (4) of sec. 3 of the statute as to the superior's remedy by action of non-entry and for payment of a casualty, and the relative form of summons given in Appendix B of the statute.

What, then, is the meaning and effect of the provision that "no implied entry shall be pleadable in defence" against the action for non-entry and a casualty? Simply this—That the entered vassal when sued shall not be able to plead either his own or any intermediate entry as excluding the claim. He cannot say that he and the other intermediate vassals having been already entered no payment can thereafter be demanded. The clause is one to protect the superior, not to affect him injuriously. If it be said that as he so far obtains advantage by it, because the vassal cannot plead the implied entries, it follows that he cannot on the other hand found on the entries, the answer is, the statute contains a limited enactment, or provision, and there is no warrant for giving to it any effect beyond its clear terms. The words are, "No implied entry shall be pleadable in defence." But it is plain that the superior must be entitled to plead, and necessarily does plead, the defender's own entry where he has taken infeftment, for that entry is the very ground of the superior's claim to the payment of the casualty, which he can enforce by having recourse to the rents. Moreover, after all it does not appear to me that the superior does in any proper sense plead the implied intermediate entry or entries in such a case as this. When he makes his claim the defender answers the demand by saying he is heir of investiture of the last vassal who paid a casualty, but his own titles, which he cannot ignore, show that the formerly existing investiture has been superseded. The heir under the old investiture cannot as such complete a title to the property. A service in special to the last person who paid a casualty could carry nothing, and could never complete a title, and a superior is entitled to require such a service by anyone claiming the character of an heir of investiture—Menzies' Lectures (3rd ed.), p. 814, and authorities there cited. Again, if instead of intermediate entries the defender had taken infeftment on an assigned precept of sasine, and the progress disclosed a new investiture and singular title, in that case the superior without any intermediate entry could certainly demand a composition, because the infeftment confirmed carried out a new investiture.

I attach no importance to any argument founded on the form of the summons appended to the statute, and employed in this case That form properly proceeds on the view that a casualty becomes payable on the death of the last entered vassal who paid a casualty. No one can suggest that "the death of C" in the schedule means the death of an intermediate vassal, although the expression used is, "who was the vassal last vest and seised." The form is quite suitable for the case—it is probably the common one—in which there are no intermediate entries. It might have been better to have added in brackets after the words, "who was the vassal last vest and seised in all and whole the lands of X," such words as ["where there have been intermediate entries, add, 'and who paid the last casualty'"]. But it is not surprising that the schedule should not have entered into the matter with such detail. It would indeed be a very strong proposition to maintain that because the person "C," who did pay the last casualty, is only described as the vassal last seised in the lands (which will be true in most cases), and is not also described as having paid the last casualty, as he did, that therefore the intermediate entries are not to be looked at even as links in the title, or for the purpose of ascertaining whether the vassal against whom the claim is made takes under the old investiture or under a new investiture and a singular title, on the confirmation of which a composition has never been paid to the superior.

The case of *Mackintosh* is clearly distinguishable from the present, and cannot, I think, affect the decision to be now given. In that case the defender had completed his title by taking infeftment, following on a testamentary settlement by his uncle. He was his uncle's heir-at-law as regarded one-half of the lands, and to that extent it was held he was only bound in payment of relief for his entry. But in that case there was no intermediate entry, or any change of the

investiture which had been already enfranchised when the defender's uncle had paid for his entry. The defender could have entered by special service and infeftment, and it was held in conformity with the former law that the mere form of the title he made up did not render him liable to more than the relief duty payable by an heir of the existing investiture. The Lord Ordinary seems to indicate that the authority of the case goes beyond what has been now stated, for his Lordship observes—"It is said that the decision applies only where the vassal is in a position to enter as heir, although he has chosen to complete as a singular successor. But this is not consistent with the judgment. Both in the case of *M'Kenzie* and of the *Marquess of Hastings* it would have been impossible for the disponee, who was in fact the heir of the last investiture, to effect an entry in that character. The Lord President points out, in explaining the case of *M'Kenzie*, that 'the form of entry was necessarily that applicable to a singular successor or disponee. Nevertheless the Court decided that he was entitled to the full benefit of his character as heir, and must be entered on payment of relief duty only.'" But, as is pointed out in the argument for the pursuer, in both of the cases of *M'Kenzie* and the *Marquess of Hastings* the defender was an heir of the existing investiture under entail destinations, which had already been enfranchised by the superior, a circumstance which was prominently before the Court in the case of *Mackintosh*. In *M'Kenzie's* case, M. *voce* Sup. & Vas. 2 App. 7, the interlocutor of the Court finds that the superior "is obliged to enter the defender, who in this case is the heir of the former investiture, in terms of the tailzie," upon relief and not composition, reserving the superior's claim to composition "on the entry of any future heir of tailzie not an heir of the investiture prior to the tailzie;" and in like manner in the case of *Hastings*, 21 D. 872, the interlocutor expressly proceeds on the basis of "the defender being the heir of the last investiture," and adds a reservation in the same terms as in *M'Kenzie's* case. These cases and that of *Mackintosh* therefore are in sharp contrast with the present. They were decided on the ground that the defender in each case was the heir of the last and still subsisting investiture, while in the present case the last investiture has been extinguished and a new investiture created and confirmed, the defender being the person liable for the composition payable in respect of this. The case is indeed in all its circumstances identical with that of the leading case of *Ferrier's Trustees* v. *Bayley*, in which the defender was held liable in composition. It is true that the defence here maintained was not pleaded in that case, but if it had been well founded, it is very difficult to suppose it would have escaped the observation not only of the bar but of the bench, by so many of whom the case has been considered and discussed.

I am, on the whole, of opinion that the judgment of the Lord Ordinary should be recalled, and that decree should be given against the defender for payment not of relief, but of composition.

Lord Adam—The question in this case is whether the defender William Dunlop Hamilton is liable to the pursuer in composition or relief in respect of his entry to the lands of Greenbank.

The material facts are few and simple. The pursuer and his predecessors were and are superiors of these lands.

John Hamilton was infeft in the *dominium utile* of these lands conform to instrument of sasine recorded on 25th of June 1855, proceeding on a precept of *clare constat* from the superior in favour of himself and his heirs.

John Hamilton was therefore duly entered with the superior. He died in 1877.

John Hamilton conveyed the lands to his immediate younger brother James Dunlop Hamilton, conform to disposition in his favour dated 8th and recorded 9th August 1860.

James Dunlop Hamilton died on 31st May 1886, leaving a general disposition and settlement, dated 28th May 1886, in favour of his brother the defender William Dunlop Hamilton. William Dunlop Hamilton is infeft in the lands conform to notarial instrument in his favour, recorded in the Register of Sasines on 17th August 1886.

Such being the state of the titles, I do not think there can be any doubt that, prior to the passing of the Act of 1874, the defender William Dunlop Hamilton would have been liable in relief duty only.

The superior might, at any time after the death of John Hamilton in 1877, have brought a declarator of non-entry against James Hamilton during his life; but not having done so, his only course now would have been to have brought a declarator of non-entry against the defender, and he being admittedly the heir of the last entered vassal John, would have been liable in relief duty, although possessing on a singular title in conformity with the case of *Mackintosh* v. *Mackintosh*.

The main objects of the provisions of the Act of 1874, now in question, was undoubtedly to put an end to the creation of barren mid-superiorities, and it did so by declaring that every proprietor infeft in the *dominium utile* of lands should be held as duly entered with the over-superior.

On the passing of the Act of 1874, accordingly, James Dunlop Hamilton became immediately entered with the superior in virtue of the entry implied by the Act, with the result that John ceased thenceforward to be vassal in the lands, James becoming such vassal; and on James's death, the defender William became, in like manner, entered with the superior and vassal in the lands.

But while thus putting an end to barren mid-superiorities, I think the purpose of the Act was to interfere as little as might be, consistently with so doing, with the pecuniary rights and obligations of the superior and vassal, and I think that it has left them very much on the old footing.

Thus the 3rd sub-section of the 4th clause enacts —"All rights and remedies competent to the superior under the existing law and practice for recovering, securing, and making effectual such casualties, feu-duties, and arrears, . . . and all the obligations in the feu rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative, in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming."

Then after this general enactment as to the rights of the superior there follows the provision for the protection of the vassal—that an implied entry should not entitle a superior to demand a casualty sooner than he could by the law prior to the Act have required the vassal to enter, or to pay such casualty irrespective of his entering.

Then follows sub-section 4, under which this action is more particularly brought, and which provides the only mode in which a superior's claims for casualties can be enforced—and therefore gives the measure of these rights, because, if a right cannot be enforced, it has practically no existence.

This sub-section introduces a new form of action in place of a declarator of non-entry—a declarator of non-entry being obviously no longer applicable, because no lands could thereafter be in non-entry. But although the form of the new action of declarator and payment is different, the effect is the same as that of the former declarator of non-entry.

The only person who is entitled to insist in it is a superior, "who but for the passing of this Act" would be entitled to sue a declarator of non-entry against the successor of the vassal in the lands—that is, the vassal whose death but for the passing of the Act would have caused the lands to be in non-entry. The only person against whom it can be raised is "such successor," and it is enacted that a decree for payment in such action should have the effect of and operate as a decree of declarator of non-entry, according to the "now existing" law.

Who, then, in this case, is the vassal in the lands, in the sense of the Act, and who is his successor?

It is not disputed that John Hamilton is the "vassal in the lands" in the sense of the statute, and the action is brought against the defender, as his successor, on that footing.

But John Hamilton was not the vassal in the lands, except on the assumption that an implied entry is to have no effect in this question, because if it is to have effect, then James and not John would have been the "vassal" in the lands.

But if John is to be treated as vassal in the lands for the purposes of this case, then it is as his successor, and his successor only, that the action can be insisted in against the defender. But in calling the defender as successor of John, the Act does not mean merely that at some previous period John was proprietor of the lands, but that the defender is to be treated as John's immediate successor in title. If John is the vassal, and the defender is his successor, it is surely the terms of John's investiture which must be looked to to see in what relation his successor stands to him. If that be done, as the defender is admittedly the heir under John's investiture, he is liable in relief duty only.

I confess that I cannot follow the reasoning by which it is proposed, in an action brought against the defender, as the successor to John, as "the vassal last vest and seised in the lands," to decern against him for a composition on the ground that he is not the successor of John in the lands because John had ceased to be vassal, and therefore could have no successor, but that he is the successor to James under a new investiture alleged to be created by James's implied entry.

It is quite true that as a matter of title James was John's successor and was duly entered, and that the defender is James's successor and is also duly entered, in virtue of their respective implied entries, but it appears to me that that has nothing to do with the present case, in which, for the purposes of the case, John is assumed by statute, contrary to the fact, to be the last entered vassal, and the action is, in the terms of the statute, brought against the defender as his successor.

It humbly appears to me that there are only two ways of looking at the case—either James's implied entry is to receive effect, or it is not. If it is, then John was not the vassal in the lands—he had thenceforth no connection with them, and could have no successor therein, and there can be no decerniture against the defender as his successor; or else the implied entry is not to receive effect, and in that case, John is to be treated as vassal in the lands, and if so, then the investiture under which he held the lands must be looked to to see whether the defender is heir of the investiture or a singular successor. I cannot see that the superior is entitled to found on James's implied entry to the limited effect only of showing that the defender is not John's successor, which he can only do by showing at the same time, and for the same reason, that John was not the vassal last vest and seised in the lands. It appears to me that the statutory action proceeds on the footing and assumption that the vassal who last paid a casualty was the last entered vassal in the lands, and it further appears to me that the superior cannot plead or found on implied entries, because that would be to displace the foundation of his action. In short, in an action directed, and necessarily directed, against the defender as the successor of John, I do not see how the pursuer can obtain a decree against him on the ground that he is not John's successor. I think, therefore, that the superior is precluded by the form and tenor of the statutory action from founding on intermediate implied entries. But, on the other hand, if the vassal were to be entitled to found on such entries, the effect would be to exclude the action. It was necessary, accordingly, to provide against that contingency; therefore the Act enacts "that no implied entry shall be pleadable in defence against such action," and that is all that was required to exclude any reference to implied entries on either side.

Further, it appears to me that a consideration of the form of action given in Schedule B, and which has been rightly adopted by the pursuer in this case, shows that the construction I have put upon the statute is the right one.

The summons seeks to have it found and declared that in consequence of the death of John Hamilton, who died upon the 27th February 1877, and who was the vassal last vest and seised in all and whole, &c., a casualty, being one year's rent of the lands, has become due to the pursuer as superior of the said lands, and that the said casualty is still unpaid, and that the full rents, maills, and duties of the said lands after the date of citation hereon do belong to the pursuer as superior thereof until the said casualty and expenses aftermentioned be otherwise paid to the pursuer. Had the form in the schedule been strictly followed, the summons should have

been thus expressed—"A casualty, being one year's rent of the lands, became due to the pursuer as superior of the said lands, upon 27th February 1877, being the date of the death of the said John Hamilton," and so on as in the summons.

It will be observed that the summons proceeds upon the assumption, in conformity with the form in the schedule, that John was the vassal last vest and seised in the lands; but this he certainly was not, if James's implied entry is to be taken into consideration. Then the pursuer is directed to describe or refer to the lands, and if the casualty due is a taxed composition or an heir's relief duty, to say, &c. Now this surely is meant to refer to the investiture of the vassal last vest and seised before referred to, and not to any investiture under an implied entry, and then it is said that a casualty became due upon the day of , being the date of the death of the said vassal. All this appears to me to be framed in conformity with the provisions of sub-section 4, and for the purpose of giving effect to them, and of leaving the superior's and vassal's rights and obligation, as regards casualties, just as they were before the statute.

If, then, John's investiture, as the vassal last vest and seised, is to be looked to, the question is whether the defender, as John's successor under that investiture, would "but for this Act" have been liable in relief duty only. That would depend on whether he was heir under that investiture, notwithstanding that he held the lands under a singular title. That he is heir is not disputed, and therefore I think the case of *Mackintosh* v. *Mackintosh* directly applies.

I think the case is quite different from *Rankin's Trustees* v. *Lamont* and that class of case. In these cases it was proposed by proprietors who were singular successors, but not also heirs under the investiture, to put forward the heir of the last entered vassal for entry with the superior, while here the defender is himself the heir of the last entered vassal; in the sense of the statute he is duly entered with the superior, and desires to put forward no one for entry with the superior.

I think, however, that the facts of the case of *Ferrier's Trustees* v. *Bayley* would have raised this question, but I am equally clear that the question was not raised or decided, probably because it occurred before the recent case of *Mackintosh* v. *Mackintosh*.

But it is said that a casualty became due in 1874 for the implied entry of James, that a new investiture necessarily came into existence with this implied entry, that this new investiture required to be enfranchised by payment of a composition, that the superior was precluded from demanding payment by a clause in the statute until the death of the last entered vassal, John, in 1877, but that he was now entitled to demand payment of it.

I do not, however, think that a casualty became due for the implied entry of James in 1874. The statute does not say so. But I suppose it is inferred from the fact that, as the law previously stood, if a vassal applied to the superior for a new investiture the superior was not bound to grant it, except upon payment of a casualty, even although the lands were not in non-entry. This, however, was an entirely optional proceeding on the part of the vassal, who chose to pay for a new investiture, and I do not think that it is to be necessarily inferred from it that a casualty is due for an implied entry.

As the law stood previous to the statute, lands became in non-entry, and a casualty became due, only on the death of the last entered vassal. The casualty became due because the lands were in non-entry, and was paid in order to obtain an entry. But no lands are now in non-entry, and if the whole matter had not been specially provided for by the statute, I could quite understand a vassal successfully resisting a claim for a casualty, in respect of an implied entry, on the ground that his lands were not in non-entry, because he was duly entered by statute, and that he was not bound to pay the superior for an entry which he had obtained without his intervention.

The statute, as I have remarked, does not say that such a casualty is to become due. Neither does the statute say anything about payment of such a casualty being postponed. What the statute says is that the superior "should not be entitled to demand any casualty sooner than he could by the law prior to this Act." That is a different thing from merely postponing payment of a casualty already due. As the law previously stood, a casualty became due upon the death of the last entered vassal; but when the superior came to demand his casualty, the question then arose, whether the vassal was liable in composition or relief, and that depended on the state of the title at that time, and not at the date of the lands falling into non-entry. If, when the demand was made, the proprietor of the lands was in fact heir under the existing investiture, he was liable in relief only, although he might not have been the heir when the lands fell into non-entry; and so also, if a composition was payable, the amount would be calculated, not according to the rental of the lands at the date of the lands falling into non-entry, but at the date of the action.

I think, accordingly, that when the statute enacted that the superior should not be entitled to demand a casualty sooner than he could by the law prior to the Act, the intention was not to postpone payment merely of a casualty, but to leave the parties on the same footing as before the Act, when a demand for a casualty was made.

Suppose the superior had raised after the death of John, an action of declarator and payment against James for payment of a casualty, it must have been directed against him as successor to John. But James undoubtedly at that time—John having died without children—would have been the heir under John's investiture, and so liable in relief-duty only. If John had left children James would not have been heir, and would have paid composition, just as he would have done before the Act. I do not think that it was the intention of the statute, that when a vassal conveyed the lands to an heir-presumptive, a new investiture should be created. It remained to be seen when the demand for a casualty was made, whether that was so or not. If it then appeared that the vassal was heir under the old investiture, no new investiture was created.

As I understand the matter, a new investiture, such as a superior could refuse to enfranchise except on payment of a composition, implies the

introduction of stranger substitutes, who as heirs under the investiture would be liable in relief duty only, and whose introduction therefore into the investiture would possibly prejudice the superior's rights by depriving him of composition.

Such a question arose in the case of the *Marquess of Hastings*, 21 D. 781, and might arise under an implied entry, and might entitle the superior to a composition, although the heir was also the heir under the old investiture; but no such case arises here.

I may say, although the case has not been so treated, that the only claim made on record in this case is for a casualty in respect of the entry of James, but which was not demanded during his life. The defender is clearly not liable for it, and I think that on that ground he ought to be assoilzied.

If that casualty had been paid by James, the defender would admittedly have been liable only in relief.

In the pursuer's view of the case, that casualty was not only due, but became payable by James at any time after 1877. I do not see why the defender should now be held liable in composition, because of the pursuer's negligence in failing to enforce payment of it.

It appears to be making the casualty payable by a vassal to depend not on the state of the title, but on an extrinsic fact, viz., whether a particular payment was or was not made, of which the vassal may have no means of knowledge. This appears to me to be without precedent, and contrary to principle.

On the whole matter, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

Lord M'Laren—It is unnecessary that I should recapitulate the facts on which this interesting question of property law arises. The subjects passed by title to three brothers successively, John, James, and William Hamilton. John is the person by whom a casualty was last paid to the superior. A casualty is admittedly due to the superior by William, and the entry is untaxed. The question is, whether William is to be treated as a person who has entered as the heir of one of his brothers, or whether he is to be treated as a singular successor or purchaser, and therefore liable in payment of a sum equal to a year's rent of the subjects.

1. There appears to be a preliminary question which is raised by the minutes of debate, and is considered in some of the opinions of my colleagues. I mean the question, Who is the 'predecessor' or person in consequence of whose death this claim of casualty arises? John conveyed the subjects to James by deed *inter vivos*, and thereafter died survived by James. If the superior had been attending to his rights, he would have obtained a casualty from James as successor to John, John being the 'predecessor' in the sense explained. Then on the death of James, survived by William, the superior would be in a position to claim a second casualty, in consequence of the death of William's immediate predecessor James. That casualty would undoubtedly be the casualty exigible from an heir. In point of fact the superior did not exact a casualty from James, and I find from the printed papers that Lord Trayner is of opinion that this omission makes no difference in the result. Lord Trayner points out that according to the conception of the statute, illustrated by the schedule (37 and 38 Vict. cap. 94), the claim to a casualty is always founded on the death of the last entered vassal, who in this case is James Hamilton. If this be the correct interpretation of the statute, then the superior's omission to exact a casualty from James would not have the effect of increasing the burden to William, who would of course be entitled to an entry as heir of James, which he is.

The Lord Ordinary, again, has held that the summons is rightly laid in concluding for a casualty as accruing in consequence of the death of John Hamilton, although his Lordship has not sustained the claim to the extent of the duty payable by an heir.

The result of my consideration of this question is that I agree with the Lord Ordinary in holding John to be the predecessor, through whose death the lands are to be treated as if in non-entry. It is undoubtedly the general intent of the statutory enactments that the obligations of the vassal to the superior are to be as far as possible unchanged by the operation of the statute. The form of an entry with the superior is abolished, and the feudal relation is changed to a species of freehold tenure, in which every person is held to have entered by the mere act of taking seisin or real possession of the lands. But for the preservation of the superior's rights, the statute has introduced what may be termed a fictitious process of non-entry, in which it is set forth that a casualty has accrued to the superior in consequence of the death of some one, and that until such casualty be paid, the rents and profits of the subject are to pertain to the superior. Under the feudal law the person whose death caused the lands to fall into the state of non-entry was the last entered vassal; that is, the person who had last paid a casualty, and not necessarily the person who last died in the possession of the lands.

It might very well happen in the contingencies of life that an entered vassal would survive more than one of the successive disponees deriving right from him. But so long as the entered vassal survived, his mere existence was sufficient to maintain the feudal relation with the superior, notwithstanding that the vassal had parted with the substance of his interest in the lands. To what do these observations tend? That under the new process, as under the old, there must be one definite way of ascertaining who is the predecessor on whose death a casualty accrues; either he must be always in all cases the person who last paid the entry duty, or he must be always in all cases the person who last died infeft. The second alternative is plainly untenable, because the person who last paid the entry duty may survive the person who last died infeft, and in such a case the superior's claim does not emerge. I therefore come to the conclusion that the new statutory action for recovery of a casualty follows strictly the analogy of the old action of non-entry, and that in this case the summons correctly libels that a casualty has become due in consequence of the death of John Hamilton of Greenbank.

I now pass to the main question, which in my

apprehension is to be solved by the same criterion which I have proposed to apply to the question already considered.

2. I conceive that for the purpose of enforcing the superior's pecuniary rights, and for no other purpose, the statute has authorised a form of action founded on a fictitious state of non-entry, in which the claim of casualty is to be made effectual in the same manner and to the same effect as if the lands were actually in non-entry, Such, I apprehend, is the true interpretation of these words—"No implied entry shall be pleadable in defence against such action.' These words are clear and intelligible on the hypothesis that the lands are to be treated as if in non-entry (although not really so), for the purpose of explicating the superior's rights. The alternative construction is, That no implied entry shall be pleadable to the effect of limiting the casualties payable to the superior; but that an implied entry may be pleaded to the effect of extending these claims. This seems to me to be a very forced construction; and it is also open to objection on the ground that it supposes the Legislature to have contemplated a compulsory variation of the contract between superior and vassal. I think therefore that this construction is to be rejected. The hypothesis of the statutory action is that the defender is unentered (because the summons sets forth the death of C, "the vassal last vest and seised in all and whole the lands of X"), and while this hypothesis is contrary to the facts of the case, the defender is not allowed to contradict it. It was not necessary to say that the pursuer should not contradict it, because it is the pursuer's statement, and is indeed the condition of his claim, that the lands are to be treated as in non-entry. That being so, neither party is in a position to found on any implied entry, and the case is to be determined in all respects as if the defender was unentered. I do not conceive that the construction requires any aid from equitable consideration, but it is a construction that does not suffer from any equitable test that may be applied to it, because it gives the superior his due—that is, the sum which he is entitled to receive according to the original charter or feu-contract.

I would here interpose an observation which may possibly tend to remove one of the difficulties which have weighed with some of my colleagues—I mean the difficulty of getting over what is termed the new investiture of James when James Hamilton became entered by force of the statute. My observation on this is, that in strictness there are no longer any investitures, and therefore the distinction peculiar to our feudal law between a new investiture and a mere renewal of the investiture has no longer a place in our legal system. I think that in Scotland all property is now enfranchised or made freehold by the mere act of taking seisin or real possession, and that the statutory entry is not a thing substituted for investiture, but is its virtual abolition, under reservation of course of the superior's pecuniary rights.

In applying the principle I have indicated to the facts of the case, I have only to consider what would be the casualty due by William Hamilton in consequence of the death of John, supposing that the implied entry of the statute were non-existent. As the implied entry is not pleadable in an action of this nature I think it must be treated as non-existent. In that case the lands are to be held as being in non-entry. Now, as William combines the characters of heir and singular successor he is entitled to take the lands out of the hypothetical state of non-entry, just as he might have taken them out of actual non-entry, by payment of the relief duties exigible from heirs. Indeed the decisions go further, because, supposing an entry were to be taken, William would be entitled to be entered as a singular successor on the terms appropriate to heirs. Under no circumstances, and in no state of the title, could a *de facto* heir be required (according to the feudal law) to compound as a singular successor, although in certain cases which are not *hujus loci* the superior might object to the introduction of a stranger into the destination unless composition was paid for or in respect of the insertion of his name. My opinion therefore is that although the defender was entered by the statute as a disponee of James Hamilton, who again was entered by the statute as a disponee of John, neither of these implied entries are to be regarded in this question, and so the defender is only liable for the casualty payable by an heir.

III. I conclude by stating in a word how I conceive the Lord Ordinary's interlocutor stands with reference to previous decisions. I have not been able to find any material distinction in the *species facti* between *Ferrier's Trustees* v. *Bayley* and the present case. But as the present remit to the consulted Judges is made by the Division of the Court in which the case of *Ferrier's Trustees* was heard and determined, I suppose that their Lordships desire our independent opinions on the questions of law argued in the minutes of debate. The Conveyancing (Scotland) Act has opened a new chapter of property law, and after the lapse of fifteen years, during which a great number of points have come up for decision, it was perhaps considered desirable that the present question, which is one of general importance, should be considered by a Court differently constituted, and who would not be absolutely bound by the opinions, however weighty, of a numerically smaller body of Judges.

With regard to the series of cases, including *Rossmore's Trustees*, with which I have a long-standing acquaintance, and *Lamont* v. *Rankin*, which went to the House of Lords, I conceive that the Lord Ordinary's interlocutor is not in conflict with them. These cases only settled this principle, that where the proposed limitation of the casualty to a duplicand feu-duty depended on the taking of an entry—that is, on doing something which could no longer be done—the defender must fail. In the present case the defender is entitled, as I think, to the privilege of an heir irrespective of the form of the title in his person.

Lord Kinnear—I remain of the opinion to which I gave effect in the interlocutor under review, but the special point of the case is more clearly brought out in the opinion of Lord Adam, in which I concur.

I do not think that there can be any serious question as to the state of the feudal title. But in consequence of the Statute of 1874 the superior's right to casualties no longer depends upon

the actual state of the title. The general purpose of the enactments which require consideration appears to be to abolish the necessity for the superior's intervention in order to complete the title of heirs and disponees, and at the same time to leave the pecuniary rights and liabilities of superior and vassal as far as possible untouched by the changes introduced into the system of conveyancing. In saying this, I of course accept as perfectly sound and autheritative the opinions which were expressed in the House of Lords in *Lamont* v. *Rankin*. It was there pointed out that the Legislature had expressed no intention such as had been assumed by the minority of the Judges "to leave payments to a superior exactly as they were, and not to give him in any case a title to a more valuable casualty than he would have had if the Act had not passed." But the particular case, with reference to which it was held that no such intention had been expressed, was that of a singular successor, who, but for the Act, might have escaped composition by procuring the entry of the disponer's heir. On the general question Lord Blackburn says—"I agree that it was not the object of the Act to produce any change in the pecuniary relations between superior and vassal; and if I could see any reasonable construction of the language used by the Legislature which would avoid doing so, I should feel inclined to adopt that construction. But I do not think it would be justifiable to interpolate a scheme for this purpose not expressed by the Legislature." His Lordship therefore held that the heir of an extinguished mid-superiority could not be put forward to protect the actual proprietor of the lands. But although the Act contains no such scheme as was required to support the argument in *Lamont* v. *Rankin*, it does contain provisions for maintaining unchanged the pecuniary relations of the superior and his actual vassal, not by enabling the estate to be taken up by a person who has no right to it, but by fixing the conditions on which a claim for casualty may be made against the true proprietor. It is material therefore to inquire what the rights of the parties would have been if the Act had not passed.

The facts are simple. John Hamilton the second of Greenbank was the superior's vassal in the lands. But he had conveyed the *dominium utile* to his brother James Dunlop Hamilton, who was infeft in a subaltern fee as the vassal of John. James Dunlop Hamilton's subaltern right might be converted at any time by the superior's confirmation of his infeftment into a holding of and under the superior. But if the Act had not passed it is not probable that that step would ever have been taken. There was no reason for displacing John from the immediate fee during his lifetime; and when he died in 1877 his brother James was his heir-at-law, and in the ordinary course of things he would have completed his title in that character, entered with the superior as his brother John's heir, and thereafter consolidated the *dominium utile* with the mid-superiority. By completing his title in this way he would not have subjected himself to a claim for composition, but would have entered as heir for payment of relief duty only, and when he died in 1886 the defender would have entered on the same condition as the heir of the investiture, because nothing would have happened to disturb the investiture created by the infeftment of John Hamilton of Rodgerton, the defender's grandfather. John Hamilton the first, John Hamilton the second, James Dunlop Hamilton, and the defender would, each in his turn, have entered as heir of that investiture.

The defender's position would have been just the same if James, as might have happened, had continued to possess on his subaltern infeftment after John's death, and had made up no title to the mid-superiority. The defender in that event, as heir of John, might have taken up the estate left in his *hæreditas jacens*, taken infeftment on his special service, and so entered as heir.

It would have made no difference to the defender if James had applied for confirmation. He could not have compelled an entry in that manner without payment of composition during his brother John's life, because as he was only presumptive heir a conveyance to him was not a mere propelling of the succession. But, on the other hand, he could not have been compelled to enter until the death of John, or to enter at any time in any other character than that of heir. If he had completed his title on John's death by confirmation of his own infeftment he would not have been liable for composition, because he was in fact the heir of the last vassal, and might have entered in that character if he had thought fit. But whether he had been required to pay composition or not, and whether his confirmation had been obtained before or after the death of his brother, the defender would have been the heir of an enfranchised investiture, and would, when the succession opened, have been entered as such for relief. In whatever manner the title of James Dunlop Hamilton had been completed, therefore, the defender could never have been made liable for composition under the old law.

The question therefore is, whether the statute gives the superior a right which the prior law would not have given him?

It cannot be disputed that immediately upon the passing of the Act James Dunlop Hamilton as proprietor infeft was entered by force of its provisions with the pursuer as his immediate lawful superior; and as a necessary consequence of his entry the mid-superiority which had been left in the person of John Hamilton was extinguished. On John Hamilton's death, therefore his heir, if he had left a nearer heir than James, could not have taken up his estate of mid-superiority so as to interpose a vassal between the superior and James or his successor in the *dominium utile*. This is decided in *Lamont* v. *Rankin*. It was equally impossible for James himself to take up the mid-superiority, because he was already entered in the full fee. This is decided in *Bayley* v. *Ferrier*. But the inference which it is proposed to draw from this admitted state of the title appears to me to be a mere assumption altogether unsupported by any provision of the statute. It is assumed that because James Dunlop Hamilton was entered by the passing of the Act to the same effect as if the superior had confirmed his infeftment he therefore became liable in consequence of his entry for the same casualty which he would have required to pay under the former law if he had applied for confirmation during his brother John's lifetime. It

is said that the right to enforce payment may have been postponed by the provision that the superior shall not demand a casualty sooner than he could by the former law have required a new vassal to enter, but the assumption is that nevertheless the liability attached immediately by the operation of the statute upon the title as it stood in 1874. But the statute creates no such liability as a consequence of the implied entry. It dispenses with the necessity for the superior's intervention in order to complete the title of an heir or a disponee by entry, and the abolition of the superior's right to enter heirs or disponees by his own writ or charter and not otherwise carries with it of necessity the abolition of his right to exact payment of relief duty or composition as the condition of his granting an entry. His pecuniary rights are saved as far as possible by other provisions. But the Act gives him no right, either in express words or by implication, to exact a casualty in respect of every entry. If such a right had been conferred it would have given a most unreasonable advantage to the superior, because it would have given him right to a year's rent upon every transmission of the property whether the lands were in non-entry or not. But the entry implied by the registration of a conveyance during the lifetime of an existing vassal does not of itself give right to a casualty, and there may be many such entries for which no casualty can ever be demanded. This appears to me to be the necessary consequence of the provisions for maintaining the pecuniary rights and liabilities of superior and vassal.

The provisions for this purpose are in sub-sections three and four of section four. But sub-section three has no application to the present case. That sub-section provides that the "implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry;' and it goes on to reserve to the superior all rights and remedies competent to him under the existing law for recovering such feu-duties or casualties subject to the proviso already mentioned. But there was no casualty due or exigible in respect of the lands at or prior to the date of James Dunlop Hamilton's entry, and the superior had no right or remedy for recovering casualties which could have been put in force at that date. This particular enactment therefore has no bearing on the case, and the rights of the parties to this action must be regulated by the fourth sub-section, and not by the third. But the fourth sub-section gives no right to any casualty except when the lands have come into the position in which but for the passing of the Act the superior would have been entitled to sue a declarator of non-entry. Now, it is certain that the superior would not have been entitled under the prior law to sue a declarator of non-entry so long as John Hamilton continued in life. The right to a casualty therefore did not accrue until John Hamilton's death, and accordingly I take it to be clear that if a change of ownership had taken place before John Hamilton died the only casualty exigible in consequence of his death would then have been payable by the new proprietor as his successor in the lands, and no casualty would ever have been exigible from anybody in respect of James Dunlop Hamilton's entry. There might indeed have been many changes of ownership between the entry of James and the death of John, and every new owner in succession might have been entered by implication of the statute, and yet none of them would have been liable for a casualty except the owner in right of the lands at the date of John's death. The statutory action could have been brought against him alone, and the intermediate proprietors would be in no way affected by the only remedy which the action affords. For the only remedy is to enter into possession, and draw the rents until the casualty is paid.

The importance of this consideration is, that when the right accrued James Dunlop Hamilton was the heir-at-law of his brother John, and if he had been required, as he might have been, to pay a casualty as John's successor in the lands he would therefore have been liable for relief duty only, and not for composition. This appears to me to follow from the well-settled rule of the former law that the casualty must be determined by the character of the applicant for entry, and not by the form of his title. There are many decisions to this effect. But that which appears to be most directly in point is the *Marquess of Hastings* v. *Oswald*, 21 D. 871, because except for the implied entry it is undistinguishable from the present. James Oswald held the lands of Auchencruive by an entailed title immediately of and under the Marquess of Hastings. In 1849 he disentailed with the consent of the three next heirs, none of whom was heir-apparent, and thereafter, in performance of the contract for disentail, he executed a new entail in favour of his nephew Alexander Oswald, as institute, and a series of heirs. This was not a mere propelling of the succession, because (as appears from the Session papers) the lands were conveyed to Alexander Oswald, with entry as at the date of the conveyance in October 1849, and Alexander, being a nephew of the disponer, might of course have been excluded from the succession under the former investiture by the birth of an heir of the body. When the fee became vacant on the death of James Oswald in 1853 the superior maintained that Alexander Oswald held by a singular title, because his right stood upon a conveyance *inter vivos* executed in performance of a contract by the last vassal. But the Court held that he was entitled to entry by a charter of confirmation for the same payment as if he had entered by service as heir of the old investiture, because although his right to the lands stood upon a conveyance *inter vivos* he was in fact the heir of the vassal last vest and seised in the fee. The case was complicated with another question, because the subsequent destination under the new entail differed from that of the old entail, and it was accordingly found that "a reservation must be admitted into the charter of confirmation by which the new investiture is established reserving to the superior his right to claim a year's rent upon the entry of the first substitute who shall not be the then existing heir under the former investiture, and to the vassal any legal defence against such claim." This part of the judgment has a material bearing on the argument. But the point of importance at present is that the casualty was determined by the new vassal's per-

sonal character as heir of the old destination, and not by the title under which alone he could hold the lands. On the same reasoning James Dunlop Hamilton would have been entitled, if the Act of 1874 had not passed, to demand a confirmation of his existing infeftment for payment of relief duty, because although he held the lands upon a singular title he was in fact the heir of the last investiture. The only difference is that there would have been no occasion to make any reservation in the charter, because the confirmation after John's death of his conveyance to James, and of the infeftment following upon it, would have made no change whatever in the investiture. It was a mere renewal of the old investiture, because no one could take up the estate in succession to James as his heir who was not also the heir of the heir of the old investiture.

The question then is, whether James Hamilton had lost the right to have the benefit of his confirmation for payment of relief by reason of his implied entry under the statute? I think he had not, because the statute subjects the successor of a deceased vassal to no other casualty than would have been exigible under the old law if such successor had been required to enter at the date when the right accrues. It is true that at that date James Hamilton could not have made up a title by special service as heir, because he had been already entered by the confirmation of his predecessor's conveyance; and it is equally true that under the former law the superior could not be compelled to enter his last vassal's successor in the character of heir unless his right were judicially ascertained by a special service. But the point is, that although the successor could not enter as heir by reason of the form of his title he was still entitled to the benefit of his character as heir, and might demand an entry by charter of resignation or charter of confirmation for payment of relief, and it was decided in *Mackintosh* v. *Mackintosh* that a successor who has been already entered by the implied confirmation of his ancestor's conveyance is still entitled to the same benefit if he be in fact the heir at the time when the right to casualty accrues. This decision appears to me to be directly applicable to the case of James Dunlop Hamilton. I agree that it would not be in point, if the right to composition accrued at the date when the Act came into force in consequence of the implied confirmation of his infeftment, or, in other words, if that implied entry were the sole ground of the pursuer's claim, but, for the reason already given, I think this is a false assumption. The right does not arise from the implied entry, but from the subsequent death of the last entered vassal. In this respect the case of *Mackintosh* v. *Mackintosh* resembles the present. The only effect of the implied entry in the one case, as in the other, is to prevent the new vassal from entering by special service. But that does not prevent him from saying that he is in fact the heir. The principle which I take to be recognised in the case of *Mackintosh* is, that the casualty payable by a successor already entered by force of the statute is to be fixed by the same rule as if he were demanding a charter at the time when the action for casualty is raised.

But, apart from that decision, I think the same conclusions follow from the conditions which the statute attaches to the superior's right of action. The case in which alone the action can be brought is when the superior would, "but for the Act, be entitled to sue a declarator of non-entry against the successor of the vassal in the lands;" and it is to be brought "against such successor whether he shall be infeft or not." It may be proper to observe that the Act seems to contemplate the possibility of a declarator of non-entry being sustained by reason of special stipulations in the feu-contract, because the prescribed form of summons contains alternatives by which it might be adapted to such cases if they occurred, and which are inapplicable to the normal case of non-entry by death. But the only case which it is necessary to consider for the present purpose is that of a feu-right conceived in the ordinary terms. And there can be no question as to the effect of the provision just cited in its application to such a right. It requires the superior to show as the condition of his right of action, first, that the vassal last vest and seised in the lands has died, because that is the only event which could have brought the lands into non-entry; and secondly, that his successor, "whether by succession or by conveyance," still remains unentered, because that is the condition which under the former law he could have sued a declarator of non-entry. The prescribed form of summons is exactly in accordance with the substantive enactment, because it requires the pursuer to set forth that the casualty has become due "in consequence of the death of the vassal last vest and seised in the lands." Now, that is an assertion which could not be made if the implied entry were to be taken into account, because the vassal last vest and seised would in that case be either the defender in the action, or any predecessor who had obtained such entry, and therefore, as a necessary complement of the provision which requires the superior to treat the vassal on whose death the right accrues as the last entered vassal, it is provided that "no implied entry shall be pleadable in defence against the action." The superior therefore is to bring his action on the assumption that no entry has taken place since that of the vassal whose death he alleges as the ground of his right, and the defender is forbidden to traverse that assumption by alleging an implied entry. But if the implied entry is to be disregarded for the purposes of the action the liability for a casualty must be determined on the assumption that the last entered vassal's successor still requires to obtain an entry; or, in other words, he is to pay for the entry which the statute has given him on the same footing as if he were demanding a charter from the superior in answer to a declarator of non-entry. The question therefore must be whether, if he were not entered at the date of the action, he could have demanded a charter without paying composition as for a new investiture.

If the superior had brought such an action in 1877 it does not appear to me that James Dunlop Hamilton's right to demand a charter without composition could have been disputed. The pursuer would have alleged, as he does now, that the casualty had become due in consequence of the death of John Hamilton, who was the last

entered vassal. The answer would have been that the defender was heir of line of this last vassal, and had therefore right to obtain a charter confirming the titles on which he already held the lands for payment of relief, and the superior could not have maintained that the implied entry had excluded that right without admitting that he had been already entered, and so contradicting his own ground of action. It has been suggested that he might nevertheless found upon the title of the defender, who could not dispute his own title, and that that title would have disclosed a change of the investiture. That is just saying in other words that John Hamilton was not the last entered vassal, because there can be no change of investiture until a new charter has been obtained from the superior in favour of strangers to the old investiture. But the suggestion is fallacious, because it confuses between the title upon which the vassal may be supposed to have entered, or to have right to enter, and the entry itself. The pursuer's argument indeed appears to me to be vitiated throughout by this inaccurate use of the terms "entry" and "investiture." It is elementary, but it has not perhaps been sufficiently kept in view, that the entry of a vassal who has been infeft upon the precept of a prior vassal, and not directly upon the precept of the superior, means nothing but the superior's recognition of the infeftment. The investiture in like manner is the title and infeftment *plus* the recognition. It would not therefore have occurred to me to doubt that either party might found upon the vassal's title notwithstanding the prohibition against pleading the implied entry. It must be permissible to found upon the title for the purpose of ascertaining the successor in the lands, against whom alone the action lies. But what cannot be pleaded is not the title, but the recognition of the title, which would otherwise have been implied under sub-section 2. In other words, the statute says that it shall not be maintained that the registration of a conveyance during the lifetime of an entered vassal has operated as a recognition of the disponee by the superior or as a change of the investiture. It cannot of course have changed the investiture if it is not a recognition of the disponee, because it is elementary and fundamental that an investiture once recognised cannot be displaced except by a return of the feu to the superior, or by the superior's recognition of a stranger.

If this action had been brought therefore in 1877 James Hamilton's title would have disclosed no change whatever in the investiture. It would have shown only that James Hamilton, who was the heir of the investiture, had been already entered by a charter by progress, which, if it had not been implied by the statute, he would have been entitled to obtain for relief. The implied writ of confirmation would no doubt have altered the investiture if it had enabled James Hamilton's heirs to enter for relief, although they were not also the heirs of John, and therefore could not have come in as heirs under the original grant. But the implied entry of James Hamilton could not prejudice the superior's right in this way, because it could not be used to enable a stranger to enter as heir, or to enable James Hamilton himself to escape liability for composition if he were not the heir when the right to a casualty accrued.

This is a material difference between the implied entry under the statute and the entry obtained under the former law by actual charter. By the old law the casualty payable for the entry of a new vassal was necessarily fixed at the date of entry, because the entry discharged the claim. By the new law it is fixed when the right accrues, or when the action is brought, because the implied entry does not affect the claim. But by the former law the superior could not exact a year's rent as the price of a new charter, unless he thereby admitted strangers to the feu, from whom he would have no other opportunity of exacting composition. The second branch of the case of *Hastings* v. *Oswald* shows that even when a new charter altered the destination the superior would not be entitled to composition on granting the charter if his right to demand it when a stranger substitute presented himself could be effectually reserved. On similar grounds it appears to me that he cannot exact a year's rent, because of its being uncertain at the date of the implied entry whether the title thereby confirmed would operate in favour of an heir or of a stranger at the date when the casualty should become due. The implied entry is not a recognition by the superior of a new vassal and his heirs, who may be strangers to the existing investiture, and therefore he is not entitled to be paid for it as if it involved such recognition. The pursuer's right to casualties remained after James Hamilton's entry exactly as it was before—a right to exact payment of a casualty on John's death, on the footing that his investiture was still the rule of the feu, and the successor's liability must be determined upon that footing, irrespective of the implied entry. If John had left heirs of his body James would not have been his heir, and must have paid composition at his death. But since he was in fact the heir he would have been liable only for relief on the same ground on which he could then have obtained a charter of confirmation for payment of relief under the former law.

If James Hamilton would have been liable only for relief, it follows that the defender's liability is also for relief, because he is the heir both of James and of John, and might therefore have obtained a confirmation of the conveyances and infeftments by which he holds the lands without paying a year's rent for it. But the form of the action against him brings out with remarkable clearness the contradiction which appears to me to make the pursuer's case untenable. He did not think proper to make any claim for casualty during James Hamilton's life, and in stating the claim against the present defender he had therefore to consider whether the casualty became due on the death of John or on the death of James. As the action is laid he founds his claim on the death of John as the last vassal. And this view may probably be supported on the ground that although James was entered by force of the statute he paid no casualty, and therefore that there is nothing to prevent the pursuer from alleging that he would under the old law have been entitled to sue a declarator of non-entry in consequence of the death of John. But then the pursuer's case must be that John Hamilton was the last entered vassal, or, in other words, that nothing has occurred to disturb the investi-

ture since the date of his entry, and accordingly he alleges as the ground of his action that a casualty has become due in consequence of the death of John Hamilton, "who was the vassal last vest and seised in the lands." This is said to be a technical and immaterial point. I venture to think, on the contrary, that it is of vital importance, because the superior has no action unless he can show that but for the Act he would be entitled to sue a declarator of non-entry. Now, the only way in which the lands could have fallen into non-entry before the passing of this Act was by the death of the vassal last vest and seised as of fee. The foundation of the pursuer's action therefore is the averment that John Hamilton was the vassal last vest and seised in the lands. But that implies an averment that no other vassal has entered since his death, or, to use the language of the old law, to which the pursuer is required by the statute to appeal, that the fee is still vacant in consequence of his death. If these propositions cannot be substantiated the action fails. But then it follows that the investiture established by the original charter to John Hamilton of Rodgerton has not been changed for the purpose of this action. The superior's right to casualty, and the corresponding liability of the vassal, must be measured by the same investiture. And when the pursuer avers that John Hamilton was the last entered vassal the casualty payable must of necessity be determined by the relation of his successor in the lands to his investiture, because that is the last investiture according to the pursuer's own statement. The pursuer cannot be permitted to contradict his own ground of action, and the condition of his action is that he has recognised no new vassal, or, in other words, that he has made no change in the investiture since the entry of John Hamilton. He cannot be permitted to say that nobody has been recognised since John Hamilton, and therefore that John Hamilton's heirs are the only persons enfranchised, and at the same time to say that James was recognised during John's lifetime, and therefore that John's heir must pay composition. If the superior's right is to depend on the assumption, which the statute requires to be made, that John Hamilton was the last entered vassal, it appears to me to follow that the vassal's liability must be determined upon the same assumption. I cannot suppose that this admits of argument. The right and the liability must necessarily be reciprocal. These are not two different or separable things, but only two aspects of the same obligation. If the statute provides that the implied entry shall not be considered as a recognition so as to affect the liability of the vassal it follows of necessity that it shall not be considered as a change of the investiture so as to alter the right of the superior.

But if this reasoning be erroneous, and the old investiture has been extinguished by the entry of James Dunlop Hamilton, the defender is the heir of the new investiture, and in that character is liable only for relief. It is of no consequence whether James paid a casualty or not if he is to be considered as an entered vassal for the purpose of the action. For it is decided that no casualty exigible from James can be demanded from the defender, and I do not understand that there is any difference of opinion upon this point. If the pursuer chose to waive his claim against an entered vassal he must submit to the loss. He cannot throw it upon a succeeding vassal.

The pursuer is in this dilemma. Either the investiture has not been changed since the entry of John, and in that case the defender is liable only for relief, because he is the heir of the old investiture; or else it has been changed by the entry of James, and in that case the defender is still liable for relief only, because he is the heir of the new investiture. The pursuer may possibly be entitled to treat the entry of James as an alteration of the investiture. But if he so treats it he must accept the necessary legal consequence of that position. He cannot be permitted to maintain two contradictory propositions at one and the same time, and to say that James was duly entered during the lifetime of John, and therefore that the defender cannot have the benefit of his character as John's heir, and at the same time to say that James was not duly entered, and therefore that the defender takes no benefit from his character as heir of James.

The sounder view appears to me to be that the action lies against the defender as John's successor, and that his liability must be determined by his right to obtain a confirmation of the series of titles on which he holds the lands on the assumption that there has been no entry with the superior since that of John Hamilton. But if he were now in the position of demanding a charter he would be entitled to obtain it without payment, and his liability for the implied charter which the statute has given him must be determined by the same rule.

The effect of the whole series of enactments appears to me to be that the infeftment of a disponee during the lifetime of an entered vassal shall have the same feudal effect as a charter of confirmation under the former law; that no casualty shall be exigible in respect of this implied entry until the lands fall into the position which under the former law would have been non-entry; that when this event happens a casualty is to be exigible from the person who is at the time the last vassal's successor in the lands, and from no other person; and lastly, that his successor shall be liable for the same casualty as he would have been required to pay by the former law if he had been demanding an entry at the date when the casualty is demanded upon the titles on which he then holds the lands. I do not think this view inconsistent with the decisions. What I take to have been decided is, that the actual successor in the lands must pay a casualty according to his own liability, because when he has once been entered by the registration of a conveyance in his favour he cannot put the last vassal's heir into his place. The ground of judgment is thus expressed by the Lord Chancellor in *Lamont* v. *Rankin*—"The appellants are by the Act deemed and held to be duly entered, and if so, there is no vacant fief into which the heir could enter." I think it quite in conformity with the law so laid down to hold that the actual successor, who alone holds the fee, must pay the same casualty as he would have paid if instead of being entered by implication he had been required to enter under the former law. Therefore, if the successor is in fact the heir of the last vassal when the right

arises he shall pay relief. If he is a stranger, he must pay composition. If it is proved or admitted that he is in fact the heir, the question whether he can still make up a title in that character does not appear to arise under the statutory action, for the action does not, like the old declarator of non-entry, require the defender to make up a title or forfeit the lands. It merely requires that he shall pay a casualty. The only previous case in which the point now to be determined could have been raised was that of *Ferrier* v. *Bayley*. But in that case it was not raised, and therefore it was not decided. The decision was that an implied entry as disponee excluded a subsequent entry by the same person as heir of an extinguished mid-superiority. But no question was raised as to the amount of casualty payable, if it were decided that the title could not be completed otherwise than by the implied entry. But if *Ferrier* v. *Bayley* is to be taken as a decision in point it is not binding upon the whole Court, and ought not in my opinion to be followed.

Lord Trayner—Applying the provisions of the Act of 1874 to the admitted facts of the present case, I think it clear (1) that James Hamilton was entered with his superior by force of statute in 1874; (2) that a new investiture was thus created, whereby the prior investiture was evacuated; and (3) that in 1877, on the death of John Hamilton, a casualty became due to the superior, and could then have been exacted from James. Granting these propositions, it follows that the defender's claim to be entered as heir to John Hamilton cannot be sustained. After the completion of James' right by implied entry in 1874 there was no right left in John to which the defender could have served. The decision in the case of *Ferrier's Trustees* appears to me conclusive of this part of the case.

It is in accordance with the pursuer's argument to hold, as I do, that the result of the implied entry of James was to operate a change of the investiture, and to create a new investiture excluding the heirs of John Hamilton. But I have some difficulty in seeing how the pursuer can maintain that argument, and at the same time maintain the claim as put forward in his summons. The pursuer concludes for decree against the defender for a "casualty, being one year's rent of the lands," which has become due "in consequence of the death of John Hamilton, . . . who was the vassal last vest and seised," &c. How could John Hamilton be the vassal last vest and seised when James became the vassal vest and seised in 1874? The pursuer explains this by saying that he had to follow the form of summons provided by the Act. But the schedule appended to the Act does not require him to state what is not the fact; it gives a form no doubt, which is to be followed, "as nearly as may be"—but not to be followed, as I have said, irrespective of the conditions of the case. The importance, I suppose, of setting forth John as the last vassal is that the defender cannot bring himself as an heir within the investiture as it stood in John, and if not an heir, then necessarily a singular successor liable in composition. If the summons had set forth James as the vassal last vest and seised, the defender being admittedly his heir, it would have followed that he was liable only in relief. But turning from the conclusions of the summons to the averments in the condescendence, I find the facts to be thus stated (Cond. 4 and 5)—That James, in respect of his implied entry in 1874, became subject to payment of the casualty of composition "as a singular successor of" John, "when it should become payable on the death of the latter;" that the "said casualty" became exigible in 1877 when John died; that James died in 1886 without having made payment of "the said casualty;" that the defender is infeft in the lands in question in respect of a general disposition and settlement in his favour granted by James; and that in virtue of his infeftment he is liable to the pursuer "in payment of the casualty which had become due as aforesaid." That is, in a word, that as James did not pay the casualty exigible from him in 1877 the defender is not bound to pay it—not to pay a casualty in respect of his own entry in 1886, but to pay a casualty due by and exigible from his predecessor in the lands. The decision in *Mounsey* v. *Palmer* has settled that the defender is not liable for any casualty except that exigible in respect of his own entry, and the pursuer's claim as laid cannot in my opinion be sustained.

But apart from this, and assuming the present claim to be relevantly stated as a claim for the casualty due on the defender's own entry, the question is, what is the extent of the defender's liability—is it for composition or relief? That depends upon the character in which the defender stands to the person last entered, and it is admitted that the defender is the heir-at-law of James. It therefore appears to me that as heir of James, who was the vassal last vest and seised, the defender is liable in relief duty only. The answer which is made to this, however, is, that the defender is not the heir of an enfranchised investiture recognised by the superior, James not having paid the composition exigible from him in 1877. I think there is a fallacy involved in this answer. (1) There is no recognition by the superior of James' entry required. It is recognised by the statute, and the superior cannot disregard it. (2) It is not payment that enfranchises an investiture, but the act of the superior admitting the vassal to his public holding. The act of the superior is essential; the payment may be called accidental. For a superior may, if he pleases, enfranchise an investiture without exacting any payment. He may, at his own pleasure, refuse to exact any payment; he may in a doubtful case accept relief duty where he thinks composition due; he may accept half the amount of the casualty as a compromise rather than go to law about a disputed casualty.

In all cases it lies absolutely within the pleasure of the superior to renounce in whole or in part the pecuniary advantage he may be entitled to derive from a change in investiture. But whatever he may elect to do in reference to the payment due to himself the enfranchisement of the investiture is not thereby affected. The enfranchisement is complete when the superior has recognised the new investiture by granting his writ of confirmation, either on or without consideration. Now, that being so, how stands the investiture of 1874? James by recording his infeftment became entered with the superior "to the same effect as if such superior had

granted a writ of confirmation according to the existing law and practice" (Act of 1874, sec. 4, sub-sec. 2). It is not open to doubt that if under the old law—that is, as it stood prior to 1874—the superior had granted James a writ of confirmation, the investiture thereby created would have been enfranchised quite irrespective of what, if anything, had been paid for it. No conveyancer having that writ of confirmation in his hand would have asked on what consideration it had been granted. The fact of its being granted was the essential matter; the vassal under it was duly entered by its execution and delivery. But if the implied entry under the statute is to have all the effect of a writ of confirmation, then it must have the effect of enfranchising the investiture, and if that effect followed the investiture created by James' implied entry, then the defender, as heir of that investiture, owes the pursuer relief duty and nothing more.

There is this difference between the case of an entry by writ of confirmation granted under the former practice and the implied entry under the Act of 1874. The superior could formerly withhold his writ of confirmation until his casualty was paid; he has no such protection now, because the entry is completed by the vassal taking infeftment, an act which the superior cannot prevent or control. The statute, in view of this difference, provides that no implied entry shall be pleadable in answer to the superior's demand for a casualty—that is, as argued by the pursuer, "it is to be impossible to avoid the claim by saying—'I am already entered by force of the statute, and therefore no casualty on entry can possibly now be due by me.'" But this difference is only one affecting the mode in which the superior can make good or secure his pecuniary claim; it does not affect the legal consequences of the entry itself.

Again, if the payment of the casualty has anything to do with the question, which I think it has not, through whose fault is it that the casualty due on the entry of James has not been paid? That casualty was due in 1877, and then exigible. It was never demanded. Had the superior enforced his right the casualty would have been paid, and the defender would only have been liable on his entry in payment of relief. This will be conceded. Is the neglect of the superior to enforce his right to increase the burden on the defender? Suppose the feu-duty to be one penny Scots, and the yearly rental of the subjects £500, the defender will be liable for £500 (composition), or only one penny Scots (relief duty), just as the superior enforces or neglects his rights. Surely that is not reasonable. If the superior suffers by his neglect, *sibi imputet*, the defender may justly claim to be dealt with as if the superior had done his duty by his own interests.

In my opinion the judgment of the Lord Ordinary is right. The defender is undoubtedly the heir of James, and succeeds to the lands in question as his heir. James was duly entered with the superior by force of statute to the same effect as if the superior had granted him a writ of confirmation; but had the superior granted such a writ in point of fact, I think no one would ever have asked on what consideration he had granted it. It would have been sufficient for the defender to have produced the writ in favour of his author to entitle him to an entry on payment of relief duty. I think that is really the position in which the defender now stands. Regarding the defender as claiming to enter as the heir of James (not as claiming to be heir of John, which, as I have said, he cannot successfully claim to be) the case of *Ferrier's Trustees* has no application.

Lord Wellwood—I am of opinion that the defender is liable in a casualty of one year's rent of the lands, and not relief duty merely.

The material dates are as follow—In 1860 John Hamilton second of Greenbank, who was duly entered with the superior, conveyed the lands of Rodgerton to his brother James Dunlop Hamilton, who was infeft in the same year. In 1874 James Dunlop Hamilton, by virtue of his infeftment, was on the passing of the Conveyancing Act of that year impliedly entered with the superior; at that time he was not heir-at-law, but merely heir-presumptive of John Hamilton, second of Greenbank. In 1877 John Hamilton second of Greenbank died childless, and a casualty then became due from James Dunlop Hamilton. No demand, however, was made upon him, and he died in 1886, also childless, leaving a general disposition and settlement in favour of the defender, his younger brother, and the defender was infeft in the lands conform to notarial instrument recorded in the General Register of Sasines 17th August 1886.

The superior (the pursuer) now demands from the defender a casualty, being one year's rent of the lands, "in consequence of the death of John Hamilton of Greenbank, . . . who was the vassal last vest and seised in the said land." The defence is that the defender is only liable in a casualty of relief in respect that he is heir-at-law both of John Hamilton the second of Greenbank and James Dunlop Hamilton.

Under the law as it stood prior to the passing of the Conveyancing Act of 1874 the defender would have been entitled to enter with the superior in the character of heir by taking up the mid-superiority, which in that case would have been *in hæreditate jacente* of John Hamilton second of Greenbank. He could thereafter, by executing the appropriate deeds, have consolidated the *dominium utile* with the mid-superiority. It is decided, however, by *Ferrier's Trustees* v. *Bayley*, 4 R. 738, and following cases, in particular *Rankin's Trustees* v. *Lamont*, 6 R. 739, and 7 R. (H. of L.) 10, that the effect of the 4th section of the Conveyancing Act of 1874 is to make it impossible for the defender now to adopt that course. The question for consideration in the present case is, whether although the defender cannot in point of form make up his title as heir of the vassal who last paid a casualty, he is liable only in relief duty, in respect that although his title is in form and must remain that of a singular successor, he is *de facto* heir of the vassal who last paid a casualty. This depends upon the true scope and effect of the 4th section of the Conveyancing Act.

The leading provision is contained in section 4, sub-section 2—"Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infeft in the lands, shall be deemed and held to be as at the date of the registration of

such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior, whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasable at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." This I take to be the cardinal provision. The province of those which follow is simply to modify in favour of one or other of the parties the consequences which would otherwise have attended a completed entry equivalent to entry by confirmation.

In particular according to the then "existing law and practice," a disponee desirous of entering with the superior could not have obtained a writ of confirmation without paying the appropriate casualty. Again, a vassal who had been granted a writ of confirmation was in a position to plead that all casualties due at its date had been discharged. It was therefore necessary, as by the statute infeftment was declared equivalent to entry by confirmation, to protect the rights of the superior by declaring that a vassal impliedly entered should not be entitled to found upon his implied entry as an answer to the superior's claim, and accordingly it was provided by section 4, sub-section 4, that no implied entry should be pleadable against the superior's action for a casualty.

On the other hand, the statute does not allow the superior to claim a casualty oftener or sooner than he could previously have done, it being provided by section 4, sub-section 3, "but provided always, that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."

There are other provisions which seem to me to show that, except in so far as its effects are expressly modified, an implied entry is attended with all the consequences of an entry by writ of confirmation. For instance, if notice of change of ownership is given to the superior, the previous proprietor is freed from liability for performance of the obligations of the feu—See section 4 (2).

If, then, an implied entry carries with it, except in so far as its effects are modified, the consequences of entry by confirmation, the next thing to be considered is, what are those consequences? Now, the first effect of an entry was under the old law, and is under the Act, to evacuate and sweep away the mid-superiority as it stood in the person of the disponer, and to make the disponee thus entered hold directly of the over-superior. In the next place, the superior is entitled to a casualty in respect of the entry, and this right is preserved intact, subject only to the proviso which I have quoted, to the effect that he shall not be entitled to demand a casualty sooner than he could by the law as it stood prior to the Act have required the vassal to enter or to pay such casualty. But the Act does not declare that when a casualty becomes due and exigible it shall or may be different in amount from what it would have been if demanded at the date of the implied entry. As Lord O'Hagan says in *Rankin's Trustees* v. *Lamont*, 7 R. (H. of L.) 15—"The word 'sooner' points neither to the amount of the payment nor to the person to make it, but to the period at which it would be exigible." And again—"The proviso forbade the superior to claim the casualty before he was entitled to it on the death of an entered vassal. If it was intended further to limit his right as well with reference to the amount as to the time of payment, the privilege of tendering the heir, and the sufficiency of his discharge of the relief duty, might have been perpetuated by a few simple words."

I am of opinion that in the present case the defender is bound to pay composition and not relief duty, for this reason, that on the passing of the Conveyancing Act 1874 his author James Dunlop Hamilton was entered with the superior. The effect of that entry was not merely to evacuate the mid-superiority in the person of John Hamilton second of Greenbank, and thus sweep away the old investiture, but also to make the vassal entered under the new investiture liable in a composition (he being a singular successor), although payment of it could not be demanded until the death of John Hamilton second of Greenbank. In other words, I think that the amount of the casualty which would have been payable at the date of the implied entry had the vassal been then entered under the old law cannot be affected by any change of circumstances which may have taken place subsequently to infeftment, as, for instance in the present case, by the accident of the vassal from whom a casualty is demanded happening at the time when the demand is made to be heir of the vassal who last paid a casualty.

If it had been intended that the character in which the vassal should be held as entered, and the amount of the casualty to be paid should be determined as at the date of a casualty becoming due, it would have been enacted that on the death of the vassal who last paid a casualty the person then infeft in the lands should be held to be duly entered with the superior. Or it might have been provided that the superior should not on a casualty becoming due be entitled in respect of a prior implied entry to claim any other or higher casualty than he would have been entitled to had such implied entry not been previously taken. This would have suspended the effect of the implied entry as regarded the amount of the casualty as well as the time at which it might be demanded. In the view which I take of the statute, however, an implied entry takes immediate effect except in so far as it is otherwise expressly directed, and as no exception is made in regard to the amount of the casualty to be paid that must be taken to be the amount which would have been payable if demanded at the date of the implied entry.

The defender relies on the provision of the statute (Act 1874, sec. 4, sub-sec. 4) that no implied entry shall be pleadable in defence against the superior's action for a casualty, and it is argued with much force that if an implied entry is not to be pleaded against the superior it should not be pleaded in his favour to the effect of enlarging his rights. The answer is, that while this provision is made in the superior's favour the converse is not enacted, and cannot, I think, be implied and read into the statute.

Again, it is said that the superior's rights will

be enlarged if the pursuer's contention is sustained. This is true; but *Ferrier's Trustees* v. *Bayley* and *Rankin's Trustees* v. *Lamont* establish that this consideration is not of itself sufficient to override the fair construction of the statute. No doubt this is a harder case for the vassal than if he were seeking to put forward an heir who was not also proprietor of the lands, but the defender is not in a more favourable position, because the old investiture having been extinguished in consequence of James Dunlop Hamilton's implied entry he can only claim through the new investiture, which has not been enfranchised.

The facts of the case indeed are identical with those in *Ferrier's Trustees* v. *Bayley*. It may be that the defence here is rested on more plausible grounds, because it is not sought to revive an extinct mid-superiority. The defender, however, seeks to avail himself of the old investiture by founding on his relationship to the vassal whose mid-superiority was extinguished.

It is true that the form of the title is not conclusive, but the question turns not upon the form of the title, but upon the character of the vassal at the time when the title is made up. If he is then heir of the existing investiture he will be dealt with as an heir; if his position is that of a stranger to it, he will be treated as a singular successor. In the case of *Mackintosh*, 13 R. 692, the vassal was at the date of the implied entry heir of the existing investiture, and might have demanded an entry as such. Again, in the older case of *M'Kenzie*, 1777, the vassal, although he made up his title so as to comply with the provisions of the newly executed deed of entail, was heir of the existing or prior investiture, and was for that reason held entitled to be entered on payment of relief.

In the present case, however, when John Hamilton (2) died in 1877, James Dunlop Hamilton was already fully entered as a singular successor and could not have thereafter reverted to the old investiture. The defender is in no better position than his author. This case must be taken as if the question had arisen in 1877, and if James Dunlop Hamilton would then have been held to be a singular successor, the impediment created by his implied entry cannot, if the view which I take of the case is correct, be ignored in a question with his disponee and heir, the defender.

I am therefore of opinion that the Lord Ordinary's judgment should be altered.

Lord Kyllachy—The question in this case is, whether the defender is liable in a casualty of relief or of composition? and there are, as I understand the case, two views on which it is maintained that he is only liable in relief. The first is, that James Hamilton, his immediate predecessor, was duly entered with the superior, and that he is James Hamilton's heir, and that that being so, it is of no consequence that James Hamilton paid no casualty upon his entry, or that his entry was only an implied entry under the statute. The other view, which is alternative, is, that the defender is entitled, for the purposes of the present (statutory) action, to treat the old investiture in favour of John Hamilton of Greenbank and his heirs as still subsisting, and to connect himself as heir with the old investiture, and so pay only an heir's casualty in the same manner as under the old law.

It is obvious that the questions thus raised depend for their answer on the precise effect which is to be given—in fixing the pecuniary rights of the superior—to the implied entries under the statute intermediate between the entry of the last vassal who paid a casualty, and that of the existing proprietor, who is the defender in the statutory action.

The case would be clear enough if those implied entries were to receive effect all round. It would also be clear enough if they were to be ignored all round. It is admittedly, however, impossible to go that length in either direction. If the implied entries were to receive full effect—as if in each case there had been a writ of confirmation under the old law,—there would not only be an implied enfranchisement of new investitures without payment of casualty, but the fee would, or might, be kept always (impliedly) full, so that no casualty could ever be demanded. On the other hand, if the implied entries were for the purposes of the statutory action to be wholly ignored the result would be to conflict not only with the decisions of the Court in the case of *Ferrier's Trustees*, 4 R. 738, but also with the decision of the Court in the case of *Rossmore's Trustees*, 5 R. 201, and that of the House of Lords in the case of *Lamont* v. *Rankin*, 7 R. (H. of L.) 10.

The question therefore really is (1) how far the view first above mentioned can be maintained short of ignoring altogether the proviso that implied entries shall not be pleadable against the superior, and (2) how far the view second above mentioned can be maintained short of ignoring the decisions in the cases of *Rossmore's Trustees* and *Lamont* v. *Rankin*. I exclude in the meantime the case of *Ferrier's Trustees*, it being at least doubtful how far the present question was in that case argued.

(1) In my opinion it is impossible for the defender without violating the express words of the statute to found on the implied entry of James Hamilton (the last impliedly entered vassal) as foreclosing all reference to former investitures, and enabling the defender to take his stand on the simple fact that he is the heir of James Hamilton. The statute, dealing with the statutory action, provides expressly that "no implied entry shall be pleadable against the superior," and I see no reason why this proviso should not receive effect according to its terms. No doubt it is necessary (because it is necessarily implied) to confine the proviso to implied entries on which no casualty has been paid (just as it is necessary to make a similar implication in the schedule in construing the words which refer to the death of the vassal "last vest and seised)." But (subject to that restriction which cannot help the defender) I see no reason for denying effect to words which seem to be plain, and not only to be plain, but to be essential to the statutory scheme. In particular, I am not able to discover any ground for holding as suggested that the proviso only affects the mode in which the superior can make good or secure his pecuniary claim, and does not affect the legal consequences of the implied entry itself. In my opinion the whole object of the proviso was to exclude the legal consequences of the implied entry in so

far as the same might prejudice the pecuniary rights of the superior.

Moreover, it is not, I think, possible for the defender in this view of the case to stop short at treating the implied entry of the last vassal as an enfranchisement of the last vassal's investiture. If the implied entry is good for that purpose, it must also, it is thought, be good to the effect of postponing the superior's right of action in many cases quite indefinitely. No doubt James Hamilton, the last impliedly entered vassal in this case, happens to be dead, but if he had been alive the question would have been just the same. And if the view now under consideration were well founded the superior would have had no action as now on the death of John Hamilton of Greenbank, but would have had to wait until the death of James Hamilton, and if James Hamilton had happened to dispone *inter vivos* to a disponee who took infeftment he would have had to wait until the death of that disponee. Now, as I already said, I do not think it possible to maintain that such is the meaning of the statute, nor indeed do I understand that the defender would so contend.

(2) It remains, however, to consider how far it is possible to take the other view, viz., to ignore the implied entries for the purposes of the statutory action, and at the same time to give due effect to the decisions to which reference has been made.

Apart from those decisions I quite follow and appreciate the defender's argument. In particular, I accede to the proposition that the superior's whole rights and remedies are for the purposes of this question to be found in the 4th subsection of section 4, and that there is nothing in the statute which gives him right to demand a casualty except the provision in sub-section 4 to the effect that "when but for the Act the superior would have been entitled to sue a declarator of non-entry, he shall have right to bring the statutory action against the proprietor of the lands for the time." I also accede to the proposition that under the old law no declarator of non-entry could have been brought when the fee was full, and that that being so, the superior requires as the basis of his statutory action to ignore the intermediate implied entries, because standing those implied entries, the fee may be and indeed generally will be full. All this I think quite sound, and thinking so, I acknowledge the force of the argument, that as the superior ignores and must ignore the implied entries as filling the fee, he cannot at the same time object to the defender ignoring the implied entries as extinguishing the old investitures.

But, in the first place, in construing a statute like the present it does not necessarily follow that all its provisions are in precise logical symmetry. The question always is, what does the statute mean, and it may very well be that logically or illogically the purpose and meaning of the statute was to entitle the superior to ignore the implied entries so far as they might be pleaded as excluding his action, and yet to found upon them as excluding any attempt on the part of the existing proprietor to connect himself with extinguished investitures. It is certainly the case that while it is expressly provided that "no implied entry shall be pleadable in defence against such action" it is nowhere said that such implied entry shall not be pleadable in support of such action.

In the second place, however, I am unable to regard this question as still open. The case of *Ferrier's Trustees* v. *Bayley*, is, it is hardly disputed, expressly in point, and I doubt whether it is sufficient to displace the authority of that judgment that the point now taken does not appear to have been specially argued. But however that may be, there is no disputing the authority of the case of *Rossmore's Trustees* or of the case of *Lamont* v. *Rankin*, which went to the House of Lords. And I am quite unable to distinguish this case from those cases. It is true that the defender here is himself the heir of the old investiture, and is here tendering himself, and that in the cases in question the defenders sought to tender heirs who happened to be third parties. But having carefully read the judgments in those previous cases, I am unable to discover that they or any of them proceeded on this distinction. It was nowhere, so far as I can see, suggested that notwithstanding subsequent implied entries in favour of strangers, the statute left open the old investitures for the benefit of the heir of the old investiture if he happened to be the true owner of the estate, foreclosing merely the right to put forward—in answer to the superior's action—anybody but the true (beneficial) owner of the estate. That could hardly, I think, have been held consistently with the subsequent decision of the Court in the case of the *Duke of Hamilton* v. *Guild*, 10 R. 1122, which expressly affirmed the right of the defender in the statutory action if uninfeft to exclude the superior's claim for composition by putting forward a third party—not the owner of the lands at all, and making up a title in the person of that third party as the heir of the subsisting investiture. Neither do I think it is possible to hold that the principle of the judgments in question was merely this—that the old investiture was still open, but that entry being abolished nobody could be put forward to connect with the old investiture who was not in a position to obtain infeftment, and thus become a successor in the lands. That would rest the judgments in question on a mere technicality, and one which could have been easily overcome, viz., that the heirs there put forward had not had dispositions executed and recorded in their favour, or that the defenders did not propose to execute and procure the recording of such dispositions. It appears to me that if this had been all that was meant it would have been somewhere expressed, and moreover, that the unimportance of the judgments—which in this view would have been clear—would have been speedily recognised. The true principle of the judgments was, however, in my opinion different, and was the same in all the cases (*Ferrier's Trustees* included), and was simply this—that however the superior's action may be laid, and whatever he may require to assume *fictione statuti* as the basis of his action—implied entries under the statute in favour of strangers have the effect of extinguishing all previous investitures, and of forbidding all recourse to those extinguished investitures for the purpose of enabling any person to connect himself therewith as heir.

I am therefore of opinion that the pursuer is here entitled to prevail, and I have only to add

that I do not consider that the case of *Mackintosh* touches the present question. In the case of *Mackintosh* there was no change of investiture operated. Giving the fullest effect to the only implied entry which there occurred the old investiture remained intact. The old investiture was in favour of Æneas Mackintosh and his heirs-at-law, and the disposition which he executed, and which was impliedly confirmed, was in favour of his heir-at-law. And that appears to have been the basis of the judgment. It is true that the case in question, and the previous cases on which it followed, may be held to affirm the proposition that under the old law a person might claim entry on relief who had so made up his title that he was no longer in a position to serve. But the important fact which distinguishes all those cases from the present is that at the date when the heir in those cases made up his title by confirmation he was in a position to serve. By making up his title by confirmation he merely exercised an option affecting the form of his title, and in the exercise or non-exercise of which the superior had no interest.

At advising—

Lord Justice-Clerk—After much deliberation and consideration the consulted Judges have given their opinions in this case, and these opinions disclose the great difficulties raised by it. For their Lordships are divided as nearly equally as an uneven number admits of, being five of them in favour of reversing the judgment of the Lord Ordinary, and four of them for adhering to it. The responsibility of this Division is thus rather increased than lessened by our having sought the assistance of our brethren, for instead of their deliberations having disposed of the difficulty which led to their being consulted, the case comes back to us hanging in the balance as before, and we have to take our choice between very learned and closely reasoned opinions which are in strict conflict with each other.

After studying these opinions and the whole case, my opinion, arrived at in the end without any substantial doubt, is in accordance with that of the majority of the consulted Judges. That being my opinion, I might have contented myself with expressing it, knowing that I could add nothing of weight to their reasons. But in a case of so great importance, which in its ultimate decision must rule so many and so important interests, it may be considered desirable that the views of individual Judges should be expressed on the points which affect its decision. In doing so, however, it will be unnecessary to recapitulate the facts which are already so clearly stated in more than one opinion, and about which there is no controversy.

The first question is, Did every proprietor holding as a singular successor become at the passing of the Act of 1874 the direct vassal of the superior? This I hold to be conclusively settled by the decisions already pronounced. It is clearly expressed in the Lord President's judgment in the case of *Rossmore's Trustees*. The refusal to allow the defender in that case to put forward the heir of the previously entered vassal, so as to limit the payment to relief, is justified by the Lord President in these words—"I come to the conclusion, certainly not without much consideration, but also in the end, I am bound to say, without any difficulty, that the effect of a person taking infeftment subsequent to the passing of the Act of 1874" (which is the same thing as his being infeft at the date of the Act) "is to enter him as a singular successor with the superior, and of course to subject him to all the conditions of such an entry as it stood before the statute, and, among other things, to the payment of a composition." This view of the law is fully upheld in the other cases which are referred to in the opinions of the consulted Judges including decision by the House of Lords. The question is not in my opinion an open one, but if it be assumed that the laying of a case before the whole Court re-opens questions which have already been made subject of decision, then my opinion is, that apart altogether from previous decision, the view contended for by the pursuer of the effect of the statute is sound and ought to be sustained.

The opening part of sub-section 2 of section 4 of the Act of 1874 makes the change in the law in very clear terms. By it a proprietor infeft at or after the passing of the Act is to be deemed and held as at the date of registration of his infeftment duly entered as if the superior had granted a writ of confirmation. No enactment could be more clear and distinct, and if the clause had stopped there no possible doubt could have existed as to its effect. But there is modification by proviso, and the modifications made require careful consideration to see whether they so affect the direct enactment as to give it a different meaning from that which its words import. Here it is noteworthy that the modifications are specific and sharply defined. There is no suggestion of modification to be implied. The direct modifications which have a bearing on the present question are these—(1) That although the proprietor is held entered by registration of his infeftment he is not necessarily to be liable at once to pay a casualty, but only at the time at which, under the conditions subsisting before the statute, the superior could have demanded it; (2) that his implied entry shall not also imply, as a writ of confirmation would have done, that all previous casualties were discharged, and shall not be pleadable in defence against the superior's action for a casualty; (3) that although no lands are to be deemed to be in non-entry, and no action of declarator of non-entry can be raised, yet that the superior may raise an action of declarator and for payment of any casualty exigible at the date of the action, decree in which is to have the same results as a decree of declarator of non-entry until the casualty is paid.

These are practically all the statutory modifications of the enacting words in sub-section 2 of section 4. There is nothing said in that or other sub-sections to modify to any other effect the declaration that registration of infeftment implies entry. In particular, it is not said that the entry by force of statute does not extinguish mid-superiority. It is not said that when a casualty is exigible it is not to be that which, but for the postponing proviso, would have been exigible at once. It is not said that the postponement of the time for the enforcement of the ordinary pecuniary conditions of confirmation is to expose the superior, in whose favour these conditions

exist, to having their value modified by the subsequent course of events. It is not said that the character of the casualty which is the sequence of the entry forced on the superior by the statute without present payment of casualty is to depend upon the chapter of accidents occurring after the entry. Had such anomalous results been intended they could have been easily expressed. As was pointed out in the House of Lords in *Rankin's* case, "a few simple words" would have expressed such intention of the Legislature had the intention really existed. Even admitting that implication might be enough, it would require to be necessary implication, and it can scarcely be contended that there exists any necessity for such implication.

Keeping in view these three things—First, what the statute enacts; second, what modification it applies to the enactment; and third, what modifications it does not apply—let us now consider the grounds of the judgment of the Lord Ordinary. These are mainly two in number—First, that as the payment of a casualty in respect of James' entry under the statute is postponed by statutory proviso till the death of the vassal last vest and seised in the lands, therefore, as James ceased to be a mere presumptive heir at that date, or became the heir *de facto*, he is entitled to limit his payment to that applicable to an heir, and the superior could not demand a composition. Second, that whether this is so or not, the casualty is now one of relief only, William being the heir, and succeeding as heir—that is, as heir of John's investiture.

Now, taking this last contention first, it appears to me to be fallacious to speak of William as being the heir of the investiture of John, as some of my brethren do. In *Ferrier's* case it was distinctly held that no person could now tender himself as heir to one who had disponed away the property prior to the Act of 1874. By that Act the right and title of such a one were absolutely taken away whenever registration of the disponee's infeftment was completed. Nothing remained in him as the basis on which alone such a tendering of his heir as would have been competent before the statute could rest. If the question be asked, Who after the passing of the Act was the vassal of the superior, liable to him in the feu-duties affecting the lands, and the performance of all the obligations of feu? the answer plainly is "not John, but James." James' entry by virtue of the statute is declared to be "to the same effect as if the superior had granted a writ of confirmation." So certainly is this so, that it is only by special proviso that the superior's claim against the former vassal and his heirs is reserved to him "until notice of the change of ownership shall have been given to" him, and this again is declared to be without prejudice to the previous proprietor or his heirs, &c., recovering all feu-duties he "may have had to pay in consequence of any failure or omission to give such notice." I am therefore unable to understand how it can be held that William has any defence to this action on the ground that he is the heir of John. John's right ceased to exist by force of statute in 1874. James could not therefore succeed to John when John died in 1877, for John was divested, and that being so, neither can William claim the character of heir of John's investiture. The Lord Ordinary, and those of my brethren who are in favour of upholding his judgment, found strongly on the case of *Mackintosh* in support of the opposite view. But I must confess that I am unable to understand why they should rely upon *Mackintosh's* case at all. If John's investiture ceased to exist in 1874, then *Mackintosh's* case cannot apply. If it did not cease to exist, and William can take advantage of it, then there is no need to appeal to *Mackintosh's* case in support of his right to satisfy the superior's claim for a casualty by a casualty of relief only. It is trite law that if the person succeeding as heir is to be entered, the superior must enter him for relief. And if James had not been entered till 1877 at John's death the case we are dealing with would have been a different one altogether. I therefore do not see even the purpose for which *Mackintosh's* case is founded on. In the view I take of that case it has no application to the present. There the vassal from whom a casualty was demanded was, as regarded one-half of the estate, which he took only on the death of the previous vassal, the heir of investiture entitled to enter by special service. It was held that having that right he was not debarred from pleading it against the demand for the greater casualty for the whole property by the last proprietor, merely because having the right to the whole testament he had taken infeftment as a singular successor thereunder, he being at the same time his heir in relation to a half. That comes to nothing more than this, that if the vassal entered by virtue of the statute has the character of heir of the already enfranchised investiture, he can claim that the investiture is continued in his person, and can therefore claim to limit his payment of casualty accordingly, notwithstanding that the form in which he made up his title is that appropriate to a singular successor. That which was in his predecessor, and which could pass to him by right as heir, he was entitled to found upon in any question as to what casualty was due to the superior on his entry under the statute. His relation at the time of the statutory entry being that of heir to a *pro indiviso* half of the estate, he was held entitled to plead that relation in the question of composition or relief. Here there is no such case. James was in 1874 only heir presumptive to John, and therefore not in a position to take anything as heir. He, when he obtained his entry in that year, did so solely on the right obtained from John by disposition, and therefore fell to be dealt with as a stranger in the question of payment of casualty when that should become exigible. That this brings about a claim for a greater casualty than might have been the case had the Act not been passed is no reason for not giving effect to the statute. As Lord Cairns pointed out in the case of *Lamont*, such a consideration will not justify the interpolation of words into the statute upon an assumption that the Legislature intended what the legislative enactment does not express.

But then it is said—and this is the second ground on which the Lord Ordinary's judgment is sustained—that as James, though only the heir presumptive of John at the time when he was entered by force of statute in 1874, turned out to be actually his heir when he died, James was entitled as at 1877 to satisfy the superior's claim for a casualty by payment as for relief only. This

view is based on the principle that the casualty must be determined "by the character of the applicant for entry, and not by the form of his title," as Lord Kinnear points out. But the answer seems to me to be this, that James was not in 1877 an "applicant for entry." He was entered at the passing of the Act "to the same effect as if the superior had granted a writ of confirmation." It seems to me impossible to maintain that if there had been no words in the statute postponing exaction of casualties a demand in 1874 for a casualty could have been resisted by James, and if payment of casualty could not have been resisted there could have been no pretence for limiting it to relief. It was the confirmation in the case of a singular successor which was impliedly effected in James' case by the passing of the Act of 1874. It is quite true that prior to 1874 a singular successor could by the device of tendering the heir for entry limit the casualty to relief. But it has been expressly decided that the singular successor cannot now tender the heir. What is the difference in this case? It is only that the heir as to whom it is suggested that he might have been tendered in 1877 is the same person as the singular successor, it happening to be the fact that at the time of John's death James was his heir. But if Lord Cairns' doctrine in *Lamont's* case must be accepted, that "the appellants" [*i.e.*, the singular successors] "are by the Act deemed and held to be truly entered, and if so, there is no vacant fief into which the heir could enter," then the distinction between the two cases is a distinction without a difference. Lord Cairns' words may be applied to this case thus—James is by the Act deemed and held to be truly entered, and if so, there is no vacant fief to which he—though on the death of John he proved to be the heir—can enter. The death of John added nothing to James' right or title. There was in 1877 nothing left in John for James to take up as John's heir. The death of John had only one practical effect. It put an end to the statutory postponement of the payment due to the superior for the enfranchisement of that entry, which was already completed as if by writ of confirmation in 1874. I am confirmed in this view by the knowledge that it was held by so high an authority in the feudal law as the late Lord Curriehill, who in his opinion in the unreported case of *Sturrock* v. *Carruthers' Trustees* in 1879, after stating the rule that the heir cannot now be put forward so as to evade payment of a composition, says—"This rule must take effect where the person whose entry is implied happens, after his infeftment as a singular successor of the original vassal, to become also the heir of that vassal."

Some stress is laid by those who are in favour of adhering to the Lord Ordinary's interlocutor upon the form of the action, which proceeds, following the form in the schedule, to describe the heir on whose death a casualty became exigible, namely, John, as "the vassal last vest and seised in the lands." The view taken is that this description of John implies—to use Lord Kinnear's words—"an averment that no other vassal has entered since his death, or, to use the language of the old law, to which the pursuer is required by the statute to appeal, that the fee is still vacant in consequence of his death." This reasoning seems to me to ignore the fact that the statute creates an anomaly by its implied entry and postponed exigibility of the casualty which but for proviso would have been at once exigible. This anomaly necessarily creates difficulty in the formal procedure for obtaining a decree on the occurrence of the event which removes the bar to exaction. It requires to be enacted that "no implied entry shall be pleadable against" the superior's action when the event has occurred. And accordingly the form of action passes by all such implied entries, and the vassal, to the occurrence of whose death the right to enforce payment of a casualty is postponed, is for the purposes of that action (which passes by implied entries) dealt with as the vassal who was last vest and seised in contradistinction to the vassal who is impliedly entered, and from whom the superior demands a casualty by his action. That this is the sound view of the meaning of the form in Schedule B appears in my judgment very clearly when consideration is given to the expressions used in the Act itself to describe the old and new vassals in the case of implied entries under the statute, where it is dealing with the rights of the superior, both as reserved and as taken away, in the case of implied entries.

In sub-section 2 of section 4 two persons are contrasted, the vassal who is impliedly entered, and the vassal who was entered before him. The words which the statute uses to describe the latter are "the proprietor last entered." Thus it is enacted that notwithstanding the "implied entry the proprietor last entered in the lands, and his heirs and representatives, shall continue personally liable" for feu-duties, &c., until notice of change of ownership is given to the superior." And again the right is conferred upon "the proprietor last entered in the lands to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered may have had to pay in consequence of any failure or omission to give such notice," and all remedies competent to the superior are to be held to be assigned "to the proprietor last entered in the lands and his foresaids" for recovery of such sums from the entered proprietor. The same expression "proprietor last entered in the lands" is again used in reference to the preservation of evidence of the notice of change of ownership, which is to save him from being still liable to pay feu-duties after the implied entry. And accordingly in Schedule A the instructions for drawing up the notice direct that after the words "which formerly belonged to," the name "of the last entered vassal" is to be inserted.

Now, nothing can be more clear than this, that the statute in the passages I have quoted adopts the words "proprietor last entered in the lands" to describe the proprietor who was entered but has been divested by implied entry of another, and the words "the entered proprietor of the lands" to describe the proprietor who is entered by the statutory implied entry. The two expressions are used in contrast to designate the two proprietors, the old and divested proprietor, and the new and impliedly entered proprietor. Such being the distinctive expressions used in the statute itself, and they being in no way ambiguous when they occur in the statute as to their application, it appears to me that all difficulty which might be supposed to exist regarding the wording of the statutory form of summons in Schedule B

is removed. In that summons the word "last" is used in the same sense in which it is used in the statute itself. The words "the death of C, who was the vassal last vest and seised," do not in my opinion mean who was such vassal when he died, but mean who was the vassal last entered, in contrast to the vassal who, previous to C's death, had entry effected for him by statutory implication, and is thus the entered proprietor of the lands. The words in the enacting clauses cannot be read in any other sense, and the words in the schedule can be read in the same sense, and if they can be so read, then they must be so read—it not being allowable to assume repugnancy—and if so read, all the difficulties suggested disappear.

I have only further to add that I do not think the result is affected by the fact that William has succeeded to James. It is said that as James was entered by implication, and William succeeds James as his heir, that therefore William is liable as for relief only. But this contention is directly in the teeth of the statutory proviso that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, &c., which may be due or exigible in respect of the lands at or prior to the date of such entry." Now, William's entry is an implied entry, and at the time at which it took place a casualty was due and exigible for the enfranchisement of James' entry. William therefore cannot plead his implied entry to debar the superior from making good out of the lands by action of declarator and payment the casualty which at the time of that entry was due and exigible, while William is further debarred from pleading either his own entry or that of James in answer to the action by the express words of the statute that "no implied entry shall be pleadable in defence against such action." William has no entry upon which he can found except either his own or James' entry. But both of these entries being statutory entries by implication only, I hold that under the express words of the statute they cannot be looked at. As regards the determination of any question of class of casualty or exaction of casualty, William's position must be considered as if he had to make up his title by the ordinary method necessary before 1874. This, as he cannot found upon implied entry, he could not now do as heir of John, consolidating by resignation *ad remanentiam* in his own favour. It is only as heir of James that he could proceed. And what would have been his procedure? It would have been to take up and execute the procuratory in the disposition by John to James, thus placing himself in the position to obtain a charter of resignation from the superior. But what would have been the payments he would have had to make in that case? Plainly a composition would have been exigible, and he could not have successfully maintained that he was liable as for relief only.

Although it is not permissible in forming an opinion as to the interpretation of statutory enactment to take into consideration what the effect of a particular interpretation may be, it is satisfactory to know that the judgment which the majority of the consulted Judges recommend will be consistent with the general idea which seems to run through the different clauses. The enactments of the statute are evidently not intended to cut down the superior's pecuniary interests, but are to save these. It is quite certain that if the views of the minority were to prevail, the superior would in many cases be deprived of all chance of obtaining a casualty of composition, and indefinitely. This would be a curious result, in the case of property held by individuals, of an Act which expressly provides in the case of corporations or trusts which have no succession, that a composition is to be paid to the superior at regular intervals. I think that the judgment we must give will bring about a more consistent result in the application of the statute than that of the Lord Ordinary.

On these grounds, and in respect of the opinions of the majority of the consulted Judges, I must move your Lordships to recal the interlocutor, and to decern in terms of the conclusions of the summons.

Lord Young—I am of opinion that the interlocutor of the Lord Ordinary is right and ought to be affirmed.

Lord Rutherfurd Clark—I agree with the Lord President.

Lord Lee—I agree with the Lord Ordinary and his views as stated in his note. I also agree with Lord Adam as to the specialty in the case.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause with the opinions of the consulted Judges, in conformity with the opinions of the majority of the Judges of the whole Court, Recal the Lord Ordinary's interlocutor of 20th December 1887: Find that the casualty due by the defender to the pursuer is a composition of one year's rent of the lands described in the summons: Find the pursuer entitled to expenses; allow an account thereof to be lodged; and remit the same to the Auditor to tax and to report: Remit the cause to the Lord Ordinary, with power to him to decern for the taxed amount of said expenses, and to proceed further in the cause as may seem just."

Counsel for the Appellant—D.-F. Balfour, Q.C. —Graham Murray—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent — Sol. Gen. Robertson, Q.C.—Guthrie. Agents—Campbell & Smith, S.S.C.

Friday, July 12.

FIRST DIVISION.

[Exchequer Cause.

LORD ADVOCATE *v.* LAIDLAY'S TRUSTEES.

Revenue—Indian or British Company—Contract of Copartnery—Death of Partner—Transfer of Shares—Inventory Duty.

The firm of R. W. & Co. carried on an extensive business in indigo, silk, and other produce, which after being grown or manufactured in India was either sold there, and the proceeds remitted to this country, or was

consigned to the London agents of the firm for realisation in Europe. The property of the concern was vested in three trustees, all of whom resided in the United Kingdom. The articles of copartnery also provided that upon the death of a partner his representatives should not become partners in his stead, but that they might, if they chose, within a specified time, sell his share to a person or persons approved of by a committee appointed to decide all matters affecting the interest of the partnership, and if a sale or transfer were not completed within that time, the value of the share was to be ascertained by the London agents of the company, and the price paid by the trustees to the representatives of the deceased partner upon their executing a transfer to the trustees of such share.

A partner of the firm, domiciled in Scotland, died, and his executors transferred his shares to three of his sons, to each one share, at the price of £9000 per share.

Held (*diss.* Lord Shand) that the £27,000 was liable to inventory duty, as it was a debt recovered by the executors in this country, and both creditor and debtor were resident there.

Opinion per Lord Shand that the articles of copartnery, and the manner in which the business of the firm was carried on, showed that this was an Indian Company, and that the £27,000, being a payment in respect of a share thereof, was Indian estate, and was not liable to inventory duty in this country.

This was an action by the Board of Inland Revenue against the trustees and executors of the deceased John Watson Laidlay, concluding for payment of a sum of £756 of additional inventory stamp duty, so as to make up, along with the sums previously paid, the full amount of stamp duty which would have been payable if the recorded inventory had contained a full inventory of the moveable estate of the deceased in the United Kingdom. The action was raised in the following circumstances.

The deceased John Watson Laidlay of Seacliff in the county of Haddington died on 8th March 1885. His trustees and executors gave up an inventory of his personal estate in the United Kingdom, and the appropriate stamp duty was paid by them thereon. At the end of the inventory, under the head "abroad," there was stated a sum of £25,221, 4s. 3d., said to be "the deceased's share in the real and personal estate as a partner in the firm of Robert Watson & Company, Calcutta, as valued by the agents of the company." The value of the deceased's share or interest in the nett balance of the partnership assets was not included in the inventory as estate in the United Kingdom for payment of inventory duty, and inventory duty was not paid upon it. The deceased held three one thirty-second shares in the said firm, and under an agreement taking effect as from 8th September 1885 these shares were transferred by his trustees and executors, one to each of his sons Andrew Laidlay, Robert Watson Laidlay, and Alfred Hope Laidlay, the agreed-on price paid for each share being £9000.

The firm of Robert Watson & Company, which began business in September 1877, was formed under articles of partnership dated in August 1877, which were a renewal of older contracts of copartnery dated in 1855 and 1867. There were nine partners at the date of the action, seven of whom resided in the United Kingdom, and held 30 shares, and two resided in Calcutta, and held two shares, the shares in all being 32. By the preamble of the said contract of 1877 it was declared that the whole real and personal property and effects of the firm should be vested in three parties named (all of whom were resident in the United Kingdom) as trustees for the partnership. The articles also contained the following important provisions:—"2. The business shall be the carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realisation in Europe of such produce." "7. The style or firm of the partnership shall be 'Robert Watson & Company.'" "8. The said style or firm of 'Robert Watson & Company' may be used by Messrs Jardine, Skinner, & Company or other the managing agents for the time being appointed in their stead, and under the special or general authority in writing of such managing agents, but not otherwise by the Mofussil manager in all dealings and transactions, and in all actions and suits by and against the company, and in all other matters and proceedings which can be conducted in the name of the said firm, but the partners or any of them as such shall not be at liberty to use the said style or firm for any purpose or on any pretext whatsoever. In case of any action, suit, or other proceeding by or against the said partnership, the names of the trustees thereof for the time being may be used."

By article 9 it was provided that five partners named "shall constitute a committee to advise with the agents both in London and Calcutta, and to decide, subject to the approval of a general meeting of the partners, in all matters affecting the interest of the partnership, and also to decide as to calling when necessary a meeting of the partners. . . . 10. Messrs Jardine, Skinner, & Company are hereby constituted the managing agents of the partnership in India, and the entire business of the partnership there shall be carried on by them as such managing agents subject to the provisions herein contained, but only so long as the said firm of Jardine, Skinner, & Company or some or one of the partners therein shall in their or his own right hold or be entitled to at least two thirty-second shares in the property of the partnership hereby constituted. . . . 11. Messrs Jardine, Skinner, & Company, as such managing agents, shall have all powers necessary for the efficient carrying on of the business thereof, and are hereby expressly empowered (but subject to the opinion of the committee whenever it shall have been expressed) to decide whether all the said branches of business shall be carried on, or which of them, and to what extent. Provided always, that no branch of business not heretofore undertaken by the partnership shall be taken up without the consent previously obtained of the committee. The said managing agents shall also determine the amount of the outlay to be expended in the business and concerns of the partnership in each year, and the mode and terms of disposal of the produce thereof, and have power to appoint and remove

all persons in the employment of the partnership in India, and to give to such persons all such powers, including a power of substitution, as the said Messrs Jardine, Skinner, & Company may from time to time think proper. And further, the said Messrs Jardine, Skinner, & Company are hereby authorised to enter into all contracts necessary for the carrying on of the business of the company, to institute and defend all suits in which the partnership may be concerned, and also to compromise any such action or suits, and to compound any debts due to the partnership or other claims or demands, and to refer any claim or demand of or against the partnership to arbitration, and generally to manage the said estate and conduct all the affairs in India of the said partnership, and to do and execute all such acts, matters, and things, as they shall deem necessary for the purposes aforesaid. 12. All moneys which shall be borrowed from Messrs Matheson & Company for the purpose of the partnership, and for carrying on the said concerns, shall be drawn for by Messrs Jardine, Skinner, & Company only, and in their own names, and not in the name of the partnership or of the firm thereof, and all the money which shall be required to be remitted to the various concerns of the partnership shall be supplied by Messrs Jardine, Skinner, & Company, and all the produce of the concerns of the partnership shall be received and disposed of by them. . . . 14. All necessary books of account of the partnership, showing the receipts and payments and assets and liabilities of the partnership shall be kept by Messrs Jardine, Skinner, & Company as the managing agents at their usual place of business in Calcutta, and shall be at all times open for the inspection of the partners. . . . 15. As soon as practicable after the 30th day of September in each year, and the realisation of the produce of the season, the managing agents in Calcutta shall prepare a general account or balance-sheet showing the result of the operations of the partnership during the year ending on that day, and the nett profit or gross loss after paying or providing for all the outlay expenses and engagements of the year of every kind, shall be appropriated as follows, the profits to the extent of 8 per cent. on the capital shall be carried to the account of the respective partners in the books of the partnership in proportion to their respective shares, the excess of the profits beyond 8 per cent. shall be set apart and paid to the London agents to form and afterwards maintain a reserve fund. . . . 18. As a remuneration for the trouble as managing agents of the partnership business, Messrs Jardine, Skinner, & Company shall be entitled to receive a commission of 2½ per cent. on the proceeds of sale of the indigo and silk and other produce to be produced in the concerns of the partnership in each year, whether the same shall be sold in Calcutta, or shipped for realisation in Europe. . . . 19. The said Messrs Matheson & Company are hereby declared to be the agents of the partnership in Europe, the entire business of which therein shall be transacted through them, and all the produce of the partnership shall be consigned to them, or if sold in India, the proceeds shall forthwith be remitted to them. The said Messrs Matheson & Company shall supply the necessary funds for the current advances of each season, whether for working the estates, the production of indigo, silk, or other produce, and the same shall be on the security of the mortgages and covenants contained in the indentures of mortgage and confirmation hereinbefore referred to. Any further expenditure of moneys whether for the purchase of new concerns, or for land tenures, or for advances made to secure leases of property, or for any extraordinary expenditure under the heads of law proceedings, land surveying, machinery, or otherwise, shall be provided in such manner as the managing agents shall from time to time determine. . . . 20. The said Messrs Matheson & Company shall be entitled to interest on the general cash balance which may be due to them, at the rate of £5 per cent. per annum, so long as such balance shall not exceed £150,000, and at the minimum rate charged by the Bank of England for the time being for discounts (when above 5 per cent.) on any sum which may exceed that amount; they shall also be entitled to a commission of 2½ per cent. on the sales of the produce of the season, whether such sales are made in India or in Europe. 21. No partner or partners shall contract any debt or draw, accept, or indorse any bill or note, or transact any business in the name of the partnership, nor shall any of the partners, not being a majority of the partners, in any manner interfere with the conduct of the business of the partnership by Messrs Jardine, Skinner, & Company or Messrs Matheson & Company respectively, but all powers for controlling, regulating, ordering, and managing the affairs of the partnership, which consistently with the provisions of these presents may be exercised by all the partners for the time being, may be exercised by a majority of the partners."

By article 25 it was provided that the death of any partner should not cause a dissolution of the partnership as between the other partners; that the representatives of a deceased partner should not become partners in respect of the share of such partner; that the interest of a deceased partner should cease at the 30th September next after his decease; that if the representatives of the deceased partner desired to sell his share and interest to any partner, or to any other person approved of by the committee, they might do so, but that if they did not desire to do so, or did not find a purchaser within six months after the partner's death, the fair value of the share was to be ascertained by Messrs Matheson & Company, and paid by the trustees of the partnership to the representatives of the deceased on their executing a transfer of such share to the trustees.

The following important admissions were made by the parties:—"(1) . . . Of the parties who signed the articles of 1877, two were resident in India and executed them there. (2) The meetings of the committee named and appointed by No. 9 of the articles of 1877 took place in London in the office of Matheson & Company, the London agents of the partnership, and were summoned by Matheson & Company acting in concert with the chairman of the committee who was resident in England. The committee as a rule met prior to the annual meeting of the partners to consider the business to be laid before the meeting, and at other times when any business required it, of which they were informed by Matheson & Company, to

whom the regular advices as to the state of the business were addressed by the managing agents in India. A minute-book of meetings and correspondence was kept for the committee of which Matheson & Company were the custodiers. The committee discharged the duties devolving upon them under the said articles, and were in correspondence with the managing agents in India as shown by the minute-book. (3) The financial year of the partnership closed, in terms of article 15, on 30th September in each year; and as soon as possible thereafter Jardine, Skinner, & Company, on the footing that there was sufficient profit, passed a dividend at the rate of 8 per cent. to the credit of each partner's account in the books of the partnership. Messrs Matheson & Company were advised thereof, and requested to make, and did make, payment of the dividend to the partners respectively. This payment was generally made in or about the month of December. As soon as the result of the year's operations was ascertained, and after receiving the particulars of the London account from Matheson & Company, Jardine, Skinner, & Company made up detailed accounts of such operations, and if there was any profit above the 8 per cent., and the contribution to the reserve fund provided for under the articles of copartnery, they passed the same to the partners' account in proportion to their respective interests in the concern. Those accounts, along with a statement of each partner's own private account, including his share of profits, were sent to Matheson & Company, who transmitted abstracts of the accounts and printed statements and reports relative thereto to the partners along with the statement of their private account. These accounts were generally circulated by Messrs Matheson & Company about June or July in each year; and within a few days after they remitted to each partner his share of the final dividend, or passed same to the credit of his private account with them if he had such. The partners resident in Great Britain were generally in the habit of holding an annual meeting in the course of each summer. These and other meetings were held at Messrs Matheson & Company's office. At these annual meetings the partners discussed the accounts and the general prospects of the company. Decisions were given by the general body of the partners at their annual meeting upon points connected with the business submitted to them for that purpose by the managing agents in India through the committee. (10) The produce of the partnership estates was either realised by Jardine, Skinner, & Company, and the proceeds remitted to the London agents, or it was consigned to the London agents for realisation in Europe, all in terms of article 19. In the latter case Matheson & Company transmitted to Jardine, Skinner, & Company statements showing the realisation for entry in the business books of the partnership in India, which statements were entered accordingly. In carrying out the said article 19 Matheson & Company were during the whole period of the partnership under advance to Robert Watson & Company, as the outlay was chiefly at the beginning of each season, and from the nature of the business no season's accounts could be closed until from six to nine months after the next season had begun."

The pursuer also alleged that the deceased's interest or share in the assets of this partnership was estate situated in this country, and that an inventory to include such share as estate in this country fell to be exhibited duly stamped with inventory duty.

The pursuer pleaded, *inter alia*—"(1) In respect that the said partnership was truly an English company, the interest or share of a deceased partner in the partnership assets is liable to inventory duty."

The defenders pleaded, *inter alia*—"(2) The business of Robert Watson & Company being chiefly carried on in India, where their principal office is, the share and interest of John Watson Laidlay therein at his death was locally situated in India within the meaning of the said statutes, and is not liable to inventory duty."

On 15th March 1889 the Lord Ordinary (Fraser) ordained the defenders to exhibit upon oath and to record in the proper Sheriff Court in Scotland a full and true inventory or additional inventory of all the personal or moveable estate and effects of the deceased John Watson Laidlay not contained in any inventory hitherto exhibited.

"*Opinion.*—The claim is for inventory or probate duty, and the answer to that quesion depends upon whether or not the property of the deceased is held to be situated in India or in the United Kingdom. This property consisted of a share in the real and personal estate as a partner in the firm of Robert Watson & Company of Calcutta, which was sold after the death of Mr Laidlay to his sons at the price of £27,000.

"The firm of Robert Watson & Company consisted at the time of the death of Mr Laidlay of several partners, and its business was 'the carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realisation in Europe of such produce.' The whole work done under the partnership in the production of the articles dealt in was done in India. Managing agents, in the persons of Jardine, Skinner, & Company, were appointed to superintend the works in India with very extensive powers, and it was declared that all the produce of the concerns of the partnership should be received and disposed of by them. All the necessary books of account of the partnership were to be kept by them, but they were subject to the control of a committee of five members, who had also very extensive powers. They were to advise with the agents both in London and in Calcutta, and to decide, subject to the approval of a general meeting of the partners, on all matters affecting the interest of the partnership. The minute-book which has been produced indicates how close was the supervision which they exercised. Besides the agents in Calcutta, the partnership had also London agents, viz., Matheson & Company, to whom all the produce of the partnership sent to Europe for sale was to be consigned, and if such produce were sold in India, the proceeds were to be forthwith remitted to Matheson & Company by Jardine, Skinner, & Company.

"Now, the deceased Mr Laidlay had three shares in this partnership, and the question comes to be, whether these shares shall be

held as an asset in his possession in Scotland, where he was domiciled and where he died, or whether they shall be held as an asset situated in India, in which latter case no inventory duty as under the statutes mentioned on record could be claimed. The contract of copartnery provides for the case of the death of a partner. In such a case it is declared that his interest in the partnership shall cease as at the 30th day of September after his decease—that is, his representatives shall be entitled to claim profits made between the date of the death and the 30th of September, but not after the latter date, though they are entitled to the value of the deceased's interest in the partnership. Such value may be realised in various ways, as provided by the 25th article of the contract of copartnery. If the representatives of the deceased shall desire to sell the share to any of the partners or to any other person, such other person to be approved by the committee, the same may be sold for such price as may be agreed upon. But if they do not desire to sell, or cannot find a purchaser approved by the committee, then the fair value of the share is to be paid to them by the trustees for the partnership.

"The first of these modes of dealing with Mr Laidlay's shares was adopted. By an agreement between Mr Laidlay's executors and three of his sons, executed partly in England and partly in Scotland, the executors agreed to sell to these sons Mr Laidlay's three shares at the price of £9000 for each share, and the purchasers being approved of by the shareholders, they became partners in room of their deceased father.

"Now, the Lord Ordinary is of opinion that the executors were not entitled to deal with Mr Laidlay's shares in the partnership without giving up an inventory and obtaining confirmation thereto. If the shares had not been sold to the sons, and if the mode of realisation was payment by the trustees to Mr Laidlay's representatives, this would simply be payment by a debtor to his creditor of a simple contract debt, and the mode in which such a debt is regarded is illustrated by the case of *Fernandez' Executors*, February 8, 1870, L.R., 5 Chan. App. 314, the rubric of which is as follows:—'A chartered bank whose head office was in England, but whose business was chiefly carried on in India, was ordered to be wound up, and the Indian assets were remitted to this country. A creditor domiciled in India proved his debt, received a dividend, and died, leaving a will which was proved in India. After his death a final dividend became payable—*held* (*reversing* the decision of the Master of the Rolls) that the dividend ought not to be at once remitted to the executors in India, but could only be paid to them on their producing a properly stamped English probate.' Lord Giffard, in delivering judgment, said—'Probate duty, as we all know, attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of the domicile of the testator. The moneys now in question are *bona notabilia* in London, and I have no hesitation in saying that this Court cannot authorise the payment of them to a person who, if he were to receive them and administer them, would be going directly in the teeth of the Act of Parliament, and doing a thing for which, if the Crown chose to proceed against him, he would be liable in a penalty. Upon these grounds I am obliged to say that there can be payment only upon production of an English probate.' And Mr Hansen, in his Treatise on the Probate Legacy and Succession Duties Acts, p. 161, further expresses himself as follows:—'The duty is payable in respect of the whole amount which the representatives of a deceased partner in an English firm are entitled to recover and receive from the surviving partner in this country, on account of the share of the deceased, notwithstanding that the partnership assets or any part of them are situate abroad, for the legal interest in the partnership property vests in the surviving partner, who is liable to account for and pay to the representatives of the deceased partner the amount which may ultimately appear due to him after the assets have been realised and the partnership debts discharged, and this liability is in the nature of a personal debt, and situate therefor like other debts within the jurisdiction of that country where the debtor resides.' No doubt, in the present case the profits were earned with the manufacture in India of the articles dealt in, but these profits were obtained not entirely by the exertions and the skill of the Indian managers. They were the servants and bound to obey the instructions of the London committee. Then, further, these profits were all remitted to London, and they were distributed there. Sir James Hannen, in the case of *Ewing*, January 25, 1881, 6 P.D. 28, says—'The share of a deceased partner in a partnership asset is situate where the business is carried on, and shares in a company are locally situate where the head office is.' But the question is more complex when the business is carried on at two places—one at the place of manufacture of the article dealt in, and the other the place of the governing and directing body. One does not get much aid from the latter part of this opinion, for the question always returns, which is the head office, and as regards the present case the Lord Ordinary must hold it to be London."

The defenders reclaimed, and argued—The asset upon which inventory duty was claimed was truly an asset situated in India in the sense of the revenue statutes. The *persona* of the company was in India, no matter where the individual partners might for the time being happen to be, and the seat of the business was there also. While the *locus* of the registered office of a company might be of importance in determining the residence of the company, it was not conclusive of the matter—*Cesena Sulphur Company* v. *Calcutta Mills Company*, L.R., 1 Exch. Div. 428; *Werle* v. *Colquohoun*, L.R., 20 Q.B.D. 753; *Colquohoun* v. *Brooks*, L.R., 21 Q.B.D. 52. Nor did the residence of the individual partners necessarily determine whether the concern was, for Revenue purposes, to be viewed as an English or an Indian copartnery. The articles of association and the actings of the parties alone determined the question, and showed that in the view of those most interested it was considered to be an Indian copartnery. The *locus* of the corporeal assets was also an element of importance; here it consisted of real and personal property in India, where in fact the whole assets of the company were situated, as any money belonging to the company in this country was borrowed from its financial agents. As the business was an

Indian one, a share thereof must necessarily be an Indian asset, and not liable to inventory duty.

Authorities—Cases cited by the Lord Ordinary and *Attorney-General* v. *Bouwens*, 4 Mac. & Wels. 171; *Loyd* v. *Solicitor of Inland Revenue*, 12 March, 1884, 11 R. 687; statutes regulating the exhibition of inventories—48 Geo. III. c. 149; 55 Geo. III. c. 184, Sched. pt. 5; 16 and 17 Vict. c. 59; 21 and 22 Vict. c. 56; 23 and 24 Vict. c. 80; 39 and 40 Vict. c. 70; 44 Vict. c. 12 sec. 27.

Argued for the respondents—Liability for probate duty depended upon the locality of the property at the time of the decease. In the present case the articles of copartnery established the rights of the representatives of a deceasing partner, and made it clear that what his executry estate possessed thereunder was a right of claim against the trustees of the company for a sum of money, which sum was a debt due to the executors by their debtors in this country. It was this sum of money which was recoverable, and was recovered in this country by persons resident and domiciled here, which the respondents claimed should be entered in the inventory of the deceased's estate. The actings of the parties as interpreting the articles of association showed that the respondents' contention was right. Probate duty was exigible wherever property was recovered by the judicial authority of probate. The executors of the deceased Mr Laidlay had a claim for a share of this estate measured by the value of the deceased's interest in the copartnery, and it was upon the value of this share that the Crown claimed inventory duty, which was fairly due.

Authorities—Cases cited by the Lord Ordinary, and *Attorney-General* v. *Hubback*, L.R., 13 Q.B. Div. 275; Lindley on Partnership (last ed.), p. 339.

At advising—

Lord President—The late John Watson Laidlay of Seacliff, in the county of Haddington, died on the 8th of March 1885. The defenders are his trustees and executors, and they gave up an inventory of his personal estate, upon which they obtained confirmation in April 1885. That inventory showed a nett personal estate in the United Kingdom amounting to £294,345, and upon that amount stamp duty was paid. But at the end of the inventory, under the head "abroad," there was a sum stated of £25,221, which is said to be "the deceased's share in the real and personal estate as a partner in the firm of Robert Watson & Company, Calcutta, as valued by the agents of the company;" and it is alleged and admitted that "the value of the deceased's share or interest in the nett balance of the partnership assets was not included in the inventory as estate in the United Kingdom for payment of inventory duty, and inventory duty has not been paid upon it."

This company of Robert Watson & Company was a common law partnership. It was not in any respect a statutory or corporate body, and therefore the rights and interests of the partners depend of course entirely upon the provisions of the contract.

The contract was executed in August 1877, and the nature of the business is determined by the second article—"The business shall be the carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta or shipment for realisation in Europe of such produce." There were nine partners in the concern; seven of these were resident in the United Kingdom, and held 30 shares in the concern, and two were resident in Calcutta and held one share each, the shares amounting in all to 32. The shares were declared by the contract to be personal estate. For carrying on the business there were several provisions made. In the first place, there were three trustees in whom the property of the concern was vested, and these were all resident in the United Kingdom. There was also a committee of five, all resident in the United Kingdom, and their duties are specified in the 9th head of the contract. They "shall constitute a committee to advise with the agents both in London and in Calcutta, and to decide, subject to the approval of a general meeting of the partners, on all matters affecting the interest of the partnership, and also to decide as to calling when necessary a meeting of the partners."

The financial agents were Messrs Matheson & Company, of London, and their duties are described in the 19th head of the contract —"Messrs Matheson & Company are hereby declared to be the agents of the partnership in Europe, the entire business of which therein shall be transacted through them, and all the produce of the partnership shall be consigned to them, or if sold in India, the proceeds shall forthwith be remitted to them. The said Messrs Matheson & Company shall supply the necessary funds for the current advances of each season, whether for working the estates, the production of indigo, silk, or other produce, and the same shall be on the security of the mortgages and covenants contained in the indentures of mortgage and confirmation hereinbefore referred to. Any further expenditure of moneys, whether for the purchase of new concerns or for land tenures, or for advances made to secure leases of property, or for any extraordinary expenditure under the heads of law proceedings, land surveying, machinery, or otherwise, shall be provided in such manner as the managing agents shall from time to time determine, either by a rateable contribution from the partners, which they hereby agree to make, or by charge on the profits, or by advances from the said Messrs Matheson & Company." The managing agents were of course resident in Calcutta, because there the business of the company was to be carried on in so far as concerned the production of the produce which was to be either disposed of in India or sent home; and these gentlemen were to have a commission of 2½ per cent. upon the sales. Their powers and duties of course in carrying on the business as managing agents were very large, and just such as we might expect from the nature of the business which I have already stated as appearing from the second head of the contract.

The business was carried on very much in the way that might be expected, and quite in conformity, I think, with the provisions of the contract. There is a minute of admissions regarding this matter, some parts of which

it may be necessary to read. The meetings of the committee named and appointed took place in London, "in the office of Matheson & Company, the London agents of the partnership, and were summoned by Matheson & Company, acting in concert with the chairman of the committee, who was resident in England. The committee as a rule met prior to the annual meeting of the partners to consider the business to be laid before the meeting, and at other times when any business required it, of which they were informed by Matheson & Company, to whom the regular advices as to the state of the business were addressed by the managing agents in India. A minute book of meetings and correspondence was kept for the committee, of which Matheson & Company were the custodiers. The minute book in use from and after 1st October 1877 is produced and admitted as correct. The committee discharged the duties devolving upon them under the said articles, and were in correspondence with the managing agents in India, as shown by the minute book." The financial year ended on the 30th September, and as soon as possible after that the managing agents at Calcutta, "on the footing that there was sufficient profit, passed a dividend at the rate of 8 per cent. to the credit of each partner's account in the books of the partnership. Messrs Matheson & Company were advised thereof, and requested to make, and did make, payment of the dividend to the partners respectively"—that is, in this country—"as soon as the result of the year's operations was ascertained, and after receiving the particulars of the London account from Matheson & Company, Jardine, Skinner, & Company"—that is, the managing agents—"made up detailed accounts of such operations, and if there was any profit above the 8 per cent. and the contribution to the reserve fund provided for under the articles of copartnery, they passed the same to the partners' accounts." Then, with reference to the annual meeting of the partners, these meetings "discussed the accounts and the general prospects of the company. Decisions were given by the general body of partners at their annual meeting upon points connected with the business submitted to them for that purpose by the managing agents in India through the committee." The proceeds of the partnership estates was either realised by Jardine, Skinner, & Company at Calcutta, and the proceeds remitted to the London agents, or it was consigned—that is, the produce was consigned to the London agents for realisation in Europe. "In the latter case, Matheson & Company transmitted to Jardine, Skinner, & Company statements showing the realisation for entry in the business books of the partnership in India, which statements were entered accordingly. In carrying out the said article 19, Matheson & Company were during the whole period of the partnership under advance to Robert Watson, & Company, as the outlay was chiefly at the beginning of each season, and from the nature of the business no season's accounts could be closed until from six to nine months after the next season had begun."

Now, I shall reserve what I have to say in the meantime as to what the nature of this company is, whether it was a company in the United Kingdom or a company in India, but it appears to me that the decision of this case depends not so much upon that consideration as upon the provisions made for the way in which the representatives of a deceased partner are to be dealt with, which is fixed by the 25th article of the contract. That provides not only for the mode of dealing with a deceased partner's interest, but also with the interest of a bankrupt or insolvent partner, and in the expression of that article these things are so mixed up throughout that the reading of it leads to a little confusion, but I shall take the liberty of stating what I conceive to be the import of this clause as applicable to the case of a deceased partner, only omitting all reference to the case of a bankrupt or insolvent partner. Now, with reference to the death of a partner, it is provided, in the first place, that the death of a partner shall not cause a dissolution of the company; in the second place, the representatives of a deceased partner are not to become partners of the company; in the third place, the interest of a deceased partner ceases at the termination of the current financial year—that is to say, on the 30th September after his death; fourth, the value of the deceased partner's share at 30th September is to be determined by Matheson & Company, and on the executors executing a transfer to the trustees of the deceased's share and interest in the concern the trustees shall pay the ascertained value to the executors in cash, either in whole or by half yearly instalments, in the option of the trustees, extending over a period of not more than three years, interest running at the rate of 5 per cent. on the unpaid instalments. The trustees undertake also to indemnify the executors and the executry estate of liabilities incurred by the deceased as a partner. Fifth, the executors may, if they prefer it, within six months after the 30th of September, sell the shares of the deceased to any other person to be approved by the committee, at such price as they can obtain therefor. This is the course which was adopted in the present case. The three shares held by the deceased in the firm under an agreement, taking effect on the 8th of September 1885, were transferred by the executors, one to each of his sons Andrew Laidlay, Robert Watson Laidlay, and Alfred Hope Laidlay, the agreed-on price paid for each share being £9000.

Now, though the executors did not become partners, and were not entitled to become partners, it will be observed that they have a right to transfer the shares to the other partners to the company, or if they prefer it, to sell them at such a price as they can obtain. This right of transferring the deceased's shares, or selling and transferring them does not in the slightest degree imply that the executors were vested with tth property of these shares. It is expressly provided that the executors are not to become partners, and therefore they could not sell the shares in their character of partners. It is a power of sale, and nothing else, just analogous to those powers of appointment with which we are quite familiar in many trust-deeds, and it is perhaps still more clearly analogous to a power which is given in the Companies Act of 1862 to executors without becoming partners of the company to sell the shares of the deceased, as provided for by the 24th section of the Act of 1862 and the 14th head of Table A. In

short, what the executors have a right to do under this 25th head of the contract is to sell that which originally belonged to the deceased, but which upon his death no longer belonged either to him or his representatives. In short, the right of the deceased partner came to an end at his death, saving of course his right to the balance upon the current financial year, but from his death the share in the partnership concern was no longer *in bonis defuncti*, and formed no part of the executry estate.

It seems to me to follow from this that what the executry estate possesses under the operation of this clause is a right of claim against the trustees of the company for a sum of money; in short, the trustees become indebted to the executors in a sum of money, or the executors by means of a sale realise a sum of money, and in either case that sum of money is a debt due to the executors by their debtors in this country. It seems to me therefore, as the result of the whole examination of this contract, the manner in which the business was carried on, and the nature of the business itself, that even if it cannot be pronounced with certainty that this is an English or a British company, or a company belonging to the United Kingdom, and carrying on business in the United Kingdom, it still is perfectly clear that what is to enter the inventory and what the Crown demands shall enter the inventory of the deceased's estate is a sum of money recoverable and recovered in this country by persons resident and domiciled here—I mean that both the creditor and the debtor in that money are resident in this country. That, I think, brings the money within the operation of the statutes regarding inventory duty as being executry estate in the United Kingdom, and therefore I am for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I have nothing to add to the exposition which your Lordship has given of the position of this case as shown mainly in the articles of partnership and the minutes of admission of the parties in regard to the question raised. I therefore simply state that I concur with your Lordship in thinking that the question here raised depends entirely, or at all events mainly, upon the true construction of the 25th section of the articles of copartnership, and that, reading that carefully, I can come to no other conclusion than that the claim which is made by the executors of the deceased partner in this case is a claim for payment of a sum of money in England to be paid by the trustees for the company in this country, and upon that ground the sum so due to the estate of the late Mr Laidlay must enter the inventory as the Lord Ordinary has found.

Lord Shand—I think the question raised in this case is very well stated in two passages of the Lord Ordinary's opinion—"The claim is for inventory or probate duty, and the answer to that question depends upon whether or not the property of the deceased is held to be situated in India or in the United Kingdom. This property consisted of a share in the real and personal estate as a partner in the firm of Robert Watson & Company, of Calcutta, which was sold after the death of Mr Laidlay to his sons at the price of £27,000." And in a subsequent part of his opinion his Lordship says—"The deceased Mr Laidlay had three shares in this partnership, and the question comes to be, whether these shares shall be held as an asset in his possession in Scotland, where he was domiciled and where he died, or whether they shall be held as an asset situated in India, in which latter case no inventory duty as under the statutes mentioned on record could be claimed." I am of opinion—differing from the Lord Ordinary, and I understand from all of your Lordships—that the property was an asset of the deceased's estate situated in India, and which is therefore not liable for probate duty in this country.

The deceased, as explained in article 1 of the condescendence, seems to have been possessed of very considerable wealth.

The inventory of his personal estate in the United Kingdom is given up as £294,345, and has borne already a stamp duty of £8832. At the end of the inventory, under the head "abroad," there is stated a sum of £25,221, said to be "the deceased's share in the real and personal estate as a partner in the firm of Robert Watson & Company, Calcutta, as valued by the agents of the company." That sum was not given up for inventory duty, but I rather suppose that this note appended as to estate abroad is given in terms of some enactment in the statutes which requires a full disclosure of the personal estate to be made, in order that the Crown may consider whether they have or have not a claim for duty upon it.

Having regard to the terms of the contract of copartnery of this company, and the minute of admissions in regard to the actings under it, and to the statements and admissions generally on record, I have come to the conclusion without difficulty that this company was an Indian company, and not an English company in any proper or reasonable sense—that it was an Indian company having its capital, its property, and its whole assets in India, and carrying on its business in India, and from Calcutta as its centre, where alone it had its head office. The Lord Ordinary seems to have taken the view—although his note is not so distinct on the subject as might be desired—that the head office of this company was in London, and that London was the centre of its business. The earlier part of his opinion leaves it doubtful whether he did not regard the company as having its business centre in Calcutta, but in the concluding sentence, after referring to a passage in the opinion of Sir James Hannen in the case of *Ewing*, his Lordship says—"One does not get much aid from the latter part of this opinion, for the question always returns, which is the head office, and as regards the present case the Lord Ordinary must hold it to be London." If I had concurred with the Lord Ordinary in so thinking I should have been for affirming his Lordship's judgment. I do not understand that your Lordships agree with the Lord Ordinary in that view. The judgment which is to be pronounced proceeds, I think, not on the view, so far as I understand your Lordships' opinions, that this was an English company. If, however, it is an Indian and not an English company, then I think it follows that the funds in question are Indian assets, and as such are not subject to probate in this country.

Now, as I regard this question of fact whether these are Indian assets as really at the root of the proper decision of this case, I must, with your Lordships' leave, notice, perhaps with some degree of detail, the provisions of the contract of copartnery of this company which bear upon that subject, and which, I think, bear out the opinion I have expressed. In the first place, I find that in the narrative of the contract which was entered into in 1877 as a renewal of an older contract about to expire in that year, or rather a new contract framed upon the basis of the former contract, this is directly set forth in the preamble, "that whereas the capital of the said partnership consists of real and personal estate in India which by virtue of an indenture," &c., had been held by other parties named, it was thereby declared that this property should be vested in three persons thereby named and appointed "as trustees for the said partnership." On the face of the deed it is thus clearly expressed, and the whole of the deed otherwise shows that the capital of the company consisted of real and personal estate locally situated in India, and nothing else. Article 2 of the contract provides that the business is to be the "manufacture or working of indigo and silk and other produce," and the sale in Calcutta or shipment for realisation in Europe of indigo, silk, and other produce. That describes the business which the company were carrying on, and carrying on clearly, as I think, from its head office in Calcutta, for any sales which were made of produce from India sent home to Europe for the purpose of realisation were sales made by the Indian house through the London agency, the accounts for which had at once to be sent back to Calcutta to enter the books there, and to form part of the general balance of the company. So much for the capital and business of this company.

Then, as regards the management of the company, nothing is more clear than that this was a company that was being carried on and managed entirely at Calcutta as its centre. There is one peculiarity in the deed that I do not remember to have seen in the case of any common law copartnership before, though I daresay it may be common enough in these Indian companies—I mean the provision that none of the partners individually are entitled to interfere in the business. There is an express provision to that effect in section 21—"No partner or partners shall contract any debt, or draw, accept, or indorse any bill or note, or transact any business in the name of the partnership, nor shall any of the partners, not being a majority of the partners, in any manner interfere with the conduct of the business of the partnership by Messrs Jardine, Skinner, & Company, or Messrs Matheson & Company respectively." As the partners have no right to interfere in the business it is provided that there shall be certain managing agents or, I should rather say, managing partners of this company. They are appointed by this deed, viz., Jardine, Skinner, & Company, of Calcutta, one of the provisions of the deed being that this firm or its partners must hold two shares of the company. Therefore the company at Calcutta has its managing agents or, I should rather say, managing partners there. It further appears that all the powers which partners usually have in managing their own business are conferred upon Jardine, Skinner, & Company. They are acting in Calcutta in the management of the business just as partners would do if they were themselves conducting the business with one exception, and that is, that from time to time they may consult, if they desire it, a committee of three or four of the partners who are in London, but who appear to me to exercise no function except that of a consulting committee. The views I have now stated of the contract are, I think, borne out by the sections from 8 to 15 of the contract. Section 7 provides that "the style or firm of the partnership shall be Robert Watson & Company;" section 8 that "the said style or firm of Robert Watson & Company may be used by Messrs Jardine, Skinner, & Company, or other the managing agents for the time being appointed in their stead," and they alone are entitled to use the said style or firm or to authorise its use for any company purpose, and for instituting or carrying on any suits on behalf of the company. Article 10 provides that "Messrs Jardine, Skinner, & Company are hereby constituted the managing agents of the partnership in India, and the entire business of the partnership there shall be carried on by them as such managing agents, subject to the provisions herein contained." Section 11 is perhaps the most important on the subject, and it provides that "Messrs Jardine, Skinner, & Company, as such managing agents, shall have all powers necessary for the efficient carrying on of the business thereof, and are hereby expressly empowered (but subject to the opinion of the committee whenever it shall have been expressed) to decide whether all the said branches of business shall be carried on, or which of them, and to what extent. . . . The said managing agents shall also determine the amount of the outlay to be expended in the business and concerns of the partnership in each year, and the mode and terms of disposal of the produce thereof, and have power to appoint and remove all persons in the employment of the partnership in India, and to give to such persons all such powers, including a power of substitution as the said Messrs Jardine, Skinner, & Company may from time to time think proper. And further, the said Messrs Jardine, Skinner, & Company are hereby authorised to enter into all contracts necessary for the carrying on of the business of the company, to institute and defend all suits in which the partnership may be concerned, and also to compromise any such actions or suits, and to compound any debts due to the partnership, or other claims or demands, and to refer any claim or demand of or against the partnership to arbitration, and generally to manage the said estate and conduct all the affairs in India of the said partnership, and to do and execute all such acts, matters, and things as they shall deem necessary for the purposes aforesaid." It is further provided that moneys which have been borrowed from Matheson & Company, as to whose position I shall say a few words immediately, "for the purpose of the partnership and for carrying on the said concerns shall be drawn for by Messrs Jardine, Skinner, & Company only," "and all the money which shall be required to be remitted to the various concerns of the partnership shall be supplied by Messrs Jardine, Skinner, & Company, and all the produce of the concerns of the partnership shall be

received and disposed of by them." Then there is a provision that in regard to their counting-house business premises, they are to bear the expense of that themselves. Then comes this important provision in regard to the books of the company, and in passing I may say that it has always been regarded in these cases as the determining or leading element in the question where the head office is to be found, that you shall ascertain where the books of the company are kept, and where the balance-sheets are struck —(Section 14) "All necessary books of account of the partnership showing the receipts and payments and assets and liabilities of the partnership shall be kept by Messrs Jardine, Skinner, & Company, as the managing agents, at their usual place of business in Calcutta, and shall be at all times open for the inspection of the partners." Then follows a provision with reference to the balance-sheet, and even in the striking of the balance-sheet the partners do not interfere, nor have Matheson & Company in London anything whatever to do with that. The provision as to the balance-sheet is—(Section 15) "As soon as practicable after the 30th day of September in each year, and the realisation of the produce of the season, the managing agents in Calcutta shall prepare a general account or balance-sheet showing the result of the operations of the partnership during the year ending on that day, and the nett profit or gross loss, after paying or providing for all the outlay expenses and engagements of the year of every kind, shall be appropriated as follows—the profits to the extent of 8 per cent. on the capital shall be carried to the account of the respective partners in the books of the partnership in proportion to their respective shares, the excess of the profits beyond 8 per cent. shall be set apart and paid to the London agents to form and afterwards maintain a reserve fund." Then article 18 provides—"As a remuneration for their trouble as managing agents of the partnership business Messrs Jardine, Skinner, & Company shall be entitled to receive a commission of 2½ per cent. on the proceeds of sale of the indigo and silk and other produce to be produced in the concerns of the partnership in each year, whether the same shall be sold in Calcutta or shipped for realisation in Europe, they paying thereout all the Calcutta charges and expenses of managing the business of the partnership." Now, that settles, I think, the position of Jardine, Skinner, & Company. They are no doubt to act subject to the opinion of a certain committee that meets in London, but I think it appears that it was only to a very limited extent that there was any opinion or advice ever given to them by this committee. We have had before us the minute book for a number of years, and it seems to me that they have scarcely interfered in the business at all, and if they did interfere it was only when their advice was asked. They were gentlemen of experience in Indian matters, and could give the managers of the company—the partners who were carrying it on—the benefit of this experience by their advice. Such matters as the settlement of very important litigations that had arisen in regard to heritable property belonging to the company or the like are brought before them, and little if anything else, as appears from the minute book which has been printed, and so very unimportant does the business appear to have been that from 1881 to the present day there is not a minute of any business done recorded in the book.

Then what is the position of Matheson & Company and the office they have in London? I describe them, I think, properly when I say they are financial and commercial agents for the company in London. The company seems in its operations to require in the early part of each season a large advance of money, and Matheson & Company agree to make that advance, and as moneys come in in the course of the sales of produce, the managers of the company carrying on its business in India remit from time to time the sums which they are able to give towards the reduction of the balance in Matheson & Company's books against the company, towards which of course also is placed the proceeds of sales made in Europe. So far as I can see Matheson & Company had practically nothing else to do, at least nothing else of importance, with this company, except that when the committee or the partners if at anytime called together to talk over the business that was going on they found a room for the purpose in Matheson & Company's premises. That this was the position which Matheson & Company held is, I think, quite clear from sections 19 and 20 of the contract. The 19th section provides that "the said Messrs Matheson & Company are hereby declared to be the agents of the partnership in Europe, the entire business of which therein shall be transacted through them, and all the produce of the partnership shall be consigned to them, or if sold in India the proceeds shall forthwith be remitted to them. The said Messrs Matheson & Company shall supply the necessary funds for the current advances of each season, whether for working the estates, the production of indigo, silk, or other produce, and the same shall be on the security of the mortgages and covenants contained in the indentures of mortgage and confirmation hereinbefore referred to. Any further expenditure of moneys, whether for the purchase of new concerns, or for land tenures, or for advances made to secure leases of property, or for any extraordinary expenditure under the heads of law proceedings, land surveying, machinery, or otherwise, shall be provided in such manner as the managing agents shall from time to time determine." And in article 20 Matheson & Company are to be "entitled to interest on the general cash balance which may be due to them, at the rate of £5 per cent. per annum so long as such balance shall not exceed £150,000, and at the minimum rate charged by the Bank of England for the time being for discounts (when above 5 per cent.) on any sum which may exceed that amount; they shall also be entitled to a commission of 2½ per cent. on the sales of the produce of the season, whether such sales are made in India or in Europe."

Matheson & Company, as agents of the company in this country, are thus paid a sum of 2½ per cent. mainly because they are advancing in a great measure the funds which from time to time are required for carrying on the company. They are the agents in London merely of a company which is carrying on its business in Calcutta. They have no right or power to use the company name or form—a circumstance of itself, I think, sufficient to show that their office is not the head

office of the company, but the office of agents only. On the other hand, Messrs Jardine, Skinner, & Company are the managing partners at the head office of the business. It is only necessary that I should notice further that in addition to these officials there are several trustees named, being the persons to whom I have already alluded in referring to the preamble of the contract, but these trustees have no functions other than to hold the property. They hold the property in trust. It was necessary to give some persons a title to hold the property just as is done in the case of the large insurance companies we have in this city. Certain trustees are named in whom the property is vested in trust. Beyond the holding of that property I do not see that these trustees had any functions or duties whatever. They are not persons who intromit with the money in any way whatever in the conduct of the business.

Now, such being the terms of the contract, and the way in which the contract was worked, there appears to me to be no doubt that the company is not an English company, but that it is an Indian company carrying on its business in India, and which has its head office in Calcutta. The assets of the company are Indian assets, and the share which any person has in the copartnery is a share of an Indian business. Mr Laidlay when he died was a partner in this Indian business. Part of his personal estate therefore was locally situated in India, that estate being his share in this business. Whether his right is to be regarded as being a certain proportion or share of the company's capital and assets, or whether we regard the company (as it is in Scotland) as a separate *persona*, which it is not in India, and his right is to claim a share in the business, the assets of which belong to the company, the result is the same. The asset or right has as its subject, property in India. It is a share in a business carried on in India.

That being so, I confess myself unable to see that by his death all this was changed, and that what was an Indian asset immediately before his death instantly became an asset of his estate locally situated in Scotland in consequence of his death. I think it quite proper to put the test proposed in the argument. I think the proper test in a question of this kind is, was confirmation necessary to enable the executors to deal with that part of the testator's estate? and I answer that question in the negative. The estate, or (as I see in the English cases estate of this kind is called) the *bona notabilia*, being situated in India, probate there would necessarily be required in order to authorise realisation, and we see from the defender's statement on record that probate in India was taken out accordingly. What has happened is this, that Indian estate and no other has been realised. Now, I cannot see that the mode in which the property or right vested in Mr Laidlay was realised could in the persons of the executors realising it convert it from Indian estate into Scotch estate. What in point of fact occurred was this, that under section 25 of the contract of copartnership, which empowers the executors of partners who die to dispose of their shares in the company, the shares of Mr Laidlay were sold and disposed of by the executors to persons who assumed precisely the rights in the partnership assets or business which Mr Laidlay had. There were sons of Mr Laidlay who were anxious to get his share of the business apparently, and they agreed to take it and to pay for it, and accordingly the share or interest which Mr Laidlay had in this business was bought by these sons, and transferred to them. The subject of that sale, however, surely was Indian estate, or Mr Laidlay's right to shares of an Indian business which was Indian estate, *bona notabilia* situated in India. It was a sale. It has been suggested that there was no right in the assets of this company at the time of sale. It is true the executors were not entitled to become partners of the company, but they were entitled to sell or otherwise to receive from the company the value of Mr Laidlay's interest in the business. I ask what was sold? The interest of Mr Laidlay in this Indian firm was the subject of the sale. Accordingly, you have nothing here but the deceased's executors realising his interest in that Indian company, and therefore you have them realising an asset situated in India. Suppose this sale had happened to be to two gentlemen residing in Calcutta, instead of being to the sons of Mr Laidlay at home, would the value of the property or interest have required to enter a Scotch confirmation in order to make it a good sale—a sale by persons having a title? I answer, plainly not, and the liability for probate duty cannot depend upon the accident of whether the purchaser happens to be in this country or in India. The question is not from whose sons the purchase money came, but where is the subject of the purchase belonging to the executry estate, the interest in the Indian business, situated?

But, as your Lordship pointed out, there is a further provision in this contract which, however, was not brought into operation in this case, by which, if the shares had not been sold, the company themselves or the other partners would have retained the interest of Mr Laidlay as a shareholder in the company, and paid out the value of it. "The fair value of the share" is to be determined by Messrs Matheson, and paid over to the executors. In point of fact that was not done. What was done was simply the executors realising by a sale to partners who assumed the deceased's place in the copartnery. But suppose the company had themselves taken and paid for the shares, it does not appear to me that it would have made the slightest difference in the case. The company say, "We will not allow executors to come into our copartnery," but surely the interest in the copartnery of the gentleman who has gone out remains, and though that interest is converted into a sum of money, it is a sum of money which represents his interest in an Indian firm, whether you call it assets or a share of the assets of the firm, or his right to a share in the company. It is said that if the company had so taken over his share this would have created a contract debt, and I suppose that would be so, but that contract debt was not in respect of a share or interest in an English company but of an Indian company, and though the money might by arrangement or by contract be paid in this country for the convenience of all concerned. the right or property in respect of which the payment would be made was situated in India. I am unable to see that if a man sells either to a third party or to the company itself a share of an Indian business he is not thereby realising as part of his estate an asset which is situated

in India. Article 25 of the contract no doubt bears that "the trustees of the partnership shall pay, or cause to be paid or secured, as hereinafter mentioned, the sum so determined;" but the obvious meaning of that is merely that they are to authorise payment. The funds of the company are all in the hands and under the management of the managing partners in India, who may no doubt require Matheson & Company to make advances when required. And the contract in that article goes on to provide at the close of it "the funds to be paid by the said trustees of the partnership shall be provided by the partners rateably." What is that but the purchase by the remaining partners of this company of Mr Laidlay's share in the Indian business? And in that view of the case the question always comes back to this—What is the nature of the asset sold or taken over? Is it an asset situated in India or not? It is said these trustees are in this country, and it is a payment from one person in this country to another. Well, if the trustees lived in India would it make any difference? I apprehend not. Although it is a payment by one set of partners in this country to another, what is the payment in respect of? It is payment in respect of a share in an Indian business. Therefore it is an Indian estate, and therefore it is not liable to probate duty in this country.

I have only further to add that I think everyone of the authorities referred to by the Lord Ordinary, or that were referred to in the argument, support the view that I have now stated. I have looked over them. The case of *Fernandez' Executors* was one of a contract debt, and the decision proceeded entirely on the view to which I should now give effect. A gentleman in India was receiving dividends from England. He died, and his executors desired to get the unpaid dividends free from probate duty, but it was held, that though a number of the assets of the company were in India, the duty must be paid, because the company was an English company, and had its head office in England. That is precisely the principle which I apply to this case. Mr Hansen, in the passage which was referred to by Sir James Hannen in the case of *Ewing*, says at p. 160 of his book on Probate Duties—"Property which consists of shares in or claims upon any company or society must be taken to be locally situate in the place where the company has its head office, and to be *bona notabilia* accordingly." And the passage which Lord Fraser has quoted in his note is to the same effect. Finally, in the case of *Ewing* Sir James Hannen says, with reference to an asset of Mr Ewing which was said to be situated in England—"I am not aware that the point has been the subject of judicial determination, but all analogies seem to lead to the conclusion that Scotland is the local situation of this asset of W. Ewing. Thus, the share of a deceased partner in a partnership asset is situate where the business is carried on, and shares in a company are locally situate where the head office is." Now, the Lord Ordinary in quoting these authorities properly applied them, because he concluded his opinion by saying—"The question always returns, which is the head office? and as regards the present case, the Lord Ordinary must hold it to be London." If he had held that the head office of the company was in Calcutta his judgment would have been against the Crown. I do not understand that your Lordships hold that the head office of Robert Watson & Company is in London, and if the head office be in India, as I certainly hold it to be, then according to all the authorities a share of the business is an asset in India of the person who holds it.

I am on these grounds of opinion—and although differing from your Lordships I am humbly clearly of opinion—that this fund is not subject to probate duty in this country.

Lord Adam—The late Mr Laidlay died possessed of three shares in the company of Robert Watson & Company. These shares were sold by his representatives to three of his sons (one share to each) at the price of £27,060, and the question is, whether or not this sum so realised by the trustees, and paid to them in this country, ought to have been included in the inventory of the moveable estate given up by the trustees in this country. As I understand the plea maintained against the giving up of these shares in this country is this, that they were shares in an Indian company, and being shares in an Indian company, the assets were locally situate in India, and therefore did not require to be given up, and ought not to be given up in this country but in India. Now, for my part, I have not found it necessary to make up my mind at all whether the the Lord Ordinary is right in saying that this is an English company, or whether Lord Shand is right in saying that it is an Indian company, because my opinion is entirely founded upon the 25th section of the contract of copartnership, and would be the same whether this company is to be considered an Indian company or an English company. I think that the 25th section is clear enough upon a little examination, and it appears to me that the most important section in it is the first, which provides that the representatives of a deceased partner shall not "become a partner in respect of any share of such partner," but the interest shall cease as from the 30th of September after the partner's death. Now, there is a clear statement as matter of contract between the parties that the partnership should not be dissolved by the death of a partner, and that the representatives of the deceased partner should have no right whatever to become partners of the company. It humbly appears to me to follow from that, that in no view could the representatives of a deceasing partner make up a title to the three shares which belonged to the deceasing partner. They could by no possibility do this, and so acquire a right to the property or a share of the property of the company of Robert Watson & Company. They had no such right under this contract. And accordingly it humbly appears to me that this is, if I may say so, where the fallacy of Lord Shand's judgment lies, because if it be the case, as I think it is, that these representatives never acquired themselves, and never could acquire a right to the property of the company, which is clear from the contract, I think it follows that it does not matter in the least where that property is situated, whether it is held to be situated in India, or whether it is held to be situated in this country. That being so, the question comes to be, what is to be done with the shares of a deceased partner, and what right his represen-

tatives have in these shares? That right is set forth in the 25th section, that if they choose they may sell within six months after the death of the partner to a partner approved of by the committee, or if they do not choose to sell they may have the value of the shares assessed or estimated by Messrs Matheson & Company, and the fair value having been so ascertained the trustees who are in this country are to pay to the representatives of the deceased partner the amount or value of the shares as so ascertained. Now, in my humble opinion that is nothing but a contract debt against this company for a sum of money. It is not a claim or a sale of a right to a proportional part of the property of the company wherever it is situated. That is not the nature of the claim. In my opinion it is clearly and simply a claim of debt, which the representatives have by this clause of the contract against the trustees in this country for payment of a sum of money. If that be so, I think there is no further question in this case about the local situation of the assets of the company, which they are not selling, and have no power to sell any right of property to. That is not what is done here. But Lord Shand says there is no difference between that case and the sale of the same subject or the same right for a sum of money to the sons. It is the sale of a right to a sum of money payable to the sons in this country, and being a sum due and paid to them in this country, I can see nothing in this case different from the ordinary case of an asset in this country, realised in this country, and properly realised in this country by the representatives of the deceased. That being so, I think the case falls under the ordinary rule, and that the asset must be given up as an asset in this country. On that short ground I concur with your Lordship.

The Court adhered.

Counsel for the Lord Advocate—Sol.-Gen. Darling, Q.C.—Young. Agent—D. Crole, Solicitor for Inland Revenue.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Lorimer. Agent—W. M. Morris, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GORDON *v.* WILLIAMS' TRUSTEES.

Judicial Factor—Title to Sue.

Held, following *M'Gregor* v. *Beith*, 6 S. 853, that a judicial factor appointed on heritable subjects "with the usual powers" has no title to sue parties who have intromitted with the rents prior to his appointment.

In July 1888 A. W. Gordon, judicial factor on heritable subjects in Redford's Land, St Andrew's Street, Leith, which had belonged to John Young and David Young, woollen manufacturers in Leeds, raised this action against the testamentary trustees of the deceased John Williams, in which he sought to have the defenders ordained (1) to produce a full account of the intromissions had by John Williams and themselves with the rents of the heritable subjects on which the pursuer had been appointed judicial factor; and (2) to pay over to the pursuer the balance which should be found due.

The petition under which the pursuer was appointed judicial factor on the heritable subjects above mentioned was at the instance of Mrs Ellen Waite, and set out that—"The petitioner is one of the next-of-kin of the said John and David Young, and until it has been ascertained who is their heir-at-law, desires that a judicial factor be appointed on the said property, with power to recover the rents and arrears of rent thereof, and to preserve the subjects from dilapidation." The petition prayed that Mr Gordon should be appointed judicial factor "with all the usual powers, and in particular, with power to sue for and receive the arrears of rents due from said subjects." The extract decree of his appointment bore that he had been appointed "to be judicial factor with all the usual powers."

The subjects in question consisted of four small houses in the tenement known as Redford's Land, the rest of which had been purchased by Mr Williams in January 1862.

The pursuer averred—"On his appointment as judicial factor foresaid, the pursuer made the necessary inquiries as to the position of the estate under his charge, and ascertained that the defenders were in the possession of the said heritable subjects, were drawing the rents thereof and acting as proprietors therein; and farther, that their author and predecessor, Williams, had been also in possession thereof since the term of Martinmas 1861. . . . Neither the said John Williams nor the defenders have ever accounted for their intromissions with the said rents, although the defenders have recently admitted their liability to account therefor. . . . The defenders are bound to account to the pursuer for the said rents for the period mentioned, subject to annual feu-duty, taxes, and repairs, as the same may be vouched or instructed."

The defenders in answer admitted that the defenders and their author Mr Williams have collected the rents of the said dwelling-houses since Martinmas 1861, and that they are bound to account for their and his intromissions since said term to the party in right of the subjects.

In a statement of facts they further averred that it had been absolutely necessary for Mr Williams, in order to protect his own interests, (the Messrs Young by their neglect having practically abandoned the subjects), to take control of the tenement, which he accordingly had done.

The defenders pleaded—(1) "No title to sue."

On 21st June 1889 the Lord Ordinary (Wellwood) repelled the 1st plea-in-law for the defenders, and ordained them to lodge accounts of their intromissions within ten days.

"*Opinion.*—The defenders' plea to title is rested on the ground that the pursuer has no title to sue for arrears of rent which were paid before his appointment to the defenders. In the circumstances I think the plea is ill founded. The authorities relied on by the defenders—*Swinton* v. *Gawler*, June 20, 1809, F.C.; *M'Gregor* v. *Beith*, 6 Sh. 853—were

cases in which the rents had been paid before the factor's appointment to persons who had a colourable title to receive them, *e.g.*, as heir or executor. Here, while the defenders and their author may have acted excusably in collecting the rents, they had no colourable title. They really acted as self-appointed factors *loco absentis*, and were therefore bound to account to the pursuer on his appointment for their intromissions, deducting, it may be, sums *bona fide* expended on repairs, taxes, &c."

The defenders reclaimed, and argued—The factor had no title to sue parties who had intromitted with the rents before his appointment. He was appointed merely to preserve the property till the person in right thereof came forward—*M'Gregor* v. *Beith*, May 24, 1828, 6 Sh. 853.

The pursuer and respondent argued—The judicial factor had the right to receive and keep the sums due by the defenders for the persons entitled thereto—Thoms (2nd ed.), 13, 67; Stair iv. 50, 27. The Lord Ordinary had made the proper observations on both the cases quoted in this note. In *M'Gregor's* case the estate had been sequestrated. The factor there was a factor with a limited power on a sequestrated estate. Here he was a factor *loco absentis* appointed for the purpose of getting at these rents. It was not for the defender to say that he ran any risk, for the heir was here, and willing to concur with the factor in granting a discharge.

At advising—

Lord President—The only question of any difficulty is as to the title of the judicial factor to sue the action of count, reckoning, and payment. Now, the title of that officer depends upon the terms of the extract-decree which is set out in the defenders' print of documents, where we also have the petition under which he was appointed. It is stated in the petition—"The petitioner is one of the next-of-kin of the said John and David Young, and until it has been ascertained who is their heir-at-law, desires that a judicial factor be appointed on the said property with power to recover the rents and arrears of rents thereof, and to preserve the subject from dilapidation." And accordingly the prayer of the petition is that the Court should appoint Mr Gordon "to be judicial factor on the said heritable subjects . . . and that with all the usual powers, and in particular, with power to sue for and receive the arrears of rents due from said subjects, he always finding caution in common form." The interlocutor appointing Gordon, the terms of which appear from the extract, appointed him "to be judicial factor, with all the usual powers, on the said heritable subjects." That interlocutor therefore is not in terms of the prayer, because it does not give the factor in particular "power to sue for and receive the arrears of rents." I am not, indeed, prepared to say that the omission is of much importance; it only shows that it is not proposed that the factor should be vested with any powers but what are necessary to enable him to protect the subjects for the heir—one of the few usual powers being to collect the rents. In the present case the rents sought to be recovered are not due by a tenant, the person sued is one who intromitted with the rents, and he takes the ground that he is liable to account to the heir, and not to the judicial factor, and the question is, whether such a factor is entitled to proceed against him without special powers? I can see no ground for distinguishing this from the case of *M'Gregor* v. *Beith*, which seems to me precisely in point. In that case no doubt the subjects on which the pursuer had been appointed factor had been sequestrated; but I do not think that makes any difference, because he could not sue for anything but the rents. Nothing was given him but the management of the estate. Then if the fact of the estate being sequestrated is unimportant, and attention is given to the ground on which the Court disposed of that case, it will be seen that the defender pleaded that although M'Gregor, as judicial factor, might be entitled to recover arrears from tenants, he had no title to sue third parties intromitters with rents prior to his appointment. That is the very class of debt sought to be recovered here. The ground assigned is very well explained by Lord Glenlee in these words—"This is an attempt to turn a factor into a trustee for creditors. If after the date of the factory a party intromits with rents the factor may have some ground for suing him, but he never can bring an action against all and sundry for previous intromissions." I am therefore compelled by the authority of that case, and the very sound principle on which it is founded, to hold that the judicial factor's title to sue cannot be sustained, and that we must recal the interlocutor of the Lord Ordinary, and sustain the plea of no title to sue.

Lord Mure—I am of the same opinion. The case of *M'Gregor*, I think, decides the question raised here. After an authoritative judgment of that kind it would be very difficult to frame a petition to entitle the factor to proceed against parties who had intromitted with the rents.

Lord Shand—I am of the same opinion as your Lordship. Persons who have intromitted with a property—and the intromitter has acted quite *bona fide* and very properly, the property having been left derelict for many years—are bound to account to the proper heir when he appears, and he has appeared in this case. The judicial factor had a limited title to preserve and take care of the property, and to receive and intromit with the rents. That would have covered a right to sue tenants in possession for arrears, but it is quite a different question when it is proposed to sue any other party. I agree with your Lordship that a person appointed as judicial factor on an estate has no right to involve it in litigation in claims against a person who has previously intromitted with the rents.

Lord Adam concurred.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Williams' Trustees—Strachan—Orr. Agent—Alexander Gordon, S.S.C.

Counsel for the Judicial Factor—M'Kechnie—Wilson. Agent—Lachlan M'Intosh, S.S.C.

Thursday, July 18.

FIRST DIVISION.

TURNBULL *v.* VEITCH.

Process—Amendment of Record—Pursuer Suing in New Character—Sheriff Courts Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 24.

Section 24 of the Sheriff Courts Act 1876 enacts:—"The sheriff may at any time amend any error or defect in the record in any action, . . . and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made." . . .

A widow brought an action as an individual to recover certain sums which she alleged to be due to her. Thereafter, having served as executrix-dative to her deceased husband, she lodged a minute craving to be allowed to insist in the action in that character. *Held* that the proposed amendment exceeded the power conferred on the Sheriff by the Act, and the minute *refused*.

This was an action by Mrs Agnes Turnbull, widow, against James Veitch for payment of certain sums of money which she alleged to be due to her by the defender.

The pursuer, who after the raising of the action was served as executrix-dative of her deceased husband, lodged in process the following minute:—"The said Mrs Agnes Wood or Turnbull, widow, residing at 17 Exchange Street, Jedburgh, executrix-dative *qua* relict to the deceased George Turnbull, sometime tinsmith, Jedburgh, craves to be allowed to sist herself as a pursuer for all right and interest competent to the late George Turnbull in the action at the instance of Mrs Agnes Wood or Turnbull, widow, residing at No. 17 Exchange Street, Jedburgh, pursuer, against James Veitch, butcher, Ancrum, near Jedburgh, defender."

On 24th January 1889 the Sheriff-Substitute (Spiers) repelled a plea of "no title to sue" by the defender, allowed the pursuer to sist herself as craved, and allowed a proof.

The defender appealed to the Sheriff, who on 26th February recalled the Sheriff-Substitute's interlocutor of 24th January 1889; refused the crave of the minute, and refused also the pursuer's motion (made at the debate), alternatively to the said minute, to be allowed to amend the petition by adding after the pursuer's designation, the words, "as executrix of the deceased George Turnbull and as an individual."

"*Note.*—It is settled that a new pursuer cannot be sisted in an action without the consent of the defender—*Morrison* v. *Gowans*, 1 R. 116. Further, it was settled by the case of *Smith* v. *Stoddart*, 12 D. 1185, which closely resembles the present, that a summons raised by a widow in her individual capacity could not competently be amended to the effect of libelling that she sued also as executrix of her husband. In *Hislop* v. *Macritchie*, 8 R. (H. of L.) 96, Lord Watson observed that the Court of Session Act 1868, sec. 29, which is practically the same as the Sheriff Court Act 1876, sec. 24, did not alter the law on this subject, and I am of opinion that the Sheriff Court Act does not do so. I therefore hold that it is not competent for the pursuer either to have herself sisted as a new pursuer, as she asks in the minute, or to have the summons amended to the effect of allowing her character of executrix to be inserted in it. I cannot do more with the case at present, as the pursuer avers that the debt is due to her as an individual. I have accordingly remitted the cause to the Sheriff-Substitute for further procedure; but the pursuer and her advisers would do well to consider seriously whether they can succeed in this action with the instance of the summons as it at present stands. On the statements and admissions made by the pursuer's agent at the debate, it appeared to me that if any debt is due for the aliment of the defender's child during the lifetime of the pursuer's husband, that is not a debt for which the pursuer is entitled to sue as an individual, but only as executrix of her husband. I understand that the pursuer had no separate estate during her husband's lifetime, and that the said child lived in family with her husband. If this is so, then assuming the claim for aliment to be otherwise well founded, it would seem the best course for the pursuer to abandon this action and raise another at the instance of herself as executrix of her husband and as an individual. It must not be supposed, however, that I advise the raising of another action. The pursuer must consider in the light of the averments made by the defender whether she has a good case or not."

Thereafter on 6th March the pursuer lodged a second minute in these terms:—"Riddoch, for the pursuer, craves the Court to allow the pursuer to amend her petition, in order that she may sue the action at her instance as 'executrix-dative *qua* widow of the late George Turnbull, tinsmith, Jedburgh, and as an individual,' or otherwise to sist process until a supplementary action is brought at the pursuer's instance as executrix-dative of her said husband, the late George Turnbull, against the defender, in order that the actions may be conjoined."

On 21st March the Sheriff-Substitute refused to grant the crave of this minute, and on 13th June, after evidence had been led, he assoilzied the defender from the conclusions of the action.

The pursuer appealed, and argued—The question was whether the minute of the pursuer should have been granted. The terms of section 24 of the Sheriff Courts Act 1876 were broad enough to cover the amendment proposed. "Record" embraced the petition, and therefore an error in the petition might be amended. The object of the amendment was to raise the real question in controversy between the parties, which was whether the defender was liable to the pursuer in the sums claimed—*Smith* v. *Stoddart*, July 5, 1850, 12 D. 1185, *per* Lord Dundrennan, 1187; *Morrison* v. *Gowans*, November 1, 1873, 1 R. 116. It was not maintained on the merits that these sums were due to the pursuer as an individual.

The respondent was not called on.

At advising—

Lord President—The only ground on which the proposition of the appellant is based is the 24th section of the Sheriff Court Act 1876. Now,

by the power of amendment permitted there, and in the Court of Session Act of 1868, there is a very valuable discretion vested in the Court, and a very expedient one if kept within reasonable bounds, but I am inclined to think it is one which must be very strictly watched, and may be carried too far, and the proposal here is, I think, to carry it far beyond the intention of the Act. The power of amendment in the Act is conferred in these terms—"The Sheriff may at any time amend any error or defect in the record in any action, upon such terms as to expenses or otherwise as to the Sheriff shall seem proper, and all such amendments as may be necessary for the purpose of determining in the action the real question in controversy between the parties shall be so made."

Now, in the first place, I do not think that an error or defect in the record is the same thing as a want of title in the pursuer as appearing on the face of record; and in the second place, this amendment cannot be made for the purpose of determining the real question in controversy between the parties, which was, whether the defender was indebted to the pursuer as an individual, which he was not. As the section of the Act does not apply, we must therefore fall back on the question whether it is competent to a pursuer to bring an action in one character and insist in it in another, and I think it is quite settled by authority that that cannot be done.

Lord Mure—The decisions quoted to us, particularly the case of *Smith* v. *Stoddart*, establish a principle which I think disposes of the proposition made by the pursuer that a party may proceed with an action in a different character from that in which he has brought it.

Lord Shand—I concur. I am disposed to think that the power of amendment which the Court receives under the Act should be very favourably construed, and I have observed that so construed it saves many new actions being brought. The present proposal, however, carries the matter too far. At the time the action was raised the pursuer did not possess the character of executrix of her deceased husband, and therefore the action was stamped as an action by herself as an individual, and could not be at her instance as executrix, as she possessed no such character. The proposal is that having acquired that character she should amend the action as brought and sue in her new character of executrix. That appears to me to go quite beyond the power of amendment in the Act, and to create an entirely new pursuer, and I am therefore of opinion that the Sheriff is right.

Lord Adam—This is simply an attempt to introduce a new pursuer as a party to the cause. There is no warrant for that in the 24th section of the Sheriff Courts Act of 1876, and I therefore think the Sheriff has reached a right conclusion.

The Court adhered to the interlocutor of the Sheriff-Principal.

Counsel for the Pursuer—Wilson. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defender—A. S. D. Thomson. Agent—Adam Sheill, S.S.C.

Friday, July 19.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DOMINION BANK OF TORONTO *v.* BANK OF SCOTLAND.

(*Dominion Bank* v. *Anderson & Company*, February 10, 1888, *ante*, vol. xxv., p. 324.)

Bill—Liability of Agents Employed to Collect Bill—Unauthorised Cancellation—Proof of Loss—Onus.

A bill having been protested for non-payment was afterwards forwarded to a bank agent who offered to try and obtain payment of it. The acceptors expressed their willingness to pay the amount of the bill and the protest charges on condition that they were freed from any claim for interest and expenses, and this condition was communicated to the holders. Without waiting for their reply the bank agent took payment of the amount of the bill and the protest charges, marked the bill "paid," and handed it over to the acceptors who deleted their signatures. The holders refused to agree to the condition mentioned, returned the money tendered to them in payment of the bill, and received back the cancelled bill. They then raised an action against the acceptors, in which they obtained decree for the amount of the bill and interest thereon, and for the expenses of the action. Before this decree could be enforced by summary diligence the acceptors were sequestrated.

In an action by the holders against the bank, whose agent had cancelled the bill, for payment of the bill, the interest thereon, and the expenses of the action against the acceptors—*held* (1) (*diss* Lord Mure) that the defenders were liable, it being proved that but for the cancellation of the bill, which was unauthorised, payment would have been recovered by summary diligence against the acceptors; and (2) that the defenders were not bound to proceed against the drawers before proceeding against the defenders, though the latter might be entitled to an assignation to enable them to proceed against the drawers.

Opinion (*per* Lord Mure) that the *onus* lay upon the pursuers to prove that payment could have been recovered by summary diligence on the bill against the acceptors; and *opinions* (*per* Lord Shand and Lord Adam) that the *onus* was on the defenders to prove the contrary.

The Dominion Bank, Toronto, were holders for value of a bill for £2939, 9s. 6d., dated 28th September 1886, drawn by the M'Arthur Brothers, Limited, upon and accepted by William Anderson & Company, merchants, Grangemouth. The Dominion Bank transmitted the bill to the National Bank of Scotland, Limited, London, for collection, and the latter bank presented it for payment on 7th May 1887 at the Bank of Scotland in London, where the same was payable, but payment was refused, and it was protested for non-payment.

On 16th May 1887 Mr Mackenzie, agent for the Bank of Scotland at Grangemouth, wrote to the National Bank of Scotland, London, in these terms:—"An acceptance of Messrs Wm. Anderson & Company of this town p. £2939, 9s. 6d. was presented at our London office, and payment refused on account of there being a dispute between the merchants who drew the bill and themselves. If the matter be now adjusted, you might send forward the document for collection."

On 21st May Mr Mackenzie again wrote to the National Bank in these terms:—"With reference to my letter of 16th inst., if the bills p. £2939, 9s. 6d. be sent on here for collection, it will in all likelihood be paid, but not the expenses, as the fault was not on Messrs W. Anderson & Company's side, at least so they say."

On 28th May Mr Mackenzie again wrote to the National Bank enclosing a letter which he had received from the acceptors, Messrs Anderson & Company, which was to the following effect:—"Confirming our former instructions to you, it just now occurs to us that immediate payment might be made provided the National Bank, London, gave a guarantee to hand over the bill to you on its return, and hold us scatheless in event of its miscarriage in any way whatever, also freeing us of expenses and interest. On hearing you have received such guarantee we will instruct you to pay."

The National Bank having received the bill from Canada, to which country they had remitted it when payment was refused in London, wrote to Mr Mackenzie on the 7th June as follows:—"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson £2939, 9s. 6d. Should the acceptors decline to pay protest charges, 12s. 6d., please return protest to us. Acceptors will of course pay the remitting charge. We presented the bill to-day at your London office, but they state that they are still without instructions regarding it."

On 9th June Mr Mackenzie replied in these terms:—"With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility. Please favour me with your instructions. *P.S.*—As Mr Anderson is presently living at Callander, and may not be here till Monday morning, we retain the bill till that day if we have not contrary instructions from you."

The enclosed letter was to this effect:—"We have yours stating the National Bank, London, will take payment of this bill, but we would like you to get a letter from them freeing us of interest and expenses as asked in ours of 28th ulto. The way we have been treated in the past is our excuse for being somewhat particular now."

On 13th June Mr Mackenzie having received no reply to his letter of 9th June, took payment from the acceptors of £2940, 2s., being the amount of the bill and 12s. 6d. of protest charges, and delivered up to them the bill perforated "paid." On the same day he sent a draft for the above sum to the National Bank accompanied by the following letter:—"I beg to enclose draft for £2940, 2s., being amount of W. Anderson & Company's acceptance referred to in your letter of 7th inst., with 12s. 6d. of protest charges. Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is concerned the draft is accepted by you in settlement of the transaction without any reservation."

The enclosed letter was in these terms:—"Confirming our former respects we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c."

The National Bank then cabled the Dominion Bank for instructions whether or not they should agree to take payment of the bill on the conditions imposed by the above letter, and on 18th June they returned the draft for £2940, 2s. to Mr Mackenzie, with a note to the effect that they were not authorised to take payment of the acceptance on the conditions on which it was tendered, and requesting that the bill and protest should be returned to them. When the bill was returned to them it was found that not only had it been perforated "paid," but that Messrs Anderson & Company had deleted their name as acceptors.

The holders, the Dominion Bank, considering that they were unable to do summary diligence upon the bill in its altered state, raised an action against the acceptors on 12th July 1887. After hearing evidence the Lord Ordinary gave decree against the acceptors for the amount of the bill, with interest thereon from 7th May 1887, and found them liable in the expenses of the action. A reclaiming-note having been presented, the First Division on 10th February 1888 adhered to the Lord Ordinary's interlocutor with additional expenses.

The Dominion Bank then charged the acceptors for the sum due under the decree, but failed to obtain payment as Messrs Anderson & Company's estates were sequestrated on 15th March 1888.

The present action was raised by the Dominion Bank against the Bank of Scotland for payment of the amount of the bill, with interest thereon from 7th May 1887, and the expenses of the action and diligence against the acceptors.

The pursuers averred—"In consequence of the defenders, or their agent at Grangemouth, for whom they are responsible, having wrongfully and without the authority of the pursuers, delivered up the foresaid bill to the acceptors, and cancelled it in the manner before mentioned, and in consequence of the delay thereby caused, and proceedings which were rendered necessary by the defenders' fault and negligence, the pursuers have sustained loss and damage to the extent of the sum in the said bill, and interest due thereon, and expenses as sued for in the summons."

The defenders in answer denied these averments, and explained that any loss which the defenders might have sustained was caused by their own actings or those of their agents, the National Bank.

The pursuers pleaded, *inter alia*—"(1) The pursuers having, by the defenders' breach of duty and wrongful conduct, sustained loss, all as condescended on, the pursuers are entitled to decree in terms of one or other of the alternative conclusions of the summons."

Proof was led before the Lord Ordinary (FRASER) on 14th November 1888. The following evidence was given on the question whether Messrs Anderson & Company were solvent, and could have met the bill and the interest thereon if it had been possible to charge on it in July 1887:—Mr Spens, writer, Glasgow, the agent for the pursuers in the litigation with the acceptors, deponed—"The bill was placed in our hands first, I think, on 6th July 1887. . . . When I was first consulted, I asked the bill to be sent so that I might do summary diligence, but when I found it was cancelled, and that I could not do summary diligence, I instructed an ordinary action. . . . My impression is that we put warrants of arrestment in the summons in the action against Anderson; I am satisfied that we arrested in the hands of the Bank of Scotland. At that time Anderson & Company, I believe, were engaged in considerable trade. (Q) Did you try to find any other money?—(A) I did—I mean I made inquiries with reference to whether I could get money due to Anderson, and I was informed I could not. I did not get anything by arrestment in the hands of the Bank of Scotland." Mr Horsbrugh, trustee on the sequestrated estates of Anderson & Company, deponed—"From June 1887 to the date of their sequestration they were carrying on their business in the way they had been doing it for some time. They appeared to have met their current bills as they became due. Between the dates I have mentioned they met bills to the amount of £10,195, exclusive of the one in question. They were met and paid at their due dates. The bankrupts were also paying freights and other liabilities during the same period. They paid freights to the amount of £1406, besides other debts. I find Mr Anderson did a considerable amount of business in discounting bills for other people, but excluding these, I am of opinion that in order to meet his own bills and make payments in connection with his own business he must have paid between 13th June 1887 and the date of sequestration over £18,000. *Cross-examined.*—I endeavoured to ascertain where he got the money, and I find he discounted bills of other people with different banks to the amount of about £12,000, that he collected book-debts to the amount of £5000 or £6000, and he got in other sums making up just about £18,000. The difficulty I had was to distinguish what were his bills and what were other people's. At 25th June 1887 he was due the Bank of Scotland £344, and the Clydesdale Bank £3613—together £3958, and there was due to him by the Union Bank, £5, 19s. 7d., so that his total indebtedness to his three bankers was £3952. The book-debts were ordinary trade debts due to him by parties to whom he actually sold timber. Those parties were mostly in Scotland, I understand. The draft in question was applied as follows—Lodged on deposit-receipt in name of Mr Anderson's son, £2846, 11s. 5d.; sent to Mr Anderson's law-agents, £95—together £2941, the sum which he got back. The deposit-receipt stood in the son's name until 4th July. It was then uplifted and applied thus—In payment in cash to Dow & Company to enable them to retire some bills on 4th July, £862; in retiring bills of his own firm, £298, 12s. 7d.; and paid into current account of his firm with the Clydesdale Bank, £1685. The £862 paid to Dow & Company was to enable them to retire bills on which they were ostensibly the primary debtor; there were cross bills. The deposit-receipts were with the Bank of Scotland, I think, but I can hardly state distinctly. *Re-examined.*—Dow & Company and Anderson & Company were, I think, accommodating each other with their names. I think the bills could be traced to their ultimate liability." Evidence was also led to the effect that the drawers were persons in quite solvent circumstances.

The Lord Ordinary on 28th November 1888 gave decree against the defenders for the amount of the bill, with interest thereon from 7th May 1887, and for the expenses of the action and diligence against the acceptors, under deduction of £161, 0s. 3d., being the amount of dividend received by the pursuers as claimants in the sequestration of Messrs Anderson & Company.

"*Opinion.*—This is an action of damages brought by the Dominion Bank, Toronto, against the Bank of Scotland by reason of the latter having failed to collect the contents of a bill which was entrusted to them for that purpose. The bill was drawn by the M'Arthur Brothers, Limited, of Toronto, upon and accepted by William Anderson & Company, merchants, Grangemouth, for £2939, 9s. 6d., and dated 28th September 1886. It was made payable at the Bank of Scotland, London, at 180 days' sight from 5th November 1886, and therefore was due on 7th May 1887. It was indorsed by the drawers to the Dominion Bank, Toronto, and they are now the holders of it for value. The Dominion Bank sent the bill to the National Bank of Scotland, London, for collection, and the latter bank presented it for payment at the Bank of Scotland in London, when payment was refused, and protest taken. The agent for the defenders at Grangemouth did the banking business for the drawees William Anderson & Company, and hearing of the presentment of the bill for payment at the defenders' London branch, wrote on the 16th of May 1887, a letter to the National Bank of Scotland, London, in the following terms:—'An acceptance of Messrs Wm. Anderson & Company of this town, p. £2939, 9s. 6d., was presented at our London office, and payment refused on account of there being a dispute between the merchants who drew the bill and themselves. If the matter be now adjusted you might send forward the document for collection.' That is to say, the defenders, through their agents, intimated to the pursuers that they would collect the money. In the meantime, however, and before this letter was received in London, the pursuers had returned the bill to Toronto in order to preserve recourse against the indorsers, and intimated this; but it was added that 'if you remit us the amount and charges we shall have pleasure in recalling the bill by cablegram.' The history of what followed will be found in the opinion of the Lord President in the case of *The Dominion Bank* v. *Anderson & Company*, February 11, 1888, 15 R. 414, and it is unnecessary to do more in the way of narrative than to refer to that opinion. It was held in that case that by reason of the mistake (or the acting without authority) of Mr Mackenzie, the agent for the defenders at Grangemouth, the signature to the bill was cancelled and the bill marked paid. The result of this was that although the pursuers obtained re-delivery of the bill (which had been

sent on to the defenders' branch at Grangemouth), summary diligence could not be done upon it because *ex facie* it was cancelled. An ordinary action was rendered necessary at the instance of the pursuers against Anderson & Company in which the latter firm pleaded that they could not be sued upon the bill because of the cancellation, while at the same time they had got possession of the timber for which the bill had been granted without paying for it. Shortly after decree was obtained in this action Anderson & Company became bankrupt.

"Now, it is proved that if due diligence had been shown by Mackenzie, the defenders' agent, the bill would have been retired by Anderson & Company. Mr Horsbrugh, the trustee in their sequestration, which took place on 15th March 1888, proves that between 13th June 1887, when the bill was cancelled, and the date of sequestration in March 1888, Anderson & Company were carrying on business to a large amount, and paid away to merchants with whom they dealt over £18,000. The money which had been sent to London in payment of the bill, and which was returned to Grangemouth, was lodged in bank on deposit-receipt in name of Anderson's son to the amount of £2846, 11s. 5d., where it remained until the 4th of July, when it was uplifted and applied by Anderson and Company to other purposes.

"A proof was led in the present action, and Mr Mackenzie was again examined as a witness. He repeated his former evidence with one unimportant variation, and gave his construction of the letters which passed between him and the National Bank in London in the same way in which he gave it in the former action, and in regard to which the Court held him to be quite wrong. He justified now, as he justified before, the delivering up of the bill for cancellation; but there was nothing new either in his evidence or in the evidence of other two witnesses to alter the opinion given effect to by the judgment of the Court—that he acted without authority. The variation from his former evidence consisted in this, that whereas he formerly said, 'If I had known that the bank did not agree to the conditions expressed in the letter of 9th, I would certainly not have given up the bill.' But now he says in answer to the question, 'If you had known that the bank did not agree to the conditions expressed in your and Mr Anderson's letters of 9th June, would you have given up the bill in exchange for the payment that you got,' he answers, 'On the 13th, certainly.' And he states that he was misreported on the former occasion, and now says that he would have delivered up the bill to Anderson & Company to be cancelled on the 13th of June, although he had known that the bank did not agree to the conditions expressed in Anderson & Company's letter of the 9th. This is a strange statement to make, coming from an agent whose duty it was to collect a sum of money, and who took payment upon conditions that he knew his principals had not agreed to.

"According to the evidence of Mr Horsbrugh, the sequestrated estate of Anderson & Company will not yield more than 1s. 6d. in the £—1s. per £ of this dividend has been paid, and the remaining 6d. it is anticipated may be soon obtained. Thus the Dominion Bank have obtained very little benefit from the decree against Anderson & Company, and they now make their claim against the Bank of Scotland on account of the *laches* of that bank's agent. No defence is here stated to the effect that Mr Mackenzie in what he did, did not represent the defenders. But the defence as stated by their counsel consisted of three parts—first, that there was no contract of agency proved. This is clearly negatived by the letters which have been produced, the analysis of which has been given by the Lord President, and the conclusion come to is thus stated in his opinion—'From that time (7th June) I apprehend that Mackenzie was acting for both parties. He did not give up the position of acting for the acceptors, but he undertook the additional duty of collecting for the National Bank, and in that character he goes on to correspond with the National Bank.'

"In the next place, it is said that although there might be a breach of duty the damages should be nominal, because the pursuers may have recourse against the indorsers who are proved by a witness adduced for the defenders (Malcolm Carswell, a timber broker in Glasgow) to be persons in solvent circumstances. This is no good answer for the defenders' breach of duty. Whether a good claim could now be made against the indorsers will depend upon the view taken by a Canadian Court as to whether recourse against them has not been lost, and the pursuers stated that they were quite willing to assign over to the defenders any claim that they may have against the drawers and indorsers.

"It is next said that in any view the damages claimable must be limited to the interest upon the bill from the time at which it fell due—a defence founded upon this, that the pursuers having got hold of the money when it was sent up to them in London ought to have kept it, and not returned it to Grangemouth. This defence, however, overlooks the fact that the money was sent up under a strict condition that no expenses or other charges for telegrams or commission should be exacted from Anderson & Company. If the money had been kept, it must have been kept under that condition which was the subject of controversy between the parties, and which condition the pursuers had rejected. The result of the whole matter is that the defenders must be found liable in the loss which the pursuers have sustained. It is proved that if Mackenzie had done his duty payment would have been obtained in the month of June. The amount of this damage consists of the principal sum in the bill and interest thereon, and of the expenses incurred to the pursuers in the former action.

"In regard to the expenses of the former action, the only point disputed was a sum of £86, 13s. 5d. of extra-judical expenses, for which decree was not obtained. A person who is damnified by the neglect of duty of another is entitled to full relief, and although these extra-judicial expenses could not be recovered as between party and party according to the rules applicable to costs, yet they were expenses to which the pursuers were put. Lord Kames in reporting the case of *Hogg* v. *Kennedy and Maclean*, 1754, M. 10,098, says—'I take it to be a general rule in all other affairs as well as in commerce that neglect of duty subjects the party to every risk and to every damage, except what he

can show must necessarily have happened though he had done his duty.' The account for the extra-judicial expenses does not require to be taxed, as parties have agreed upon a sum without taxation. Credit must be given for the dividend obtained (£161, 0s. 3d.) from Anderson & Company's estate. The amount of damage therefore would stand as follows :—

"1. Principal sum in bill referred to in this action and in the decree in the action *The Dominion Bank* v. *Anderson & Company*, £2939, 9s. 6d., with interest thereon at five per cent. from 7th May 1887 till payment.

"2. Expenses incurred by the pursuers :—

(1) Amount of expenses incurred by pursuers in action *The Dominion Bank* v. *Anderson & Company* as taxed and decerned for per account No. 117 of process . . .	£164	16	6
(2) Amount of additional expenses, being extra-judicial expenses incurred to pursuers' agents as adjusted .	40	0	0
(3) Amount of expenses of diligence on decree in said action per claim in sequestration . . .	1	3	8
	£206	0	2
Deduct the amount of the dividend of 1s. per £ received by the pursuers on their claim in Anderson & Son's sequestration	161	0	8
	£44	19	11"

The defenders reclaimed, and argued—Payment had really been taken by Mackenzie upon the terms of the letter of 7th June from the pursuers' agents, the National Bank. The liability of the defenders should at all events be limited to interest and expenses, as the pursuers' agents should not have parted with the draft which they received in payment of the bill. Further, the pursuers had not lost recourse against the drawers. All that they lost owing to the cancellation of the bill was that they could not do summary diligence upon it. They were therefore bound to proceed against the drawers before suing the defenders—*Muir* v. *Crawford*, May 4, 1875, 2 R. (H. of L.) 148; Chitty on Bills, 299; Bell's Prin. 342; Bell's Comm. (7th ed.) ii. 431, note; *Van Wart* v. *Woolley*, 3 B. & C. 439; Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), sec. 52. The pursuers were not entitled to sue the defenders for the whole amount of the bill, interest and expenses. To take the case of a law-agent, there was no authority for the view that a law-agent who had made an unsafe investment for a client was liable to be saddled with the debt *plus* an assignation of the security. When the Court had ordered the assignation of the security, that had been done in the interests of the law-agent to avoid a forced sale. This was not even the case of a law-agent, but only of one person being employed by another to collect money for him. All that the defenders could be held liable for was the loss ultimately ascertained to be due to their fault—*Potter* v. *Muirhead*, January 21, 1847, 9 D. 519; *Campbell* v. *Clason, &c.*, December 20, 1838, 1 D. 270; *Urquhart* v. *Grigor*, June 12, 1857, 19 D. 853. There was, further, no evidence that the conduct of the defenders had caused any loss to the pursuers, as it was not proved that Anderson & Company would have been able to meet the bill if charged on it in July 1887.

The pursuers and respondents argued—The pursuers' agents could not have retained the draft, as payment had been tendered on certain conditions only. Mackenzie had had no authority for cancelling the bill, and it was due to his action in so doing that summary diligence could not be used upon it, and the money recovered from the acceptors. The defenders therefore, whose agent he was, were liable—Bell's Prin. 337. They must accordingly be held to occupy the acceptors place. The pursuers were not bound to proceed against the drawers first, from whom their might be a difficulty in recovering the money on a cancelled bill—45 and 46 Vict. cap. 61, sec. 64. The cases which had been decided with regard to analogous claims against messengers-at-arms and law-agents confirmed this view. The first class of cases referred to messengers-at-arms—*King* v. *Stevenson*, December 3, 1807, Hume, 344; *Chatto* v. *Marshall*, January 17, 1811, F.C.; *Campbell* v. *Clason*, December 20, 1853, 1 D. 270, *per* Lord Fullerton; *Murray* v. *Darno*, December 6, 1797, Hume, 323; *Dougan* v. *Smith*, July 3, 1819, Hume, 356; *Highgate* v. *Boyle*, February 12, 1823, 2 S. 204; *Davidson* v. *Mackenzie*, December 20, 1856, 19 D. ; *M'Millan* v. *Gray*, March 2, 1820, F.C. In the analogous cases of actions against law-agents for insufficient investments the principle on which the Court acted was that the agents were found liable for the whole debt and the security assigned to them—*Sim* v. *Clark*, December 2, 1831, 10 S. 85; *Ronaldson* v. *Drummond & Reid*, June 7, 1881, 8 R. 767, *per* Lord Craighill; *Guild* v. *Glasgow Educational Endowments Board*, July 16, 1887, 14 R. 944; *M'Lean* v. *Soady's Trustees*, July 19, 1888, 15 R. 966; *Black* v. *Curror & Cowper*, June 27, 1885, 12 R. 990. It was clear from the evidence that had the pursuers been able to charge the acceptors on the bill in July 1887 they would have obtained payment.

At advising—

Lord President—The history of the bill which is the subject of the present action is known to us from the inquiry in the previous case of *The Dominion Bank* v. *Anderson & Company*, who were the acceptors of the bill, and it is not necessary to detain the Court over these circumstances for the decision of the present case.

There is no doubt that Mr Mackenzie, the agent for the defenders at Grangemouth, became the agent of the Dominion Bank of Canada in collecting this bill, and it is not alleged that he was acting beyond his powers as the agent of the defenders, the Bank of Scotland. On the contrary, they accept the responsibility for what he did.

The bill had been protested for non-payment, and the reason of the non-payment seems to have been some dispute as to the quality of the cargo for which it had been granted. After that the bill was sent out to Canada in order to secure recourse against the drawers, and in these circumstances Mr Mackenzie came forward and

offered to collect the bill for the National Bank, who are the agents in this country of the Dominion Bank of Canada. The bill was accordingly brought back to this country, and sent to Mackenzie at Grangemouth, who wrote to the National Bank of London a letter on 9th June in which he says—"With reference to your letter of 7th inst., I enclose herewith a communication received from W. Anderson & Company, from which you will observe that they would pay the 12s. 6d., together with the remitting charge, *re* the bill, on condition that they were held free of further responsibility." And the enclosed letter was in these terms—"We have yours stating the National Bank, London, will take payment of this bill, but we would like to get a letter from them freeing us of interest and expenses as asked in ours of 28th ulto."

The question therefore between the parties at that time was, whether Anderson & Company were liable for interest and expenses in consequence of non-payment of the bill on presentation, or were to be relieved of that charge. Everything else seems to have been arranged.

Now, the National Bank were acting merely as agents for the pursuers, and they communicated with them as to the conditions contained in the letter of Anderson & Company, and replied that they were not authorised to take payment upon these conditions. Mackenzie in the meantime, without waiting for an answer to his letter of the 9th June, and with no authority for so doing took payment for the bill under deduction of the charges for interest and expenses, except the 12s. 6d. for protest charges, and having so taken payment he marked the bill as paid, and delivered it over to the acceptors. The question then arose whether the National Bank would take payment of the amount of the bill under deduction of interest and expenses, and they adhered to the instructions which they had received from the pursuer, and declined to do so.

Now, there was a serious responsibility on Mackenzie's part in acting as he did. He had sent on 13th June to the National Bank a draft of the amount paid by Anderson & Company, but accompanied by a letter to this effect—"Of course you distinctly understand . . . that . . . the draft is accepted by you in settlement of the transaction without any reservation." The National Bank, acting on the instruction of the pursuers, were forced to return the draft, saying that they could not take it on that condition, and in so doing they acted quite rightly. The money accordingly was sent back and handed over to the acceptors, but the bill was cancelled, and a great difficulty arose in obtaining payment of it, and indeed it might have been impossible to do so if it had not been for the provision of the Bills of Exchange Act 1882, sec. 63, sub-sec. (3), which enacts that "a cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative, but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority." The position of the pursuers and their agents accordingly was that while they could not charge on the bill, they were enabled to raise an action to recover the amount of the bill, founding on the above section of the Bills of Exchange Act, and proving that it was cancelled without authority. The pursuers were successful in their action against Anderson & Company after a protracted litigation. Evidence was led, and the case was brought here on a reclaiming-note, and the final judgment was pronounced on 10th February 1888. Unfortunately before that decree could be put in force against the acceptors they had become bankrupt—that is, in March following.

The present action is brought against the Bank of Scotland to recover the loss sustained by the pursuers by reason of the cancellation of the bill. The Lord Ordinary has found the Bank of Scotland liable on the ground, as I understand his Lordship, that owing to the cancellation of the bill, which was unauthorised and improper, the pursuers, the holders, were unable to charge upon it, and that if they had been able to give a charge at the date of the action against Anderson & Company there is no doubt that they would have recovered payment, the bill being liable to no objection on the face of it till it was cancelled; if any dispute had arisen as to the sum due under it, and the acceptors had brought a suspension of the charge, there is just as little doubt that the bill of suspension would not have been passed without consignation, and so the pursuers would have been safe, because at that time it is not disputed that the acceptors' business was perfectly sound and able to meet its liabilities. That seems to me a good ground of decision, and I agree with his Lordship. The damage sustained by the Dominion Bank resulted from the wrongful act of Mackenzie, the agent for the Bank of Scotland, and therefore the Bank of Scotland is liable, and I hold that the question of their liability is not affected by the fact that other parties may be liable against whom the pursuers may have recourse, namely, the drawers, M'Arthur Brothers. We do not know much about the question whether recourse has been reserved against them, or whether they may or may not be good for the money. In the meantime the loss has been incurred directly from the fault of the defenders or their agent, and I do not think it is a good answer to the pursuers' claim that possibly they may recover from someone else. The rule of law rather is that when by the fault of a party a document of debt has been rendered inoperative or ineffectual the party in fault is liable to make good the loss thereby incurred, and cannot say to the loser that he may recover from someone else. On the other hand, I am disposed to say that the Bank of Scotland may have an equitable right to an assignation to enable them to proceed against the drawers.

Lord Mure—When the first question raised with reference to this bill came before the Court in the action against the acceptors, I concurred with your Lordship in holding that the arrangement come to between the agent for the present defenders at Grangemouth and the acceptors relative to the payment of the bill, and under which it was given up to the acceptors and cancelled by them, had resulted in a cancellation which was made by mistake, and without the authority of the holder of the bill, in the sense of the 63rd section of the Act 45 and 46 Vict. c.

61, and that the bill was therefore one on which the acceptors were still liable to be proceeded against. In that action decree was pronounced against the acceptors, who were charged on the decree. They, however, failed to pay the bill, and having thereafter been sequestrated, a dividend of 1s. in the £ has been declared on the estate; and it seems to be expected that an additional dividend of 6d. in the £ at most may be paid.

In these circumstances the present action has been brought against the defenders for payment of the bill, on the ground that the pursuers had failed to obtain payment of it through the fault of the defenders' agent at Grangemouth. The fault is said to have consisted in this—That the agent accepted payment of the bill on conditions which the pursuers had not authorised, and were not bound to accede to, and then gave up the bill to the acceptors who cancelled their signature, and thereby prevented the pursuers from doing summary diligence on the bill. The action is therefore not only substantially but expressly one of damages for loss said to have been caused by the defenders; and it is distinctly alleged in the record (Cond. 12) that in consequence of the delay which resulted from the pursuers being obliged to have recourse to an ordinary action instead of summary diligence, and from proceedings "which were thus rendered necessary by the defenders' fault and negligence, the pursuers have sustained loss and damage to the extent of the sum in the bill, and interest thereon," as sued for in the summons.

The Lord Ordinary has given effect to this contention, and decerned against the defenders for payment of the bill and interest, and for a further sum as the balance of an account of expenses brought out after crediting the defenders with the dividend received from the acceptor's estate.

I am of opinion with the Lord Ordinary that if it could be proved that the loss and damage here claimed were occasioned through the delay which occurred in taking proceedings upon the bill, and, in particular, in consequence of the pursuers having been prevented from doing summary diligence, owing to the bill having been cancelled with the knowledge and permission of the defenders' agent at Grangemouth, the damage would be of a description for which the defenders would be liable in law. But after repeated consideration of the evidence, I have been unable, the *onus* being, as I conceive, upon the pursuers to prove their case as laid in the record, to come to the conclusion, in the circumstances of this case, that if the pursuers had been able to do summary diligence at the time they resolved to proceed against the acceptors in July 1887 they would have succeeded in recovering the amount of the bill.

In dealing with this matter, the time at which the pursuers gave instructions that proceedings should be taken is of importance. As I read the evidence, that was not till the beginning of July 1887, as shown by the letter from the National Bank, London, of the 5th of July of that year, and by the evidence of Mr Spens, one of the firm to whom that letter was addressed, who says —"The bill was placed in our hands on the 6th of July 1887. When I was first instructed, I asked the bill to be sent that I might do summary diligence, but when I found it was cancelled I instructed an ordinary action." The main question therefore to be considered upon the evidence under the present action is, whether the pursuers have proved that they failed to obtain payment of the bill, in consequence of the delay occasioned by their having recourse to an ordinary action against the acceptors, instead of proceeding by summary diligence; and this I apprehend they must do by some clear and distinct direct evidence, and not by mere presumptions or inferences to be deduced from the circumstances of the case, even if these presumptions were in their favour.

Having regard, however, to the fact that the acceptors' estate did not admit of more than a dividend of 1s. 6d. in the £ in March 1888, the presumptions are, I think, much against the probability of the acceptors being able, under a six days' charge, to meet a demand for about £3000, if they had been charged for payment at the time Mr Spens received instructions to proceed, and the evidence, as I read it, tends to strengthen these presumptions. Mr Spens is questioned on the subject of arrestments on the dependence, and he says—"My impression is that we put warrants of arrestment in the summons in the action against Anderson. I am satisfied that we arrested in the hands of the Bank of Scotland. At that time Anderson & Company, I believe, were engaged in considerable trade. Did you try to find any other money? —I did; I mean I made inquiries with reference to whether I could get money due to Anderson, and I was informed I could not. I did not get anything by arrestment in the hands of the Bank of Scotland."

Mr Horsbrugh, the trustee on the sequestrated estate, is also examined, and he says that at the 25th of June 1887 the bankrupts were due to their three bankers about £3950; and with reference to the money which had been remitted to London to pay the bill, but returned, he says—"The draft in question was applied as follows—Lodged on deposit-receipt in name of Mr Anderson's son, £2846, 11s. 5d.; sent to Mr Anderson's law-agents, £95—together, £2941, the sum which he got back. The deposit-receipt stood in the son's name until 4th July. It was then uplifted, and applied thus—In payment in cash to Dow & Company to enable them to retire some bills on 4th July, £862; in retiring bills of his own firm, £298, 12s. 7d.; and paid into current account of his firm with the Clydesdale Bank, £1685. The £862 paid to Dow & Company was to enable them to retire bills on which they were ostensibly the primary debtors. There were cross-bills. The deposit-receipts were with the Bank of Scotland, I think, but I can hardly state distinctly. Dow & Company and Anderson & Company were, I think, accommodating each other with their names."

There being therefore, according to this evidence, no money to be heard of that could be secured by arrestment, when Mr Spens was instructed to proceed against the acceptors, and a large sum due to the banks with whom the acceptors dealt, it is difficult to see where the money was to come from which would have been required to meet a charge on summary diligence for so large a sum on or after the 6th of July 1887. There is plainly no direct evidence either that there was or that there would have been any

such sum available to pay the bill.

All therefore that the pursuers would have got by using summary diligence would have been a warrant to poind the acceptors' goods and effects. But there is no evidence as to what those goods and effects were, or as to what might be their value. And it must be borne in mind that it is no longer competent to imprison for non-payment of a civil debt; so that summary diligence as a means of enforcing payment of a civil debt has lost what was formerly its chief compulsitor. It is now substantially nothing more than a warrant to poind and arrest. But it is proved that there was no money to arrest, and it is not proved that there was anything to poind. Had there been funds which could have been attached by arrestment, or effects which admitted of being poinded in July 1887, these facts might, as I conceive, have been proved by Anderson and his son. But neither of these parties were examined by the pursuers, who have thus failed to clear up a matter which, in the view I take of it, was of great importance in the case, and should have been cleared up to entitle the pursuers to recover under the present action.

Does the fact, then, spoken to by Mr Horsbrugh of the bankrupts' firm having from time to time made payments to the amount of £18,000 in connection with their business between the month of June 1887 and the date of their bankruptcy, being at the rate of about £2000 a month, lead necessarily to the inference that if summary diligence, as it is now restricted, had been used the bill would have been paid? I have not been able to see my way to that conclusion. It is plain, I think, from Mr Horsbrugh's evidence that a good deal of the business of the firm was carried on by means of cross and accommodation bills, and there is no evidence to show that they were at any time possessed of any realised capital. The money which had been reurned from London, and deposited in the bank, had all been drawn out by the 4th of July, and applied in payment of other debts, and it does not appear from Mr Horsbrugh's statement that the firm ever had any money at their credit in the bank after that date. And that being so, my strong impression upon the evidence as it stands is, that if the pursuers had been in a position to proceed by summary diligence on the 6th of July 1887, instead of by ordinary action, and had done so on a bill of so large an amount, the same result would in all probability have followed as that which followed the charge given in 1888, viz., the sequestration of the acceptors' firm, and the offer of a small dividend to the creditors. For the acceptors do not appear to have been parties who had any large amount of funds at their command. The bill in question was due on the 7th of May, but had been dishonoured and protested for non-payment, and sent out to Canada by the pursuers' agent in this country for instructions, from whence it was not returned till towards the middle of June, and it was not till then that the acceptors appear to have been able to get together money enough to meet the bill, and to make the conditional offer of payment which was refused.

In these circumstances I am unable to arrive at the conclusion that the pursuers have proved that the loss sustained was caused by the cancellation of the bill, and their consequent inability to proceed by summary diligence. On the evidence as it stands the loss arose from the inability of the acceptors to pay their ordinary debts; and the pursuers have not in my opinion proved, as they undertook to do, that the acceptors would have been able to pay the bill had they been charged to do so on or after the 6th of July 1887, or that the amount of the bill would then have been recovered under a warrant to poind and arrest, which is all they would have got under summary diligence, as that remedy is now restricted under the operation of the Act abolishing imprisonment for debt.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and the defenders assoilzied from the conclusions of the action.

Lord Shand—The question in the case is one of very considerable hardship to the defenders, because it is intended to make them liable for a bill for nearly £8000, which originally they had no connection with except as collectors, and from which they could scarcely have obtained any profit. At the same time, I agree with your Lordships that the responsibility undertaken in connection with this bill attaches to the Bank of Scotland, and I cannot agree with Lord Mure that it is not proved that the pursuers have sustained loss owing to the cancellation of the bill.

The Dominion Bank being the holders of the bill, and having sent it to London to the National Bank for collection, it was presented at the place of payment and dishonoured. The National Bank then returned it to Canada that the pursuers might take recourse against the drawers. When the bill was on its way out, Mackenzie, an agent of the defenders' bank at Grangemouth, intimated that if it were still in this country the bill would be paid. The result was that the National Bank on getting this intimation telegraphed for the bill, and having received it on 7th June 1887 they sent definite instructions to the Bank of Scotland with reference to the collection of the contents of the bill in these terms—"Referring to your letter of 21st ulto., we now enclose for collection and remittance through your London office (bill being accepted payable in London) Anderson, £2939, 9s. 6d. Should the acceptors decline to pay protest charges please return protest to us. Acceptors will of course pay the remitting charge." That was an authority to the Bank of Scotland to give up the bill on obtaining payment of the sum mentioned, 12s. 6d. of protest charges, and the remitting charge. On the 25th of June the National Bank got the bill back again, but not in the same state in which it was sent. In the meantime the acceptors' names had been deleted, and it had been perforated as "paid" with the Bank of Scotland's usual mark.

Now, what had occurred was this. The acceptors being in funds to meet the bill, remitted the amount of the bill to the Bank of Scotland, and they remitted it to London, and if the remittance had not been clogged with a condition there would have been an end of the transaction, as the National Bank got all it stipulated for. But Mr Mackenzie in sending the draft sent it subject to a condition expressed as follows—"Of course you distinctly understand, in accordance with Messrs Anderson & Company's letter herewith enclosed, that so far as that firm is

concerned, the draft is accepted by you in settlement of the transaction without any reservation." The letter enclosed was in these terms —"Confirming our former respects, we hand you payment of this bill on the distinct understanding that we are freed from all responsibility for interest, expenses, &c." An indefinite amount of interest had run on the bill, and the National Bank had no authority to give up the Dominion Bank's claim for interest and expenses. They were quite willing to take the draft, but not to say that they abandoned their claim for interest and expenses. Accordingly, they returned the draft rejecting the conditions and requiring the bill to be sent. When the bill arrived it had been cancelled, because the Bank of Scotland chose to give up the bill under the arrangement that the acceptors should be free of all further claims.

One thing, I should say, is clear, that as the bill was cancelled in the way I have explained, there is liability on the part of the bank for what had occurred, and as to the amount of the liability I confess I have no doubt that it was the legal right of the Dominion Bank to get the bill as it was sent, and as it was not a proper bill which was sent to them I think they were therefore entitled to return it, and refuse to take it as a document of debt which might or might not be successfully founded on. On the question of liability I have accordingly no doubt. The pursuers might have taken that course. They appeared anxious, however, to avoid inflicting loss upon the Bank of Scotland, who were making scarcely any profit by the transaction, and had interfered with the view of helping their correspondents, the National Bank. The vital fact comes in that had the bill not been cancelled, proceedings would have been taken to enforce payment by summary diligence founded on the bill, and the charge would have expired by 4th July 1887, and it appears to me the holders would have had no difficulty in getting their money; but it appears from the letters of the agents printed in the case that they considered the question whether they could do summary diligence on the bill, and came to the conclusion that they could not. If they could have done summary diligence they would have obtained payment or consignation of the sum due on the bill as the acceptors had no answer on the merits, and could only have litigated the case by consigning the money. The agents of the pursuers having been advised that they could not do summary diligence had then to get instructions from Canada, and so early as July 12 an action was raised and litigated on the ground that the bill had been improperly cancelled. The Bank of Scotland consented to what was being done, and that the bill would not sustain diligence. Within a month of decree being obtained the acceptors were bankrupt. It appears from the evidence in the case that the agents of the pursuers intimated to the Bank of Scotland all that they were doing, who could have said that they would take the responsibility upon themselves, but, on the contrary, they allowed the Dominion Bank to go on.

As regards the liability of the defenders, is it not proved that damage was sustained? In the first place, my impression is that the *onus* would lie on the Bank of Scotland of proving that no damage was sustained owing to their action. I think the Dominion Bank would have been entitled to say—"Take and keep the bill, and pay us the amount of it." But, however the question as to *onus* might be, there has been a proof in the case, and I think that but for the cancellation summary diligence could have been done on the bill early in July 1887. The position of the acceptors at that time was that they were carrying on business as usual. They remitted a draft for the amount to London, and had the sum lying in Bank, and finding that the matter was not arranged, they uplifted the amount in July. The evidence all points clearly to this, that if a charge had been made on the bill in July the money would have been either consigned or secured. Time went on, and in March 1888 the acceptors were sequestrated. What is the evidence as to the intervening period? We find from the evidence of Mr Horsbrugh, the trustee in the sequestration, that "they were carrying on their business in the way they had been doing it for some time. They appear to have met their current bills when they became due. Between the dates I have mentioned they met bills to the amount of £10,195, exclusive of the one in question. They were met and paid at their due dates. The bankrupts were also paying freights and other liabilities during the same period. They paid freights to the amount of £1406, besides other debts." The acceptors had a going business, and surely it is to be presumed in that state of matters that the charge would have produced money. And although it appears also that the pursuers made inquiry about getting funds to arrest, and found that the Andersons had an overdraft at the bank, I think there is no reason to infer that they would not have got payment.

On the whole case, I think the *onus* was on the Bank of Scotland to show that the Andersons had no funds to meet the bill, and, on the contrary, that the proof has shown that there were funds, and further, I think that the Bank of Scotland should have called Anderson in order to discharge the *onus* upon them. And so I agree in holding that the defenders are liable, and I concur also in the view that the pursuers are not bound to go on and adopt further procedure against the drawers, who perhaps have an unanswerable objection to the bill if presented in its present state.

Lord Adam—I am disposed to think that the Dominion Bank would have been within its right to have refused to take the cancelled bill and to have claimed the full amount from the Bank of Scotland, leaving the Bank of Scotland to recover the amount of the bill. I rather think that would have been the proper course, and all questions would have been avoided as to what might have been recovered. There was, however, nothing wrong in the course which was followed, namely, to raise an action against the acceptors in their own names. I am clearly of opinion that it was impossible to charge the acceptors on the cancelled bill. Then if that be so, what followed? The litigation went on for a year, at the end of which time the acceptors became bankrupt. These facts, I think, show, unless they are redargued, that the loss which the bank suffered by the cancellation of the bill, and

their inability to charge upon it, was just the difference between the amount due on the bill and the dividend they have received from the acceptors' estate. There is, I think, no presumption after so long that the Dominion Bank would have been no more successful in securing payment at the date the bill was cancelled than a year after. No doubt it is quite relevant for the Bank of Scotland to aver and offer to prove that the Andersons were insolvent at that date, and that no loss resulted from the inability to charge on the bill. The *onus* is, I think, on the Bank of Scotland to prove that, and I am accordingly of opinion that if it is matter of doubt whether the Andersons were able to pay at the date of the cancellation, any evil which has resulted must fall on the Bank of Scotland.

If, then, I concurred with Lord Mure as to the doubtful nature of the evidence, I should still have held the Bank of Scotland liable. On the contrary, however, I agree with the Lord President and Lord Shand on the evidence in the case, that if the holders had been in a position to charge on the bill they would have recovered the amount due on the bill. And I also agree that if the loss has arisen from the cancellation of the bill, it is no answer to say that it is possible that some other persons might have been able to pay. The Bank of Scotland is on the other hand, I think, entitled to get an assignation to the bill, and to recover if it can.

The Court adhered.

Counsel for the Pursuers—Gloag—C. S. Dickson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defenders—Sir C. Pearson—Graham Murray. Agents — Tods, Murray, & Jamieson, W.S.

Friday, July 19.

SECOND DIVISION.

CUMMING (MURRAY'S TRUSTEE) *v.* GRAHAM AND OTHERS.

Lease—Sequestration—Heritable and Moveable—Grass Crop—Industrial Crop.

The lease of an arable farm for twenty-four years was taken to the tenant, whom failing to his two daughters jointly. The estates of the tenant were sequestrated after his death. The daughters entered into possession under the destination in the lease. In an action by the trustee in the sequestration of the deceased tenant against the daughters—*held* that the pursuer had no claim for the value of permanent wire fencing, although by express stipulation it was to be paid for by the landlord at the expiry of the lease if left in good order, or for grass sown by the deceased not being new grass sown for a hay crop.

The late George Wilson Murray, farmer at South Colleonard, near Banff, who died on 14th June 1887, had a lease of that farm from the Earl of Fife for twenty-four years from 1884. The lease was taken in the name of George Wilson Murray, whom failing to Lizzie Wilson Murray or Graham and Cecilia Blake Murray, his daughters, jointly, and the survivor and her heirs. George Wilson Murray appointed his son-in-law William Graham and George Cumming, Collector of County Rates, Banff, his testamentary trustees, and his estates were sequestrated on 10th January 1888, when George Cumming was appointed trustee thereon. The testamentary trustees, and after the sequestration the trustee in bankruptcy, carried on the farm until Whitsunday 1888, when George Wilson Murray's daughters entered into possession under the destination in the lease, and Mr and Mrs Graham took up their residence there.

In June 1888 the trustee, George Cumming, brought an action against Mrs Lizzie Wilson Murray or Graham, Miss Cecilia Blake Murray, and William Graham, for £401, 8s. 9d. with interest from Whitsunday 1888. The sum included, *inter alia*, the price of articles in the house and on the farm taken over at a valuation by William Graham, and the value of certain wire fencing, of the whole grass sown by the deceased tenant, and of the dung made on the lands.

The lease contained the following clause—"Further, it is hereby stipulated and mutually agreed that at the expiry hereof the tenant shall be paid for the threshing mill and whole wire fencing on the farm, as also for grates and marble mantelpieces in the dwelling-house, as well as for metal fittings in the stables and milk house, all at valuation, if the same are left in good order"—and was taken subject to the rules which regulated all the Fife estates in Scotland, one of which was, "All the straw and turnips produced on the farms shall be consumed thereon, and all the manure made thereon shall be applied annually to the lands."

The defenders in their answers "explained that the wire and iron fencing and gates belong to the defenders Mrs Graham and Miss Murray in a question between them and the pursuer. The dung made on the lands also belongs to the said defenders. The grass included in the said valuation also passed to the said defenders along with the lease."

The defenders pleaded—"(2) As in right of said lease the defenders Mrs Graham and Miss Murray became entitled to the fixtures upon the said farm, the grass, and the dung made upon the farm."

Upon 16th October 1888 the Lord Ordinary (TRAYNER) appointed intimation of the dependence of the process to be made to George Cecil Dickson, M.D., Carnoustie, who had been married to the defender Miss C. B. Murray since the raising of the action, and upon 6th February 1889 (after a proof) pronounced the following interlocutor:—"Assoilzies the defenders Mrs Lizzie Wilson Murray or Graham, Mrs Cecilia Blake Murray or Dickson, and George Cecil Dickson, from the conclusions of the summons: Finds the defender William Graham liable to the pursuer in the sum of £161, 4s. 1d. sterling, with interest as concluded for; and *quoad ultra* assoilzies the said William Graham from the conclusions of the summons, and decerns, &c.

"*Opinion.*—The late Mr Murray was at his death on 14th June 1887 the tenant of South Colleonard. He held that farm under a lease granted by the Earl of Fife in his favour, and failing him in favour of his two daughters, the

female defenders, jointly, and the survivor and her heirs. The farm was carried on by Mr Murray's testamentary trustees from his death until January 1888, when Mr Murray's estates were sequestrated, and from that date until Whitsunday 1888 by the pursuer, as trustee in the sequestration. At Whitsunday 1888 the female defenders entered on possession of the farm under the lease, and are still in possession. The pursuer now makes certain claims against the defenders, which I think may be classed (1) as claims arising upon contract, and (2) claims which he is entitled to make and enforce as outgoing tenant. . . . . .

"Mr Graham subsequently entered into agreement with the pursuer to take certain articles upon the farm at a valuation. Here again I think he was acting as for himself, and not for the female defenders, whose authority was neither asked nor given in reference thereto. No liability in reference to such agreement has been made out against the female defenders, but Mr Graham admits his liability. The extent of that liability is the next question, and it may most conveniently be dealt with by considering the items of the pursuer's claim to which he objects. In dealing with these items I proceed upon the principle that the pursuer is entitled to decree for the value of those things which passed to him by virtue of the sequestration, and which therefore he would sell, but that he is not entitled to any benefit as an outgoing tenant. That character in my opinion he never possessed. His alleged tenancy (and that of the testamentary trustees before him) was never authorised or recognised either by the successors in the lease or the landlord.

"The first item of the pursuer's claim for which Mr Graham disputes liability is wire fences, £22, 16s. 2d., to which may be added (being part of the fences) gates, £9, 7s.

"It appears from the proof that these fences were the proper dividing fences of the farm, and were indeed to all practical intents the only fences there. They were necessary for the working and cultivation of the farm according to the system of rotation stipulated for by the lease. They were fixed into the ground, and were intended to be permanent, and were not merely erected for temporary or experimental purposes, like the wire fences which were held to be removeable by the tenant in *Duke of Buccleuch* v. *Tod's Trustees*, 9 Macph. 1014. In my opinion the fences in question were by annexation and intention fixtures not removeable by the tenant. Apart from this, however, it is stipulated by the 16th article of the regulations on the Fife estates (which form part of the lease) that if the tenant shall at his own cost erect any fences on the farm the landlord shall be entitled to take them at a valuation, if so disposed. It appears to me that the fences in question being property which the deceased could not have removed or sold they did not pass by the sequestration to the pursuer; at all events, that the pursuer was not in a position to sell or deliver these fences to Mr Graham at Whitsunday 1888, and is not now in such a position, and for what he cannot sell or deliver he can claim no price.

"The second item is for grass, £146, 8s. 11d. This also appears to me to be an item for which the defender Mr Graham is not liable. An outgoing tenant had under the lease certain rights in the grass of the arable lands, but, as I have said, the pursuer has no rights as an outgoing tenant. The pursuer, however, maintained his right at least to the new grass, as an industrial crop which the deceased had sown. This claim the defender contended was excluded by the decision in *Marquis of Tweeddale* v. *Lorimer*, November 19, 1816, F.C., which seems quite in point. The decision in that case was subjected to some adverse criticism in the subsequent cases of *Keith*, December 3, 1825, 4 S. 267, and *Lyall*, November 27, 1832, 11 S. 96, but it was not overruled, and I am therefore bound to follow it, although personally I agree with the views expressed by some of the Judges, who regarded the new grass as a crop which should go to the tenant or his executor. It was observed in *Lyall's* case 'that it is often expedient not to disturb a rule which has been long settled even when the principle on which it rested has ceased to operate,' and that observation may be repeated here although it is an observation likely to find fewer adherents now than in 1832 when it was made.

"The third item objected to is dung, £77, 18s. 6d. By the terms of the regulations it was stipulated that all manure made on the farm should be 'applied annually to the lands.' The deceased could not have removed or sold it, and neither therefore could the pursuer. But part of this item consists of dung bought by the deceased and carted to the farm. For this the defender admits liability. The price of the carted dung is £16, 16s., so that this item will be allowed to that extent. . . . . .

"The sum sued for is £401, 8s. 9d., and the items I have disallowed amount *in cumulo* to £240, 4s. 7d., leaving a balance of £161, 4s. 1d., for which the pursuer is entitled to decree against Mr Graham. I assoilzie the female defenders (1) because the things which were moveable they did not buy; Mr Graham did so, and is ready to pay for them; and (2) because the things left by the deceased on the farm, which he was bound to leave, are not things for which the successors in the lease are bound to pay in a question with the preceding tenant's creditors."

The pursuer reclaimed, and argued—(1) *Fencing*—Under express stipulation in the lease the tenant was to be paid for it, and his claim to its value passed to his trustee in bankruptcy. (2) *Grass*—The cases relied upon by the Lord Ordinary were out of date. More care and expense were laid out upon the sowing and top-dressing of grass than formerly, so that it was now an industrial crop which should pass to the tenant's executor in competition with his heir. The Lord Ordinary seemed to approve this view apart from authority. In the recent Agricultural Holdings Act the Legislature had recognised that grass was an industrial crop. No doubt the claim would be less the older the grass, but its value was a matter easily determined by a skilled valuator. (3) *Dung*—The pursuer was entitled to its value as moveable.

Argued for respondents—(1) *Fencing*—This was not a case of the expiry of a lease, therefore the clause founded on by the appellant did not apply. The fences belonged to the landlord although the tenant was to be paid for them, but that only if they were left in good order. (3) *Dung*—The pursuer had no claim. Under the

terms of the lease the dung had to be used upon the farm. It could not be sold.

At advising—

Lord Lee—This is an action at the instance of the trustee on the sequestrated estates of the deceased George Wilson Murray, who died in June 1887, and is directed against his successors in the farm under the contract of lease. By the terms of the lease Mr Murray's daughters became the tenants upon his death. But this was subject of course to Mr Murray's rights and interests in the stock and crop and furniture. It appears, however, that his testamentary trustees entered into possession of the farm for the purpose of realising the crop of 1887, and that they continued to possess till the sequestration of the deceased tenant, which took place in January 1888.

The position of matters at the date of the sequestration therefore was that the trustee had right to recover from the testamentary trustees what they had realised from the crop of 1887, and had right to remove and sell any moveable property or effects upon the farm belonging to the deceased.

I do not think that any question which arose between the deceased tenant and his successors in the lease was of the nature of a question between outgoing and incoming tenant. The trustee in bankruptcy did not represent an outgoing tenant but a deceased tenant, whose successors under the lease might have been different persons altogether from his next-of-kin or executors.

But while such was the strict legal position it appears from the evidence that it was quite recognised by all concerned, on the occurrence of the sequestration, that time would be required for realising the effects belonging to the deceased tenant, and for enabling his successor in the farm to enter upon the possession, and begin the cultivation of it. For this purpose some interim arrangements were obviously necessary, unless the defenders, as successors named in the lease, chose to renounce the succession and leave the trustee to wind up the estate as he best could. In this state of matters various interim arrangements were made, and I think it not of much consequence whether they were made by Mr Graham with or without the authority of his wife and sister-in-law if it appears, as it does, that they ultimately took the benefit of these arrangements and adopted the lease.

In the result there are only three points upon which the Lord Ordinary's decision has been challenged before us. For the respondents agreed to pay the value of the thrashing mill, estimated at £3.

1. The first point is as to the wire fences and gates. I see no reason to differ from the Lord Ordinary as to the proof about these being necessary for the cultivation of the farm and of a permanent character, and in that view I am unable to hold that they formed part of the moveable estate of the deceased Mr Murray.

But the peculiarity of the case is that the lease contains a stipulation that the whole wire fencing is to be paid for by the landlord at the expiry of the lease "if left in good order." This may be merely a premium on attention to the fences. But it is said to imply that the wire fencing belonged to the tenant. I cannot assent to that, looking to the whole conditions of the lease, and in the absence of proof that the wire fencing in question was either paid for by the deceased, or put up by him, or possessed by him, otherwise than as fencing for which there was to be a money claim at the expiry of the lease, "if left in good order."

I am for adhering to the Lord Ordinary's judgment on this point.

2. The second question is as to the grass. I think that this point is settled by the case of *Keith*, 4 S. 267, as commented on and explained in the case of *Lyall*, also referred to by the Lord Ordinary. It was there decided that a tenant possessing under a lease fixing the term of Whitsunday for his removal from "grass," was not bound to remove from land sown with grass in the preceding year for the purpose of a hay crop, but it was also decided that he must remove from all other grass not being "crop."

The proposal to make the defenders pay on the next year after the deceased tenant's right had terminated the value of second and third years' grass is in my opinion unprecedented and untenable, even on the supposition that the pursuer is to be dealt with as an outgoing tenant at the term of Whitsunday 1888. It is not a case of new grass sown for a hay crop at all.

Here also, therefore, I agree with the conclusion reached by the Lord Ordinary.

3. The third point is as to the dung. It was not on the farm at the death of Mr Murray, but was made from the straw and turnips belonging to his executors, and which were consumed on the farm in terms of the stipulation to that effect in article 11 of the regulations, which require that "all the straw and turnips produced on the farm shall be consumed thereon, and all the manure made thereon shall be applied annually to the lands." I agree with the Lord Ordinary that such dung can form no part of the deceased's estate. The carted dung is not in dispute.

The Lord Justice-Clerk, Lord Young, and Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for the Pursuer—Comrie Thomson—Jameson—G. W. Burnet. Agent—A. Morison, S.S.C.

Counsel for the Defenders—Sir C. Pearson—Low. Agents—Henderson & Clark, W.S.

Friday, July 19.

FIRST DIVISION.

MACKENZIE *v.* COULTHART AND OTHERS.

Interdict—Breach of Interdict.

Circumstances in which the Court *pronounced* a sentence of two months' imprisonment for breach of interdict.

William Dalziel Mackenzie of Newbie, in the county of Dumfries, had obtained interdicts against John Coulthart, William Hill, and John Birnie, all residing at Powfoot, in the said county, interdicting and prohibiting them from erecting or maintaining or using during the open salmon fishing season stake-nets on the shores of the

Solway, between high and low water-mark, on the portion of the complainer's salmon fishings of Newbie, known as the Powfoot and Howgarth Scaurs. This was a petition and complaint by Mr Mackenzie and his tenant in the fishings of Newbie, against Coulthart, Hill, and Birnie for breach of these interdicts. In the prayer of the petition the petitioners craved the Court "to find that the said respondents respectively, by their actings and proceedings above set forth and complained of, acted illegally, and have been guilty of a breach and violation of interdict granted by your Lordships as above set forth, and of contempt of the authority of your Lordships; and in respect thereof to inflict upon them such punishment, by imprisonment or otherwise, as to your Lordships shall seem necessary; and further, to find the said John Coulthart, William Hill, and John Birnie jointly and severally liable in the expenses of the petition and complaint, and of all proceedings to follow hereon."

No answers were lodged, but the respondents having appeared, denied that they had been guilty of the breaches of interdict complained of.

A proof was thereafter taken at Dumfries, at which Coulthart and Birnie appeared for themselves, but no appearance was made for the respondent Hill.

The Court pronounced the following decree.

"Find (1) that the respondent John Coulthart has broken the interdicts granted by the Second Division of the Court of Session on 1st and 3rd December 1881; (2) that the respondent William Hill has broken the interdicts granted by said Division of the Court on 3rd December 1881; and (3) that the respondent John Birnie has broken the interdict granted by said Division of the Court on 1st December 1881: Therefore decern and adjudge the respondents John Coulthart, William Hill, and John Birnie each to be imprisoned for the space of two months, and to be thereafter set at liberty; and for that purpose grant warrant to officers of Court to convey the said respondents from this bar to the prison of Edinburgh, thereafter to be dealt with in due course of law: Authorise the petitioners to remove the nets complained of at the expense of the respondents, and authorise execution to pass on a copy hereof certified by the Clerk of Court: Find the respondents liable in expenses," &c.

Counsel for the Petitioners—Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, June 21.

FIRST DIVISION.

[Lord Fraser, Ordinary.

ADAMS *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Arbitration—Contract—Reference—Disqualification.

The arbitration clause in a contract for the making of a railway provided that the arbiter should not be disqualified from acting by being or becoming consulting engineer to the railway company. *Held* that he was not barred from acting as arbiter by the fact that he had revised the specifications and schedules upon which the work which formed the subject of the arbitration was performed.

Process—Arbitration — Decree-Arbitral — Reduction.

In a reduction of a decree-arbitral on the ground that the arbiter had given decree for a larger sum in name of penalties than was claimed by the party in whose favour decree was granted, the latter offered to discharge the excess. The Court *held* that the proper remedy was to reduce the decree *quoad* the excess.

Arbitration—Decree-Arbitral—Reduction.

By the arbitration clause in a contract for the making of a railway it was provided that "all disputes and differences which have arisen or shall or may arise between the parties under or in reference to this contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, . . . or as to any other matter connected with or arising out of this contract, and generally all disputes and differences in any way connected with the construction of this contract, or arising out of the execution of or failure to execute properly the works hereby contracted for or not," should be submitted and referred to the final sentence and decree-arbitral of the arbiter named. The contractor was bound to complete the line of railway on 30th September 1884 under a liquidate-penalty of £20 for every day's delay, but it was stipulated by the railway company that 400 yards of embankment forming part of the line should not be formed until another contractor had completed the east abutment of a bridge and the diversion of a river, or until he had received the written instructions of the engineer to proceed with the embankment. The line was not completed till 1st May 1886. The arbiter found that the contractor was liable in penalties for each day's delay (exclusive of Sundays) from 30th September 1884 to 1st May 1886. In an action of reduction of the decree-arbitral brought by the contractor, it was proved that the contractor had not got access to the ground on which the 400 yards of embankment was to be formed until February 1886. The arbiter stated that he was satisfied that there was no delay in consequence of the contractor not getting access to part of the ground till February 1886. The Court *held* that as the whole matter, including the construction of the contract, had been referred to the arbiter, the Act of Regulations prevented the Court from interfering with the arbiter's award, even on the ground of injustice.

By the Great North of Scotland (Buckie Extension) Railway Act 1882 the railway company were empowered to make a railway from Port-

soy to Elgin, and in November 1882 they advertised for tenders for the work divided into four sections. Of these the first and second sections were (1) from Portsoy to Portnockie, which was again subdivided into two sections, (*a*) from Portsoy to Tochieneal Station, and (*b*) from Tochieneal Station to Portnockie; and (2) from Portnockie to the river Spey, or the Buckie section.

Messrs W. & T. Adams, contractors, Callander, sent in tenders for both sections, which were accepted, the cost of the Portsoy section being £52,286, 19s. 7d., and of the Buckie section being £39,063, 17s. 9d. By the contracts for the construction of the two sections, dated in January 1883, which were entered into between the company as first party, and the Messrs Adams as second parties, the second parties bound themselves to complete the sections according to the specification, and the plans, sections, and drawings prepared by the company's engineer, or according to such altered or explanatory plans as might be furnished by the engineer during the progress of the works.

The contracts further provided—"And further, the said second party hereby bind and oblige themselves to commence said works as soon as they shall have been put in or offered possession of land to the extent that the said engineer shall consider necessary, and within six days after written notice to them, or any of them to do so; . . . and the said second party bind and oblige themselves and their foresaids to intimate to the said first party in writing when they are ready to commence said works, and any delay which may thereafter occur, if any, in giving the said second party possession of such lands as the engineer shall consider necessary for carrying on said works, shall not confer on the said second party a right to claim damages against the said first party, or to break this contract, but may be stated to the arbiter hereinafter named as a reason for not completing the said works within the time after specified, and if it shall appear to said arbiter that the said second party was prevented from completing the said works by that delay or by any stoppage from any cause not imputable to the said second party, the said arbiter shall be entitled to extend the time for completing the same for such period as he shall consider reasonable, but of the propriety of giving the said extension of time and the length thereof the said arbiter shall be sole judge."

The Messrs Adams' bound themselves under the contracts to carry on the works regularly and uniformly, and to have the railway ready for traffic—the Portsoy to Tochieneal part of the Portsoy section on 30th September 1883, and the remainder of that section and the Buckie section on or before 30th September 1884, "or on or before such respective days thereafter as may be respectively fixed by the arbiter after named." In the event of delay on the part of the Messrs Adams, or of their not employing a sufficient number of workmen, horses, &c., it was provided that the company might apply to the arbiter for authority to employ workmen, provide plant and materials, &c., or to take the works out of the contractors' hands, all at the expense of the Messrs Adams—"And it is hereby further declared that the said second party shall be liable in all damages and extra expenses which may be incurred by or occasioned to the said first party by the said second party or their foresaids failing to complete the said works, or to have the same ready for opening by the times respectively hereinbefore stipulated; and as compensation for loss of profits to the company should the foresaid respective portions of the line not be in a state to be opened for public traffic by the times stipulated, it is hereby declared and agreed on that the said second party shall be bound to pay to the said first party the sum of £20 sterling as the liquidate and agreed on compensation for every day during which each of the foresaid respective portions of the line, or any part thereof, shall remain unfinished, or in a state not to admit of its being opened for public traffic, after the said 30th day of September 1883 and 30th day of September 1884 respectively, or such extended periods as the said arbiter may determine as aforesaid."

The contracts also contained the following clause—"And further, the said first and second parties hereto hereby submit and refer to the final sentence and decree-arbitral to be pronounced by Benjamin Hall Blyth, civil engineer in Edinburgh, whom failing by death or resignation to George Cunningham, civil engineer in Edinburgh, whom they hereby mutually nominate and appoint to be sole arbiter, all disputes and differences which have arisen or shall or may arise between them under or in reference to the contract, or in regard to the true intent, meaning, and construction of the same, or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, or regarding the nature of the materials used, or the expense of any additional work or deduction from that specified, or any alteration which may be made as aforesaid in the works hereby contracted for, and which may make them more or less expensive than those specified, or regarding the proper maintenance of the works, or the state and condition of the same, and the amount of the monthly payments to be made to account thereof, or as to any other matter connected with or arising out of this contract, and generally all disputes and differences in any way connected with the construction of this contract, or arising out of the execution of or failure to execute properly the works hereby contracted for or not: . . . Declaring that this submission shall not fall by the lapse of year and day, or by the death of any of the parties hereto, and that neither the said Benjamin Hall Blyth nor the said George Cunningham shall be disqualified from acting as arbiter by his being or becoming the said first party's principal or consulting engineer, or a shareholder in said company, or by his holding or being appointed to any other office or employment under the said first party, or by their being partners or connected with each other in business or otherwise; and that the said arbiter shall have power to award the expenses (including those to be incurred by himself) either in whole or in part which may be incurred under this submission, against such of the parties as he shall think fit."

The specification and conditions for the construction of the Buckie section contained the following clause:—"The portion of the embankment of the line, between pegs Nos. 892 and 899,

shall not be formed until the contractor for the bridge or viaduct over the river Spey has completed the works in connection with the erection of the east abutment of the bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant-engineer to proceed with the formation of the said portion of the embankment." . . .

The contractors commenced operations, but they were somewhat dilatory in their proceedings, and complaints were made of this frequently to them. On 4th December 1883 the railway company, by their manager, applied to Mr Blyth, as arbiter, to authorise them to put on men and plant so as to carry out the works vigorously, all at the expense of the pursuers. In consequence of this appeal to him Mr Blyth visited the works, and in a letter dated 12th December 1883, addressed to the railway company's manager, he stated that no part of the work was completed, and he added that "it is evident from their present state that if they [the works] continue to be executed at the present rate of progress the first five miles cannot be finished before May 1884, and the remainder of the works until at least September 1885—or fully a year behind the contract time." Mr Blyth was very unwilling to take the strong step of putting men on the works at the contractor's expense, and suggested, that as the pursuers had promised to put on an increased force of men and waggons, that it would be for the best interest of all parties that the directors should obtain from the contractors a formal undertaking to do this, and that if they failed in their promise the application of the railway company might again be taken up.

Nothing further was done upon this application, but on 2nd December 1885 the railway company again made a formal application to the arbiter with complaint of delay, and calling upon him "forthwith to issue and pronounce the necessary order authorising and empowering them [the railway company] to provide, at the expense of the contractors, such additional workmen, horses, waggons, and other force, with all tools, implements, and materials requisite and necessary, and to continue to employ the same so as to ensure the completion of the whole of the works above referred to within the time above expressed." What the arbiter did upon this was to meet the parties, and upon the urgent entreaties of the Messrs Adams he was induced, upon their again giving an undertaking of greater diligence, to abstain from granting the prayer of the application of the railway company. The Messrs Adams accordingly wrote on 8th December 1885 as follows:—"With reference to the application by the Great North of Scotland Railway Company to you as arbiter, dated 2nd inst., discussed at the meeting before you to-day, we have now, as desired by you, to undertake to finish the works referred to in that application on or before 15th February next, unless prevented by some unforeseen occurrence. In order to do so we shall put and keep on the works as many men as can be practically done for the above end. In the event of our not by these means finishing at the above date, we will agree, if you deem it then necessary, to your giving effect to the application of the railway company." To which the clerk to the submission, by Mr Blyth's directions, replied as follows, by letter addressed to the Messrs Adams' agents, Messrs Campbell & Somervell, W.S.:—"9th December 1885.—I am instructed by the arbiter to acknowledge receipt of Messrs Adams' letter to him of yesterday. The arbiter still has the Great North of Scotland Railway Company's application under consideration, and the manner in which he will ultimately deal with it will to a great extent depend upon the information he may receive within the next eight or ten days as to what, if any, steps are being taken by your clients with the view to the completion of the works on or before the 15th February next." The arbiter was not called upon by the railway company to issue the necessary order allowing them to put on additional men and plant.

So matters stood upon this footing until the works were completed. The first portion of the work, which ought to have been completed on 30th September 1883, was not completed till 1st April 1884, and the second portion of the work was not completed, as it ought to have been according to the contract, on 30th September 1884, but only on 1st April 1886.

Thereafter, disputes having arisen between the Messrs Adams and the company with reference to the settlement of their accounts under the contracts, an appeal was made to Mr Blyth under the reference clause. After various procedure, and the taking of evidence at considerable length, and the intimation of a note of the proposed findings, against which no representations were lodged by either party, Mr Blyth issued two decrees-arbitral—the one applicable to the Portsoy and the other to the Buckie contract. Under the first he found that the Messrs Adams were due to the company the sum of £7109, 13s. 6d., with interest from 7th November 1887, and under the second he found that they were due the sum of £5103, 14s. 6d., with interest from the same date, and he gave decree for payment of the two sums. The larger portion of the items charged against the Messrs Adams consisted of penalties or liquidated damages at the rate of £20 per day for loss caused to the company through the delay in completing the works beyond the date of completion specified in the contract—being 837 days at £20=£16,740.

The Messrs Adams thereafter brought an action of reduction of the two decrees-arbitral against the company.

The grounds of action appear from the following pleas by the pursuers:—"The decrees-arbitral specified in the summons ought to be reduced—1. Because the said Benjamin Hall Blyth, through the circumstances condescended on, was disabled from exercising an impartial judgment on the matters referred to him. 3. Because, prior to the date of the two contracts aforesaid, the said Benjamin Hall Blyth had, on the employment of the defenders, prepared for them the specifications and schedules forming part of the contracts, and containing statements as to the masonry of the bridges and viaducts calculated to mislead the pursuers, or having that effect, and the fact of his having been so employed was concealed by the defenders from the pursuers, and the pursuers were ignorant of it not only at the date of the contracts but also at the date when the decrees were pronounced. 4.

Because the decrees are *ultra fines compromissi*, in respect (*a*) that on a sound construction of the two contracts between the pursuers and the defenders condescended on, the said Benjamin Hall Blyth was not empowered, after the dates specified therein for the completion of the works, to extend the time for such completion; (*b*) that the said Benjamin Hall Blyth has found the defenders entitled to sums in name of compensation or liquidated damages, but in reality penalties, enormously in excess of the sum they claimed; and these matters imply corruption on the part of the said Benjamin Hall Blyth, and are not separable from the other findings in the decrees. 6. Because the Buckie section of the railway could not be completed till the bridge at Garmouth was nearly finished, and possession of the land necessary for connecting the bridge and the railway was not given by the defenders to the pursuers till February 1886; and in the decree applicable to the Buckie contract the said Benjamin Hall Blyth has nevertheless found the pursuers liable in compensation or liquidated damages for not completing the said section at the rate of £20 per day from 30th March 1885."

The pursuers stated, *inter alia*, that the amount allowed in name of penalty exceeded that claimed by the defenders to the extent of £5250. In regard to this matter the defenders stated—"Explained further, that under the clauses of reference in the contracts the parties referred to the arbiter all questions as to the true intent, meaning, and construction of the contracts, as well as all questions connected with the execution, or failure to execute the works to be constructed, and constituted him the sole judge between them on all questions of fact or law arising upon the construction or execution of the said contracts. In particular, he was entitled and bound to decide a question which arose between the parties as to the true intent, meaning, and construction of the clause providing for payment of liquidate and agreed on compensation at the rate of £20 *per diem* as compensation for loss of profits in event of failure by the contractors to have the works completed at the times specified in the contracts, or such other times as the arbiter might fix, in accordance with the power of extending the time conferred upon him. It was maintained to him by the pursuers that the payment provided for under the clause was of the nature of a penalty, and subject to modification; and by the defenders, on the contrary, that it was truly, as it bears to be, liquidated damages assessed by the parties as compensation for loss of profits. The claims lodged by the defenders are referred to, and it is explained that they have throughout maintained that compensation for loss of profits was due to them at the rate agreed on in the contracts for the whole period during which the contractors have been found to be in fault, although, desiring to treat the contractors with liberality, they, in accordance with the statements in their claim, were all along willing to accept a payment of compensation to the extent of one-half of the amount claimed as due under both contracts. The railway company do not propose, and have intimated to the pursuers that they do not intend to enforce payment of the sums decerned for in name of liquidated and agreed-on compensation to an extent exceeding the sum of £11,490, and they hereby offer to discharge their claims against the pursuers under the decrees-arbitral to the extent of the sum of £5250, being the amount decerned for as compensation for loss of profits in excess of the sum of £11,490 insisted upon in their claim, and to engross upon the said decrees minutes giving effect to this restriction."

In reference to their 6th plea the pursuers stated—(Cond. 11) "The aforesaid bridge across the river Spey at Garmouth, forming part of the Buckie Railway, was built by the firm of Blaikie Brothers under a contract with the defenders similar to those of the pursuers, and dated in the same month of January 1883 . . . Part of the pursuers' contract with the defenders was to connect the bridge with the Buckie section of the railway by an embankment, but it was impossible to do this, and so complete the Buckie section of the defenders' contracts till the bridge was finished. Messrs Blaikie Brothers had contracted to finish the bridge by the 31st July 1884, but they did not do so till the month of May 1886. It was not till the month of February 1886 that the pursuers were put in possession by the defenders of the land necessary for the formation of the aforesaid embankment. On 20th January 1886 the defenders' resident engineer addressed a letter to the pursuers, stating that he expected that the river Spey would be diverted in a week, provided the weather kept favourable, and that he trusted they were making all the preparations necessary for filling in the banking required. The material for the embankment had to be brought from Portgordon, a distance of three miles. It was thus impossible for the pursuers to have completed the works under their Buckie contract until two months or thereabouts after the said month of February 1886. No penalties have been claimed or exacted by the defenders from Blaikie Brothers in respect of their delay in finishing their contract. Notwithstanding, the said Benjamin Hall Blyth has, by the decree applicable to the Buckie contract, found the pursuers liable in the sum of £6800 in name of liquidated damages, being at the rate of £20 per day for the period from 30th March 1885 to 1st May 1886, and as if the bridge at Garmouth had been completed by the month of January 1885."

In answer the defenders, *inter alia*, denied that the completion of the works under the Buckie contract was in fact retarded or materially affected by the state of the works of the Spey Bridge, and explained that any question of delay so arising was by the contract submitted to the decision of the arbiter.

In reference to their third plea, the pursuers stated—(Cond. 12) "The said Benjamin Hall Blyth was employed by the defenders to prepare or revise the plans, specifications, and schedules of quantities upon which the pursuers tendered for the works, and to estimate the probable cost of the works for them. At the date when the pursuers entered into their contracts with the defenders they were ignorant of the fact of the said Benjamin Hall Blyth having been so employed, and they have only become aware of it since the said decrees-arbitral were pronounced . . . The pursuers believe and aver that in adjudicating upon their claim the said Benjamin Hall Blyth has permitted himself to be biassed and corrupted by the desire to save the defenders as much as possible from having to ex-

pend more money on the said railway than they had allowed for according to his estimate." (Cond. 13) "The specifications and schedules prepared or revised by the said Benjamin Hall Blyth were in many material points inconsistent, contradictory, and misleading. In particular, after the works were in progress the pursuers were required by the defenders' engineers to construct of ashlar masonry the abutments and other parts of the various bridges and viaducts on the line, whilst the specifications and schedules, on a sound construction of them, prescribed only rubble, which is a cheaper kind of masonry. In all the cases in which these circumstances occur the said Benjamin Hall Blyth has by the decree-arbitral disallowed the pursuers' claims for the difference between ashlar and rubble prices, which amounts to £10,000 or thereby. From the said schedules it appears that the pursuers in stating their rates of prices had allowed for these works on the footing that the masonry was only to be rubble masonry. There was a great deal of evidence led before the said Benjamin Hall Blyth, and argument submitted to him as to the meaning of the expressions used in the specifications and schedules to denote the masonry of which the bridges and viaducts were to be constructed. During the evidence and the argument the said Benjamin Hall Blyth concealed from the pursuers the fact that the expressions in question had been inserted in the specifications and schedules by himself, or had been revised and approved of by him. The pursuers have only discovered this since the said decrees-arbitral were pronounced. The question whether the pursuers were to be allowed ashlar prices or rubble prices for the masonry of the Cullen viaduct was the most important question in the reference, and if the pursuers had known that the said Benjamin Hall Blyth had prepared or revised for the defenders the specifications and schedules on the construction of the terms of which the question depended they would have declined to submit their claims to him. The pursuers further believe and aver that in adjudicating upon their claims the said Benjamin Hall Blyth has permitted himself to be biassed and corrupted by the desire to save the defenders from the consequences of his own negligence in preparing or revising the specifications and schedules."

The defenders in answer stated that the fact that Mr Blyth's firm were consulting engineers to the defenders was well known to the pursuers when the contracts were entered into, but they denied that Mr Blyth had ever prepared any estimate of the line of railway as finally authorised by Parliament, or that he prepared or revised the schedules of quantities issued to intending contractors on which the pursuers tendered, and they further stated—"Any difference as to the construction of the specifications and schedules was by the contract expressly and exclusively submitted to the judgment of the arbiter. Denied that the pursuers were required to construct or did construct the abutments, or any portion of any bridge or viaduct of ashlar masonry except where ashlar masonry is expressly required by the specifications. Denied that the masonry referred to in the condescendence and described by the pursuers as ashlar is truly ashlar masonry, and explained that it is in fact rubble masonry, rather inferior than superior to the quality stipulated for in the specifications, and that the arbiter's findings upon the items of claim falling under this head give effect to the contract of parties expressed in the specifications and schedules of prices."

The defenders pleaded, *inter alia*—"(1) The action is incompetent except in so far as founded on the cause or reason of corruption alleged against the arbiter, or upon any decerniture by him *ultra fines compromissi*. (2) The pursuers' statements are not relevant. (3) The defenders are entitled to absolvitor in respect that (*a*) the matters in dispute under the contracts in question were competently referred to the judgment of the said Benjamin Hall Blyth; (*b*) that nothing existed or has occurred to disqualify him from acting as arbiter therein; (*c*) that the allegations of corruption against the said arbiter are false and unfounded in fact. (4) The said decrees-arbitral being in conformity with the contracts of submission, having fully exhausted and not having exceeded the matters submitted, the reasons of reduction ought to be repelled, and the defenders found entitled to absolvitor, with expenses. (5) *Separatim*—Even assuming the arbiter to have exceeded his powers in decerning for liquidate compensation to an amount exceeding the restricted sum of £11,490, the amount decerned for in excess of the said sum of £11,490 is separable from the remainder of the awards, and the said decrees-arbitral should only be reduced *quoad excessum*."

The Lord Ordinary (Fraser) on 26th May 1888 allowed a proof, and in a reclaiming-note by the defenders the Court on 27th June following disallowed a proof by the pursuers of their averments in one article of the condescendence, and *quoad ultra* adhered.

The following evidence was given at the proof. Mr Blyth, the consulting engineer for the company, deponed—"In condescendence 11 there is a statement as to delay being caused by failure to give possession of the ground adjoining the Spey Bridge. That matter was mentioned in the course of the arbitration proceedings, but it certainly was not made a serious point of. Not only is that so, but I am satisfied there was no delay in consequence of their not getting that ground. My reasons for that opinion are these, that the contractors were not ready to use that ground until they got it. They never asked for the ground, and if they had asked for it and did not get it in time, it would have formed a ground for asking an extension of time, which they never did. (Q) And there was a larger power which authorised certain things to be cut out of the contract, was there not?—(A) The engineer might have done that without asking me. Any remedies they had, however, were not taken advantage of. (Q) If they had had that ground much sooner, would it have made any difference on the time when the line was opened?—(A) I don't believe they were ready to use it one day before they got it. They had the ground before they were ready to use it. . . . *Cross-examined.*—I am not in a position to say whether if the Messrs Adams had the whole of the Portsoy and Buckie contract up to the side of the river by the 30th September 1884 the line could have been opened a day sooner than it was. I think the bridge could have been built very much sooner if there had been anticipation of the

pursuers being ready to use it. The line throughout certainly could not have been opened until the bridge was built, but it could have been open to Fochabers Station. . . . I am aware that the pursuers were forbidden to use any portion of the ground between certain pegs until the contractor for the Spey Bridge had completed his works and of the other provisions in the contract bearing upon that matter. The contractors were obliged not to touch that matter until they got instructions to do so. They were not ready to use the ground, and in point of fact they never asked for it. So long as the river was flowing in its bed undiverted it was quite impossible for the pursuers or any other person to form the embankment to connect with the bridge." Mr W. Adams, one of the pursuers, deponed—"The Buckie contract extended from Portknockie to Spey Bridge. The specification with respect to it contains a clause that we are not to form that line between certain pegs until we are put in possession of the land, and authorised by the engineer to go on with the work. The portion of the works to which that applied would extend to between 300 and 400 yards. The Spey Bridge was built not by us, but by Blaikie Brothers, and it was built on the west side of the river on dry land. After it was built the river had to be diverted so as to flow below the newly made arch. Then the bed of the river had to be given to us for the purpose of forming an embankment, continuing the line on to the end of the bridge. (Q) So long as the river was not diverted, was it possible for any man to form such an embankment to the bridge?—(A) No. The specification indeed provides that we should not attempt anything of the kind, and it was quite impossible to do it. The bridge had to be finished by 31st July 1884. If it had been finished then, and we had got possession of the land, our work was to be finished by 30th September following, but the bridge was not finished in July 1884, and we did not get possession of the land until February 1886. . . . *Cross-examined.*—We were quite in time with our work at that end of the bridge. We had the banking run up and stopped up to the very end for nearly two years. (Q) Did you ever ask to get possession of the ground at the bridge to get on with the work?—(A) The river was running in it in full flow, and the bridge was not getting on at all, and it would have been perfectly absurd to ask for that. We were there daily, and saw how the thing stood. They would have laughed at us if we had asked for that. I cannot say whether we asked for the ground or not, but it is not likely we would do a ridiculous thing. I did not ask the engineer, or anybody representing the engineer, to dispense with the execution of this bit of work at Spey Bridge as the arbiters had power to do, for that would have been in my opinion a strange request. Suppose we had got possession of the ground at Spey Bridge earlier, it is not the case that the position of our other works was such that we could not possibly have finished the contract before the time when it actually was finished. The work to be done on that ground of which we desired possession was the last work that was done. . . . *Re-examined.*—I have explained that the portion of the line we had to build up to the Spey Bridge was the last work done under our contract, all the rest of the line being ready to be open. It had to stand ready to be open until the intervening little bit was finished. We had to pay £20 of penalty on each contract—that is, £40 a-day—until the work was finished. (Q) The stipulation in the clause says that you were not to go on with that bit of the work until ordered to do so by the engineer, until you were given possession of the ground, and until the river was diverted, but no time is specified. Did you understand you were agreeing to pay £20 a-day of penalty for about two years, except about three months before the finishing of the contract, if you did not get possession of the ground on which you were to do the work?—(A) No. (Q) The complaint is that they broke the contract, but that you have been subjected to the penalty for that period during which it was impossible for you to prevent delay?—(A) Exactly."

Certain letters were produced from (1) Mr Moffat, the general manager of the railway company, to Mr Blyth dated 20th November 1888, intimating that the pursuers were getting on very slowly with their contracts, and asking advice as to the course they should take, and (2) from Mr Blyth in answer dated 30th November—"I quite appreciate the unwillingness of your directors to make a formal application to me, but I do not see how I can advise them in any other capacity than that of arbiter without disqualifying myself from hereafter acting as such. I would therefore suggest that you should send me the contract, at the same time requesting me formally to accept the submission, and to call a meeting of the parties on the line. This I should at once do, and I am hopeful that I might be able to make Messrs Adams understand the necessity for conducting their works more energetically, and might induce them to do so without any further proceedings under the submission being required."

The further purport of the proof sufficiently appears from the opinion of the Lord Ordinary, who on 3rd November 1888 pronounced this interlocutor:—"Having taken the proof, heard counsel thereon, and considered the cause, Finds that under the decrees-arbitral sought to be reduced the arbiter has found the pursuers liable in penalties to the amount of £16,740: Finds that this sum was larger by £5250 than the penalties claimed by the defenders, and that therefore the decrees-arbitral are *ultra petita* to this extent: Reduces the same in so far as penalties are found due to the defenders more than £11,490: *Quoad ultra* assoilzies the defenders from the conclusions of the action: Finds no expenses due to or by either parties, &c.

"*Opinion.*— . . . The objections stated by the pursuers will be noticed *seriatim*.

"First. It is objected that Mr Blyth could not exercise an unbiassed judgment in the matter, because he was consulting engineer for the company. Now, it is settled law that the engineer of the company may be made the arbiter, and no objection can be taken to him because he is so—*Mackay* v. *Parochial Board of Barry*, 22nd June 1883, 10 R. 1046, and cases there referred to. And in this particular case it was specially stipulated that no objection was to be taken to Mr Blyth as arbiter because he was or might become consulting engineer for the company.

"Second. It is next objected that Mr Blyth could not be an impartial judge because he revised the specifications and schedules forming part of the contracts. The pursuers knew per-

fectly well that Mr Blyth was consulting engineer. This was stated in the contracts which they signed. As consulting engineer his duty was to look over the specifications and plans of the work to be done, and knowing this the pursuers agreed to his being arbiter.

"Third. It is objected that the arbiter was not entitled after the time specified for the completion of the works to extend the time for such completion. In the interest of the pursuers this is not a very intelligible objection. The arbiter found them entitled to an extension of six months as regards the completion of the second part of the works. This was a concession in their favour, and why they should object to it is not very manifest.

"Fourth. It is objected that the arbiter has found the defenders entitled to damages in excess of the sums that they claimed, and this objection to the extent of £5250 the Lord Ordinary holds to be well founded. The arbiter has given to the defenders damages *ultra petita*, and that is a good ground of reduction. Upon this point the railway company on the record make this statement—'The railway company do not propose, and have intimated to the pursuers that they do not intend to enforce payment of the sums decerned for in name of liquidated and agreed-on compensation to an extent exceeding the sum of £11,490, and they hereby offer to discharge their claims against the pursuers under the decrees-arbitral to the extent of the sum of £5250, being the amount decerned for as compensation for loss of profits in excess of the sum of £11,490 insisted upon in their claim, and to engross upon the said decrees minutes giving effect to this restriction.' The Lord Ordinary does not think that this is the proper mode of getting rid of a decree-arbitral which decerns for more than is asked; the proper course is to reduce the decree *quoad* the excess.

"Fifth. It is said that the arbiter by his letter of 9th December 1885 extended the time for completion of the works until 15th February 1886, and that notwithstanding the extension of time he has awarded damages for the delay which had occurred, and which by such extension of time was condoned. The Lord Ordinary cannot read the correspondence which took place in this light. Delay had occurred, and the railway company had applied for power to put men and material on the work, and all the arbiter did was simply to abstain from granting the prayer of the application upon an undertaking that the works would be completed by the 15th of February 1886. He said nothing and did nothing as to the penalties already incurred under the contract for delay. There was here no extension of time as might have been allowed by the contract, but a simple reservation not to issue an order authorising the railway company to put men and material on the works at the pursuers' expense. The penalties were still running on.

"Sixth. The only remaining objection worthy of any notice is one regarding which the Lord Ordinary has found some difficulty. In the specification for the railway from Portknockie to the river Spey it is provided that 'the portion of the embankment of the line between pegs Nos. 892 and 899 shall not be formed until the contractor for the bridge or viaduct over the river Spey has completed the works in connection with the erection of the east abutment of bridge, the diversion of the river, and the erection of the protection walls embraced in the contract for the Spey Bridge, or until he has received the written instructions of the engineer or assistant engineer to proceed with the formation of the said portion of the embankment.' It is averred by the pursuers in regard to this matter that 'the aforesaid bridge across the river Spey at Garmouth, forming part of the Buckie Railway, was built by the firm of Blaikie Brothers under a contract with the defenders similar to those of the pursuers, and dated in the same month of January 1883, and in which the said Benjamin Hall Blyth was named arbiter. Part of the pursuers' contract with the defenders was to connect the bridge with the Buckie section of the railway by an embankment, but it was impossible to do this and so complete the Buckie section of the defenders' contracts till the bridge was finished. Messrs Blaikie Brothers had contracted to finish the bridge by the 31st July 1884, but they did not do so till the month of May 1886. It was not till the month of February 1886 that the pursuers were put in possession by the defenders of the land necessary for the formation of the aforesaid embankment. On 20th January 1886 the defenders' resident engineer addressed a letter to the pursuers, stating that he expected that the river Spey would be diverted in a week provided the weather kept favourable, and that he trusted they were making all the preparations necessary for filling in the banking required. . . Notwithstanding, the said Benjamin Hall Blyth has by the decree applicable to the Buckie contract found the pursuers liable in the sum of £6800 in name of liquidated damages, being at the rate of £20 per day for the period from 30th March 1885 to 1st May 1886, and as if the bridge at Garmouth had been completed by the month of January 1885.' It does seem hard that when the pursuers were absolutely prohibited from meddling with the embankment of the line between the pegs Nos. 892 to 899 until the contractor of the bridge over the Spey had completed the works in connection with the erection of the east abutment of bridge, &c., they should be made liable in damages for non-construction of the Buckie portion of the line seeing that these preliminary conditions were only fulfilled in February 1886. It is with some hesitation that the Lord Ordinary comes to the conclusion that this was a matter entirely within the competence of the arbiter. The Lord Ordinary does not say that he would have come to the same conclusion as the arbiter, but the arbiter had a right to decide as he did. His view was that the portion of the line joining on to the embankment was not forward, and therefore there was no delay caused by the non-completion of the Spey Bridge, but that the whole delay arose from the works for the line not being carried forward by the pursuers. If these works had been brought forward to the place for the embankment, and if a demand had been made for the diversion of the Spey, the case would have been different. As the matter stands, the Court have no right to interfere.

"Seventh, It is next objected that 'after the works were in progress the pursuers were required by the defenders' engineers to construct of ashlar masonry the abutments and other parts

of the various bridges and viaducts on the line, whilst the specifications and schedules, on a sound construction of them, prescribed only rubble, which is a cheaper kind of masonry. In all the cases in which these circumstances occur the said Benjamin Hall Blyth has by the decree-arbitral disallowed the pursuers' claim for the difference between ashlar and rubble prices, which amounts to £10,000 or thereby.' He was entitled to disallow them if such was his opinion on the construction of the specification, which is in the following terms—'The exposed faces of abutments of all under-line bridges above the top of foundations to be built of coursed rubble stones from twelve to fifteen inches in height.' The contention of the pursuers is that this means that they could make a course of masonry fifteen inches in height, composed of little pieces of stone half-an-inch thick. The contention of the defenders was that every stone must be twelve to fifteen inches in height, and this latter contention the arbiter adopted, which he was entitled to do as being the judge appointed to construe the contract and specifications.

"The result of the whole matter is that the defenders must be assoilzied from the conclusions of the action, except that there must be a partial reduction of the decree-arbitral, but with regard to expenses the Lord Ordinary must discriminate. In the first place, the pursuers have got rid of a liability for £5250; in the second place, there was a useless discussion on the relevancy, which was carried to the Inner House, and where the judgment of the Lord Ordinary was affirmed. Plainly the pursuers were entitled to expenses down to the interlocutor of the Inner House, and after that date—seeing that they have been successful upon the proof—the defenders ought to be found entitled to expenses, but substantial justice will be done by finding neither of the parties entitled to expenses."

The pursuers reclaimed, and argued—(1) The first plea—The letters which had passed between the railway company or their representative and the arbiter, and of which the pursuers were not cognisant, showed that the arbiter approached the performance of his duties as arbiter with his mind prejudiced against the pursuers. (2) The fourth plea—The arbiter ought either to have enforced the contract, and applied the penalty clauses which provided for the case of delay, or else to have declared the penalty clauses to be in the circumstances inapplicable. What he did was to extend the time allowed for the completion of the contract, and so to reform the contract, to which he afterwards reverted by enforcing penalties for delay. By agreeing to the extension of time the defenders must be held to have waived the penalty clauses in the contract, and to have betaken themselves to their common law right of damages—*M'Elroy & Sons* v. *Tharsis Sulphur and Copper Company*, November 17, 1877, 5 R. 161, *per* Lord Justice-Clerk (Moncreiff), 167; *Robertson* v. *Driver's Trustees*, March 2, 1881, 8 R. 555. Further, assuming that the penalty clauses were still enforceable, the Lord Ordinary had not met the justice of the case in the reduction which he had made on the amount of the award. The whole award must fall where admittedly penalties had been awarded greatly in excess of the claim made and the loss alleged to have been sustained. There was no previous case where the Court had sanctioned the principle of a partial reduction—*Napier* v. *Wood*, November 29, 1844, 7 D. 166. (3) The sixth plea—The award of penalties for the delays in connection with the Garmouth bridge were so grossly wrong as to amount to legal corruption on the part of the arbiter—*Edinburgh and Glasgow Railway Company* v. *Hill*, January 28, 1840, 2 D. 486, Lord Gillies, 494; *Alexander* v. *Bridge of Allan Water Company*, February 5, 1869, 7 Macph. 492. The Lord Ordinary indicated an opinion that the arbiter's view was unsound, and it practically came to this upon the evidence that penalties were awarded for delay in the completion of a contract the conditions of which prevented the pursuers from beginning it until after the period for which the arbiter had awarded penalties. This was a good ground for the reduction of the award—*Robertson* v. *Driver's Trustees*, March 2, 1881, 8 R. 555.

Argued for the defenders—(1) The pursuers' first plea—There was no concealment on the part of the arbiter. Before making his visit to the ground, on being called upon by the respondents to take up the reference, the arbiter sent the pursuers a copy of the application which had been made to him. They knew that the arbiter was the consulting engineer of the railway company, and that as engineer it was part of his duty to revise the specifications and schedules which formed part of the contract. (2) The fourth plea—The construction put upon the contract by the pursuers was very far-fetched. It was not an extension of time that was allowed by the arbiter for the completion of the work. The sole object was to get an undertaking from the contractor that the work would be finished by a particular time, and that the necessity for stronger measures might so be obviated. The idea of reforming the contract never occurred to anyone, and there was nothing in the proof to support such a view. The procedure throughout was perfectly regular and judicial. The cases of *M'Elroy* and *Robertson* were very different. No doubt, in order to found a right to penalties under the contract, there must be full implement by the person who sought to have it enforced; the Court would not allow the integrity of the contract to be broken. In *Robertson's* case it was held that the integrity of the contract had been broken, and the Court had no power to interfere to enforce it. In *M'Elroy's* case it was held that the fault alleged on the part of the person seeking to enforce the contract, which was said to debar him from pleading it, must be material and contributory to the result complained of. But the substitution of one date for another for the completion of the contracts was not such a bar, nor was it *ultra fines compromissi* of the arbiter so to extend the time. In *M'Elroy's* case there was no provision, as in this case, for an extension of time; besides, it was decided upon English precedents, and there was a later case decided in England which displaced the authority of these precedents—*Jones* v. *President and Fellows of St John's College, Cambridge*, 1870, 6 L.R., Q.B. 115. The evidence given by the pursuers—as to the grounds on which the arbiter had proceeded in making the award—must be laid aside, as these grounds could be ascertained only from

the arbiter himself — *City of Glasgow District Railway Company* v. *M'George, Cowan, & Galloway*, February 25, 1886, 13 R. 609. (3) The sixth plea—The arbiter had acted within his powers in all that he had done, and his judgment was quite competent. It was also right. The bridge at Garmouth over the Spey, and the term of its completion was not alluded to in the pursuers' contract. The sole question for the arbiter was what compensation was to be given for the delay, and in dealing with that he could not look at the contract for the building of the bridge. Cases where the implement by one party of a condition material to the fulfilment of a contract was rendered impossible by the actings of the other party were not in point—*cf. Mackintosh* v. *Midland Counties Railway Company*, July 9, 1845, 14 Meeson & Welsby, 548; *Dick & Stevenson* v. *Mackay*, May 21, 1880, 7 R. 788, *aff.* 8 R. (H. of L.) 37.

At advising—

Lord President—The Lord Ordinary in this case has reduced Mr Blyth's decree-arbitral in so far as he has decerned for penalties beyond the sum of £11,490 upon the ground that to that extent the award is *ultra vires*, and I do not understand it to be seriously disputed that he was quite right in taking that course. But there are a number of other objections to the decree-arbitral which he has not given effect to, and I think the only one that has created even an appearance of difficulty is that which is called the 6th objection. With regard to the others I do not think it necessary to take particular notice of them. I quite agree with the Lord Ordinary in the view that he has taken of all of them.

As regards the sixth, there is this great peculiarity that the arbiter has found penalties due for not executing work by the contractors in circumstances where it is alleged they were absolutely prohibited by the contract from executing these very works. Now, that objection depends upon a consideration of two things—in the first place, the evidence in regard to the execution or non-execution of that work, and in the second place, the construction of the contract. It is on the construction of the contract that it is alleged that the contractors were not only not bound to go on with their works in the circumstances in which they were placed, but were absolutely prohibited from doing so, and the evidence has been led for the purpose of showing that that was the position in which the contractors stood. The proposition that they can be due penalties for a period when they not only could not execute the works, but when they were prohibited from executing the works, is a very startling one undoubtedly. The Lord Ordinary seems to indicate an opinion that if he had been the arbiter he would have taken a different view from that which the arbiter has actually taken, but he feels himself constrained to refuse effect to the objection, because he considers that the whole of that matter is absolutely within the power of the arbiter, and in that I agree with him. The arbiter is by the terms of the arbitration clause in the contract made absolutely master of the whole affair. He is not only to take evidence in so far as that is necessary for satisfying himself of the facts of the case, but the construction of the contract is left to him. That is one of the things expressly left to the arbiter by the contract, and he has construed the contract in such a way with regard to the facts as to satisfy his own mind that these penalties are due. The ground of the objection is nothing else than this, that the decree-arbitral to this extent is unjust. It is said to be very unjust, grossly unjust, manifestly unjust; but these are degrees of injustice, and the adverbs do not add very much to the importance of the objection as being a complaint of injustice. Now, nothing can be clearer in the law of Scotland than that according to the Act of Regulations injustice, or iniquity as the Act calls it, is not a ground for reducing a decree-arbitral. The parties choose their own tribunal, they determine what matters shall be submitted to the arbiter, and by his award they are bound. In this respect we know that the law of Scotland differs very materially from that of England, in which the Courts review decrees-arbitral or awards much more readily than we do. And the same kind of rule prevailed in this Court prior to the Act of Regulations. But certainly the practice at that time was such as fully to justify, I think, the enactment of these Regulations, because anything more loose or indefinite than the rules according to which the Court interfered or did not interfere with awards of arbiters can hardly be conceived, as I think some of us had occasion to point out in a case not very long ago. But be that as it may, we are bound by the Act of Regulations, and injustice or iniquity, although very glaring, very serious, and very hard upon the party who suffers, is no ground for interfering with the award of an arbiter. And therefore upon this particular part of the case I agree with the Lord Ordinary also. The result is that I am for adhering to his interlocutor.

Lord Mure—I am obliged to come to the same conclusion. The terms of the clause in reference to this contract are very broad and general, and everything is referred to the arbiter selected by the parties, including the construction of the provisions of the contract. Now, he has construed the clause applicable to compensation or penalties for delay in the execution of the works in a way which has led him to the conclusion that there had been such delays as warranted him in awarding the penalties. That was a matter of which he was made sole judge according to the terms of the contract, and I agree with your Lordship that the mere fact that it is unjust, as the contractors allege it to be, is not a ground on which we as a Court can review or alter the judgment of the arbiter. We have no right to do so. And upon that ground I agree that the Lord Ordinary has come to a right conclusion, and that the contractors here are not entitled to any further deduction from the sum that has been fixed by the arbiter.

Lord Shand—I agree with your Lordship in thinking, with reference to the points other than head sixth, which formed the subject of discussion, that the argument maintained on behalf of the reclaimers does not require to be specially dealt with. I think the Lord Ordinary has disposed of all these points satisfactorily.

The only question which I think attended with some difficulty is that under head sixth, and we

had a very full argument with reference to the subject there dealt with. It was maintained that the Court should look at the contract itself, and should determine its meaning. I am bound to say, as the result of the argument, that if the construction of the contract lay with the Court I should have had the utmost difficulty in adopting the view that the arbiter has taken. On the contrary, I should have been clearly of opinion that the meaning of the contract would not justify the award that he has given. But parties have excluded the Court from considering the meaning of the contract. It has been left to the arbiter expressly to decide all questions regarding the true intent, meaning, and construction of the contract with reference to the settlement of all these claims; and that being so, I am of opinion with your Lordships that we cannot get behind that award, and on that ground I agree in thinking that we must adhere to the Lord Ordinary's judgment.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuers — Johnstone — Law. Agents—Alexander Campbell, S.S.C.

Counsel for the Defenders—D.-F. Balfour, Q.C. —Ferguson. Agents—Gordon, Pringle, Dallas, & Company, W.S.

Wednesday, July 17.

OUTER HOUSE.

[Lord Kyllachy, Ordinary on the Bills.

ROSE, MURISON, & THOMSON *v.* GOURLAY (WINGATE, BIRRELL, & COMPANY'S TRUSTEE).

Guarantee—Jus quæsitum tertio — Action on Guarantee by One not being Person to whom Guarantee Originally Given.

A firm gave certain guarantees addressed to an underwriters' association, for the transactions of certain underwriters, who thereafter entered into policies with certain other underwriters and brokers belonging to the association. There was no reference to the guarantees in the policies. The firm and the underwriters who underwrote the policies having been sequestrated—*held* (by Lord Kyllachy and *acquiesced in*) that the insured had a title of the nature of a *jus quæsitum* to enforce the guarantees by being ranked as creditors under them against the firm's estate.

Guarantee—Partnership—Change in Firm.

In 1871 a firm of insurance brokers granted a guarantee in the ordinary course of business for the transaction of an underwriting. At that time the firm consisted of two partners. One partner died, and thereafter the other conducted the business under the same name, and took over the assets and liabilities. After a time he assumed his son into partnership, and the business thereafter continued to be carried on under the same name. There was no agreement excluding liability for the underwriters' transactions. The underwriters having failed—*held* (by Lord Kyllachy and *acquiesced in*), in a question between the firm and the holders of policies underwritten by them, that the guarantee of 1871 was available against the firm.

The estates of the firm of Wingate, Birrell, & Company, marine insurance brokers, underwriters, and shipowners, Glasgow, and Walter Birrell and James Aitken Birrell, the partners thereof, were sequestrated in 1888. John Gourlay, C.A., was appointed trustee.

Claims were lodged in the sequestration by Rose, Murison, & Thomson, insurance brokers. They claimed a ranking in respect of certain policies of insurance, of which they were the holders and indorsees. These policies were underwritten by (1) Walter Birrell, (2) James Aitken Birrell, (3) George G. Birrell, and (4) Peter M'Ara, and the claim was made in respect of certain guarantees alleged to have been granted by the bankrupt firm or its predecessors in business trading under the same name.

The following were the material facts with regard to the claims—Rose, Murison, & Thomson were members of the "Glasgow Underwriters' Room," a body composed of brokers and underwriters, in which a great part of the underwriting business in Glasgow was done. The Underwriters' Room was governed by bye-laws. The underwriters there meeting did business only with each other—that is, with members admitted by the Committee of Admission, a committee whose business it was to see to the financial position of candidates for admission. This committee, if not otherwise satisfied, required a guarantee, which was generally granted by a broker who was to act for the applicant, and held his mandate for that purpose.

Policies underwritten by the "guaranteed members" did not bear any reference to the guarantee, but such policies were accepted, if not always in the knowledge of and in reliance on the guarantees, yet always in reliance on the fact that all underwriters who were admitted had to satisfy the committee by guarantee or otherwise of their ability to fulfil their engagements.

The firm of the bankrupts Wingate, Birrell, & Company was founded in 1860, the partners being the late Mr Wingate and Mr Walter Birrell. Walter Birrell did not become a member of the "Room" till 1862, when he was admitted by committee a member thereof on a letter addressed to the secretary of the "Room," and which was to this effect—"We acknowledge that we are responsible for the underwriting account carried on by us in the name of our Mr Birrell.—We remain, &c., WINGATE, BIRRELL, & COMPANY."

In 1871 Wingate, Birrell, & Company granted to the secretary a letter of guarantee for the liabilities underwritten by James A. Birrell, Walter Birrell's son, who was then admitted to the "Room."

Mr Wingate died in 1877. Mr Walter Birrell took over the assets and liabilities of the firm, and continued business in the same name.

On 1st January 1880 Walter Birrell assumed his son James A. Birrell into partnership. The business still continued to be carried on under the firm name of Wingate, Birrell, & Company.

James A. Birrell brought no capital into the business. By the contract of copartnery the affairs of the firm were to be balanced as at 31st December 1879, and the surplus of assets over liabilities was to be placed to the credit of Walter Birrell. The balance on the underwriting accounts in name of Walter Birrell was declared to belong to him, and it was declared that the copartnery should not be interested therein. The underwriting account in name of James A. Birrell was to be closed at the same date, and a new one in his name to be opened for his own behoof.

On 24th October 1883, by letters to the secretary of the association, Wingate, Birrell, & Company guaranteed payment of liabilities arising on the underwriting account of Mr G. G. Birrell, and on the underwriting account of Peter M'Ara to the amount of £100. G. G. Birrell and M'Ara both became bankrupt.

In these circumstances Rose, Murison, & Thomson, as indorsees of the policies above mentioned, maintained that but for the firm's guarantees the business would not have been given to Walter Birrell, James A. Birrell, G. G. Birrell, or M'Ara; that the public, the brokers who effected the policies, and the association, had acted in reliance on the guarantees; and that they were therefore entitled to claim in the firm's sequestration as creditors of the firm.

The trustee having pronounced a deliverance on a footing which disallowed this contention, Rose, Murison, & Thomson (with the concurrence of the association and of the persons originally insured under the policies) appealed to the Lord Ordinary on the Bills.

They pleaded, *inter alia*—"(1) In respect of the guarantees condescended on, *et separatim* in respect of said guarantee and the usuage of the Glasgow Underwriters' Insurance Room, the appellants are entitled to rank in terms of their claim. (3) The bankrupt firm having taken over the assets and liabilities of the preceding firms, is liable for said guarantees."

The trustee pleaded, *inter alia*—"(3) The appellants have no right or title to found on the alleged guarantees. (4) In respect of the changes in the firm of Wingate, Birrell, & Company as condescended on, the appeal should be refused *quoad* the alleged guarantees of 29th January 1862, 24th February 1871, and 2nd June 1879; *et separatim* it should be so refused as respects the bankrupt firm's estates and the estates of James A. Birrell. (5) In respect the account in name of J. A. Birrell was changed, as stated, to one for his own behoof, the alleged guarantees of 1871 and 1879 do not form grounds for supporting the appeal. (6) The appellants not having known of any of the alleged guarantees prior to the date of sequestration, are not entitled to found thereon. (8) The appeal should be refused, in respect none of the guarantees are in favour of the appellants."

On 17th July 1888 the Lord Ordinary (Kyllachy), after a proof, pronounced this interlocutor:—"Finds the appellants are entitled to be ranked on the sequestrated estates of Wingate, Birrell, & Company and individual partners of said company mentioned in the note of appeal for the sums due under the policies held by the appellants so far as underwritten by (1) J. A. Birrell, (2) G. G. Birrell, and (3) Peter M'Ara: Finds, on the other hand, that the appellants are not entitled to be ranked on the said estates for the sums due under said policies so far as underwritten by Walter Birrell; with these findings appoints the cause to be enrolled: Finds the appellants entitled to expenses, subject to modification, &c.

"*Opinion.*—[*After stating the facts*]—The first question which arises in these circumstances is, whether the appellants (or rather the appellants suing along with the association and its secretary) have a title to enforce the guarantees in question granted by Wingate, Birrell, & Company for the several underwriters referred to?

"On this question it was maintained for the respondent that the appellants had no title and the association had no interest to enforce such guarantees, that the same were not operative as obligations, and were not intended to be so, but were mere tests of the estimation in which the intrants guaranteed stood, or at best mere obligations in honour, which, if granted by members of the 'Room,' carried with them a sufficient moral sanction. They referred to *Peddie* v. *Brown*, 3 Macq. 65; *Fennie* v. *The Glasgow and South-Western Railway Company*, 3 Macq. 75; *Blumer* v. *Scott*, 1 R. 379.

"The appellants, on the other hand, maintained that these guarantees must be held to have been exacted by the committee of the association in the interests of the assured, and with a view to enforcement on their account, and that this gave the assured a sufficient *jus quæsitum* under the policies on which they could sue or claim. But they further maintained that all difficulty on this score was obviated by the concurrence in the present claim of the association and its secretary, who, having taken the guarantees, have necessarily a title to enforce them, and have also a sufficient interest in this respect that they owe a responsibility to the assured as having admitted the underwriters, and must, besides, suffer as an association by their members' default in obligations undertaken in the 'Room,' and to brokers who are members of the association. They referred to Smith's Leading Cases (9th ed.) i. 586; Addison on Contracts, p. 24 (8th ed.); *Humphreys* v. *Dale*, 7 E. and B. 206; *Fleet* v. *Martin*, 7 Q.B. 126.

"My opinion in this matter is with the appellants. I think that both on principle and authority persons assuring through brokers who are members of the association have a *jus quæsitum* in these guarantees which gives them a title to sue upon them. The test, I admit, is whether the association and the guarantors could, during the currency of the risks underwritten, agree between them to discharge the guarantees. In my opinion they could not. I at the same time consider that the concurrence of the association is not without importance, as at least relieving the appellants of any technical difficulty which might otherwise attach to their position.

"If I am right so far, it concludes the case as regards the underwriting obligations of George Gilchrist Birrell. It also, I think, concludes it as regards the obligations of Peter M'Ara. In both of those cases the guarantees claimed on were granted subsequent to the latest change in the bankrupt firm, and I do not understand that the liability of the bankrupt estate in these cases was disputed, assuming that the question of the appellants' title was decided as it has now been.

"It remains to consider the cases of (1) Walter

Birrell and (2) James Aitken Birrell. As to them the question is, how far the guarantees (or so called guarantees) founded on are affected by changes in the firm which occurred after the guarantees were granted? It will be best to take the two cases separately.

"1. Walter Birrell — The document here founded on is dated so far back as 29th January 1862, and is in the following terms:—'*Glasgow, Jany.* 29, 1862.—David M'Cowan, Esq., Secretary, Association of Underwriters, Glasgow.—Dear Sir,—We acknowledge that we are responsible for the underwriting account carried on by us in the name of our Mr Walter Birrell.—We remain, &c., WINGATE, BIRRELL, & COMPANY.'

"It is called a 'guarantee,' but it is obviously not a document of that description. It is simply an acknowledgment that the underwriting account carried on at that time in Mr Walter Birrell's individual name was truly a firm account carried on in trust for behoof of the firm of Wingate, Birrell, & Company, of which firm Mr Walter Birrell and the late Mr Wingate were the sole partners. Mr Wingate died in 1877. From that time till 1880 Mr Walter Birrell carried on the business under the firm name, but for his own behoof. On 1st January 1880 he assumed his son, Mr James Aitken Birrell, into partnership, and since then the business has been conducted by those two gentlemen still under the old firm name of Wingate, Birrell, & Company. And the firm thus constituted is the firm which has been sequestrated. The question in these circumstances is, whether the letter of January 1862 imports an acknowledgment that the underwriting account of Walter Birrell continued to be a firm account after 1880—that is to say, whether it is to be held in a question with the appellants that the account in question which, between 1877 and 1880 was undoubtedly an individual account, became in 1880, when the present firm was formed, once more a firm account and continued to be so down to the date of the bankruptcy.

"It appears to me that it is impossible for the appellants to carry their case thus far. In point of fact the account in question was not after 1880 a firm account. The contract of copartnery of the new firm expressly declared that it should not be so. And I fail to see what right the association or the appellants or any other third parties had to assume that because the account was in 1862 joint as between Mr Walter Birrell and Mr Wingate it was therefore joint from 1880 to 1888 as between Walter Birrell and James Aitken Birrell. The fact was, as I have said, otherwise, and it does not appear to me to be a legitimate inference that because a succession of firms trade under the same name every trust which existed in favour of the original firm must continue to be a trust in favour of its successors.

"2. James Aitken Birrell—The appellants here found on two (proper) letters of guarantee, one dated 24th February 1871, when J. A. Birrell was admitted an underwriter, and another dated 2nd June 1879, when his line was extended to £200. Both letters were granted by the firm of Wingate, Birrell, & Company, and the first (which it is sufficient to quote) was in these terms:—'*24th Feb.* 1871.—David M'Cowan, Esq., Secretary, Association of Underwriters.—Dear Sir,—We beg to intimate to you that we guarantee the liabilities arising on the account of Mr James A. Birrell underwritten by us in his name.—We are, dear Sir, yours respectfully, WINGATE, BIRRELL, & COMPANY.'

"There can, I think, be no doubt that Wingate, Birrell, & Company granted these letters in the ordinary course of their business as brokers. They held J. A. Birrell's mandate, and did his business, and they guaranteed his account just as they might have guaranteed the account of any other underwriting constituent. The liability therefore under the guarantee of 1871 was in 1877, when the first firm was dissolved, a proper liability of the business which Mr Walter Birrell continued to carry on, and it appears to me that both guarantees became and continued proper liabilities of the business into which J. A. Birrell was assumed as a partner in 1880. Undoubtedly Mr W. Birrell continued liable under both guarantees up to 1880. He was so liable as the surviving partner of the old firm, and also as having expressly taken over all its assets and liabilities. Undoubtedly also the new firm constituted in 1880 must be held to have taken over both guarantees unless there was some agreement to the contrary, and, perhaps, also, unless such agreement was communicated to the association. I say this because the partnership of 1880 was an assumption into a going business of a son who put in no capital, and who simply came into the business as it stood. In such a case the settled presumption is that the new firm, taking over all the assets of the business, takes over also all its liabilities.

"Accordingly, the only questions here seem to be (1) whether there was any agreement to the contrary in 1880 excluding the liability of the new firm for J. A. Birrell's account, and (2) whether there is any distinction in this matter between the guarantees as applying to risks current in 1880, and as to continuing guarantees applying to future risks. On both of these matters my opinion is in the negative. I do not read the contract of copartnery of 1880 (24th February 1879) as at all excluding the continuance of the guarantee as a firm's guarantee, and seeing that continuing guarantees of this sort are incidental to the carrying on of a broking business, I see no reason to distinguish between the guarantees as guarantees for the past and guarantees for the future. It strengthens this conclusion that the two partners had here really no interest to make any difference. The father was individually liable as an original guarantor until he withdrew. The son was necessarily liable, as principal, and the two were the only partners of the firm.

"On the whole, therefore, while I am against the appellants as regards the account of Walter Birrell, I am in their favour as regards the account of James Aitken Birrell, and, as already said, I am also in their favour as regards the account of G. G. Birrell and Peter M'Ara.

"I shall only in the meantime make findings to the above effect. I understand the parties have arranged to settle all questions of figures extra-judicially."

The interlocutor was acquiesced in by the parties.

Counsel for the Appellants—Graham Murray. Agents—J. & J. Ross, W.S.

Counsel for the Respondent—C. S. Dickson. Agents—Davidson & Syme, W.S.

Friday, July 19.

FIRST DIVISION.

MACLEAN'S TRUSTEES *v.* MACLEANS.

Succession—Vesting—Period of Payment—Substitution in Moveables.

A testator in his settlement directed his trustees to pay over the free yearly income of his estate, both heritable and moveable, to his son. In the event of the son dying without lawful issue the trustees were directed to convey the testator's heritage and his plate and pictures to J. M., son of his brother J. M., and the lawful heirs of his body, whom failing to G. M., a younger son of his brother J. M., and the lawful heirs of his body. With regard to the residue of his estate, the testator appointed his trustees, "in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, . . . to apportion and divide the said residue among the children of my said brother J. M. equally." Then followed this declaration—"That the share of succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The testator's personal estate amounted to £48,000, which was all capable of early realisation except a sum of about £5000. The testator's son died without children. J. M., the testator's nephew, survived him between five and six months, and then died unmarried and intestate. At the time of his death the trustees had not conveyed the heritable estate or the plate and pictures to him, nor had they divided the residue.

Held (1) that the plate and pictures fell to be conveyed to the testator's nephew G. M., along with the heritage, as substitute heir of provision; and (2) that a share of the residue vested in the person of the testator's nephew J. M.

Mr Hugh Maclean of Westfield and Hythehill, in the county of Elgin, died on 8th April 1885, leaving a trust-settlement. By its terms the trustees were directed, after payment of debts, and making provision for certain alimentary annuities, to pay over the free yearly income of the estate, both heritable and moveable, to the testator's son John Alexander Maclean during all the days of his life, and if John Alexander Maclean should predecease his wife to pay her an alimentary annuity of £300 during her life. The testator further provided—"*Eighth*, After the death of the said John Alexander Maclean, my son, and within a period of twelve months after that event shall occur, if he shall leave lawful issue, I hereby direct my said trustees to dispone and convey my said lands and estates of Westfield, Inchshaggarty, and Inchbrock, particularly above described, and my dwelling-house at Hythehill, with offices and garden, and my plate and pictures, to the eldest son of the said John Alexander Maclean, and the lawful heirs of his body, whom failing to the second son of the said John Alexander Maclean, and the lawful heirs of his body. . . . And in regard to the residue of my estate, if it should happen that the said John Alexander Maclean should leave more than one lawful child of his body, I hereby direct and appoint my trustees, after the lapse of twelve months from the death of the said John Alexander Maclean, to divide and apportion the said residue of my estate among the said children equally and share alike, the heir succeeding to the estates of Westfield, Inchshaggarty, and Inchbrock being entitled to receive an equal share of the residue of my estate along with the other children. . . . *Ninth*, In the event the said John Alexander Maclean should die without any lawful descendants of his body, then and in that event I hereby direct and appoint my said trustees, within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit, after making due provision for all the annuities, legacies, and bequests herein contained or referred to, and for the complete fulfilment of this my deed of settlement, to dispone and convey my said lands and estates of Westfield, Inchshaggarty, and Inchbrock, specially above described, and my dwelling-house of Hythehill, offices and garden, with my plate and pictures, to James Maclean, my nephew, son of the said James Maclean, my brother, and the lawful heirs of his body; whom failing to George Maclean, my nephew, a younger son of the said James Maclean, my brother, and the lawful heirs of his body; whom also failing to my nearest lawful heirs whomsoever; and with regard to the residue and remainder of my means and estate, I, in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, direct and appoint my said trustees to apportion and divide the said residue among the children of my said brother James Maclean, equally and share and share alike, whom I hereby appoint to be my residuary legatees, declaring hereby that the member of the family succeeding to my said heritable estate of Westfield and others, specially above described, shall also be entitled to a share of the residue along with the others." The truster then made provision for the case of children of predeceasing children, and then followed this declaration, "that the share of succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned."

John Alexander Maclean died on 12th January 1888. The fact of his death was at once communicated to James Maclean, who was then acting Commissioner of the Courts of Requests and Police Magistrate, Jaffna, Ceylon. So soon as he could make the necessary arrangements he came home, arriving in this country in the beginning of April. Both at the date of John's death in January, and when James arrived in this country in April 1888, the estate of Westfield consisted of the farm of Westfield, in the occupation of a tenant holding under lease granted by the first parties for nineteen years from Whitsunday 1886, at a rent of £330, and the farms of Surradale and Orchardfield in the natural occupation of the first parties as proprietors in trust, at a rental of £740; and the personal estate under the charge of the first parties, out of a gross total of

£48,000 odds, included a number of stocks and shares which could be easily and quickly realised, and £20,950 of heritable securities convertible into cash on three months' premonition prior to a term of Whitsunday or Martinmas. The only asset of importance in point of amount which was not capable of early realisation was the stock, crop, and implements on the farms of Surradale and Orchardfield, the amount of which was a little over £5000. At the request of James the first parties let the same on a lease for nineteen years from Whitsunday 1888 as to the houses, grass, and fallow-land, and at the separation of the crop from the ground as to the land under grain crop. James died intestate on 24th June 1888. He was unmarried, but was survived by an older brother and sister, Hugh Maclean and Elizabeth Maclean, and by a younger brother George Maclean. At the time of his death the parties of the first part had not made the conveyance in his favour of the heritable estate specified in the ninth purpose of the trust, with the plate and pictures as directed in the said ninth purpose, nor had they apportioned and divided the residue of the estate.

Questions having arisen as to the distribution of the estate, the present case was presented to obtain the judgment of the Court by (1) the testamentary trustees of the testator, (2) George Maclean, and (3) Hugh Maclean and Elizabeth Maclean.

The second party maintained that the residue could only vest on actual payment, and that consequently no share therein vested in James. He also contended that he had the exclusive right to the plate and pictures, as being part of the subjects falling to be conveyed to him with the heritage as heir of provision under the settlement.

The third parties maintained that the provisions in the testator's settlement in favour of the deceased James Maclean vested in him on the testator's death, subject to defeasance in the event of John Alexander Maclean being survived by lawful descendants, or otherwise that the said provisions vested in James Maclean at the death of John Alexander Maclean. They admitted that the second party took the heritage originally belonging to the testator as heir-at-law of James Maclean, but contended that the plate and pictures fell into residue, or, at all events, fell to be dealt with in the same manner as the residue. They further maintained that in ordinary course the residue of the estate should have been apportioned and divided among the residuary legatees before James' death, and that the fact of this not having been done could not prejudicially affect their interests in the succession.

The first parties contended (1) that by the terms of the settlement they were not bound to divide the residue until twelve months from John's death had elapsed, and (2) that in ordinary course it was not practicable to do so sooner, having regard to the magnitude of the estate and the nature of the investments; to the facts that until the crop of 1888 of the farms of Surradale and Orchardfield had been reaped, and the proceeds got in, and the rents of Westfield falling under John's executry had been collected, the residue in the sense of the settlement had not been ascertained, and they could not proceed to apportion and divide.

The following questions were submitted for the opinion of the Court—"(1) Did a share of the residue vest in the person of the deceased James Maclean? (3) Do the plate and pictures form part of or fall to be dealt with in the same manner as the residue, or do they fall to be conveyed to the second party along with the heritage?"

Argued for the first and second parties—(1) As regards the residue—The testator had expressly postponed the period of payment, which was the declared period of vesting, till after John Alexander Maclean's death. The provision was that the trustees were to divide the residue "within twelve months after that event, or so soon thereafter as circumstances will permit." The testator meant by this to give his trustees twelve months from John's death in which to realise, and as much additional time as circumstances rendered necessary. That was the only reasonable contention, and derived aid from the provisions under the 8th purpose as to the residue in the event of John leaving issue. In these circumstances he had directed the trustees to make the decision "after the lapse of twelve months from the death" of John. He clearly anticipated that the trustees would require twelve months at least for realisation of the estate. That being the sound construction of the claim in question, no vesting had taken place in James, who only survived John six months, unless it could be shown that the trustees had unduly delayed to realise—*Howat's Trustees* v. *Howat, &c.*, December 7, 1869, 8 Macph. 337, and 42 Scot. Jur. 116; *Sutherland's Trustees* v. *Clarkson*, October 29, 1874, 2 R. 46; *Thorburn* v. *Thorburn*, February 16, 1836, 14 S. 485, and 8 Scot. Jur. 289. The case of *Ferrier* did not conflict with the cases of *Howat's Trustees* and *Thorburn* —*Ferrier* v. *Ferriers*, May 18, 1872, 10 Macph. 711, and 44 Scot. Jur. 390. (2) As regards the plate and pictures—A testator had the power to impress a substitution on his personal estate, and it was always a question of intention whether he had done so. Though the presumption of law was against a substitution in moveables, and in favour of a conditional institution, that presumption might be overcome. There was undoubtedly a substitution impressed on the heritable estate here, and the testator dealt with the plate and pictures along with the heritable estate. Plate and pictures, also, were not like money, of an evanescent character, but were as definite in character as heritage. In this the testator had evidently intended a substitution, and it should be given effect to, the first beneficiary not having evacuated the destination—*Ramsay* v. *Ramsay*, November 23, 1838, 1 D. 83.

Argued for the third and fourth parties—(1) As regards the residue—Vesting took place at John Alexander Maclean's death. That was the period of payment. The trustees were directed to realise so soon after John's death as possible. James therefore having survived John by six months had taken a vested interest in the residue—*Ferrier* v. *Ferriers*, May 18, 1872, 10 Macph. 711, and 44 Scot. Jur. 390. The survivance of the period of payment was the important element—*Bryson's Trustees* v. *Clark, &c.*, November 26, 1880, 8 R. 142. In all the cases cited by the other parties the direction was

In the event of" (the person nominated) "pre-asing me or dying before receiving payment." *Thorburn's* case, 14 S. 487, Lord Corehouse essed himself thus—"Mr Thorburn directs as soon after his death as may be thought pru- . . . his trustees shall divide the residue . . . ıg his brothers and sisters. If the deed had ɔed there, there would have been room old that as John Thorburn survived his her his share should be holden as vested her the trustees had actually proceeded to allocation." That doctrine was directly cable here. In any view, the trustees could ɔught to have realised before James' death, paid him his share, which must therefore be to have vested in him. (2) As regards the and pictures—The beneficiaries' interests hem must be the same as if the trus- had done their duty and conveyed them ɔut undue delay. The presumption of law h was against a substitution in moveables not displaced here. The presumption was displaced by the fact that the plate and ıres were conveyed by the same clause as heritage—*M'Dowall* v. *M'Gill*, June 19, 9 D. 1284, and 19 Scot. Jur. 555; *Baillie* v. *it*, May 21, 1859, 21 D. 838, and 31 Scot. 465; *Walker's Executors* v. *Walker*, June 878, 5 R. 965; *Campbell* v. *Campbell*, June 740, M. 14,855; *Brown* v. *Coventry*, June 92, Bell's Octavo Cases, 310, and M. 14,863.

advising—

ED PRESIDENT—By the settlement of Hugh ean of Westfield the object of the testator is ɜssed to be that his eldest son John Alex- r should be restricted to an alimentary life- of the estate, but that after his death the ɜ generally is to go to his children. It ɔd out, however, that John Alexander had ıildren, and therefore the question we have termine really arises upon the death without of John Alexander Maclean. Now, the part e settlement which refers to that contingency be found under the ninth head, which is duced by these words—"In the event the John Alexander Maclean should die without lawful descendants of his body, then, and ıat event, I hereby direct and appoint my trustees, within twelve months after the ı of the said John Alexander Maclean, or so thereafter as circumstances will permit, making due provision for all the annuities, ies, and bequests herein contained or re- d to, and for the complete fulfilment of this leed of settlement, to dispone and convey aid lands of Westfield, Inchshaggarty, and brock, specially above described, and my ling-house of Hythehill, offices and garden, my plate and pictures, to James Maclean, ıephew, son of the said James Maclean, my ıer, and the lawful heirs of his body, whom ıg to George Maclean, my nephew, a younger of the said James Maclean, my brother, the lawful heirs of his body." Now, as ıe construction of that part of the clause I t there is very little room for question. I ot doubt that George Maclean is called, r as a conditional institute or as substitute, ıe case may be. If James Maclean prede- ıd John Alexander, of course he could not and George Maclean would take as condi- tional institute. But James Maclean survived the death of John Alexander by six months, or nearly so, and accordingly the right to the heritage vested in him, and upon his death intestate, and without having done anything in the way of evacuating the substitution, the substitution took effect in favour of George Maclean. With regard to the pictures and plate, they are within precisely the same destination as the heritable estate itself, and the direction is to dispone and convey the estate of Westfield "with my pictures and plate." There is no doubt about the intention of the testator to combine the two to prevent their separation, and a substitution in movables is quite an effectual and regular mode of settling property of this description, provided always that that substitution is not defeated. I hold therefore that George Maclean as substitute heir of provision is entitled to the estate of Westfield and the pictures and plate as one indivisible subject.

But then there occurs another question, arising partly out of the construction of what I have already read, but partly also out of the construction of what follows—"With regard to the residue and remainder of my means and estate, I, in the event of my son dying without lawful descendants of his body, and within twelve months after that event, or so soon thereafter as circumstances will permit, direct and appoint my said trustees to apportion and divide the said residue among the children of my said brother James Maclean, equally and share and share alike, whom I hereby appoint to be my residuary legatees." Now the question put upon the construction of that part of the clause is, whether the share of this residue vested in James Maclean, the nephew of the testator. James Maclean survived the death of John Alexander. I think John Alexander's death was in January, and James Maclean's death was in June, so that he survived five months at all events, and the question is whether during that time the share of the residue vested in James Maclean. The direction to pay or divide or apportion — the words are all used—is that it shall be done within twelve months of that event—that is, the death of John Alexander, or so soon thereafter as circumstances will permit. But then there must be taken in connection with that also the further declaration which follows this clause, in which it is "declared that the share of the succession effeiring to the said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." There is no period of payment—no precise period of payment—mentioned in the deed, the direction being to divide within twelve months of the death of John Alexander, or so soon thereafter as circumstances permit. Now, the word "thereafter" admits of two constructions; it may mean either after John Alexander's death, or after the expiry of twelve months from John Alexander's death. My opinion is that it has the former meaning, not only from the expression in this clause itself, but from the contents of the deed. The expression regarding the twelve months is that the division is to take place within twelve months. That being so, it may take place at any time within twelve months; it may take place within one month as well as at the expiry of twelve months,

because it is not on the expiry of twelve months that it is to take place, but at any time within twelve months; and it seems to me therefore that when the testator gives permission and implied direction to divide within twelve months at any time when it shall be practicable, he could hardly at the same moment and in the same breath have said, "or at any time after twelve months." The same expression occurs in regard to the disposition of the heritable estate. It is an appointment within twelve months after the death of John Alexander Maclean, or so soon thereafter as circumstances will permit. There I think the meaning is the same. There is another part of the deed in which a different expression is used, and which I think was intended to have a different meaning. It is in regard to the residue of the estate in the event of John Alexander Maclean leaving more than one lawful child of his body. In that case the testator directs his trustees after the lapse of twelve months from the death of John Alexander Maclean to divide the proportion. There his meaning is obviously different. Again, with regard to the conveyance of the heritable estate in the event of John Alexander Maclean predeceasing him, he directs that the heritable estate shall be conveyed to the eldest son of John Alexander Maclean within the period of twelve months after that event. So that these expressions stand in contrast with the one which is used with regard to the division of the residue among the children of John Alexander Maclean if he has any; and upon the whole of that I come to the conclusion that it is in the power of these trustees—and indeed it is almost a direction—it is implied—that they should divide the estate as soon as possible, as soon as circumstances will permit after the death of John Alexander Maclean.

Now that being so, the nature of the testator's estate comes to be very important. If it had been of such a mixed character that it really could not be ingathered and divided except after a long period of administration, I can quite understand that that would influence the construction of this clause. I think it would suggest probably that the "thereafter" meant to give a large discretion to the trustees as to the time within which they could realise, and that they might either realise and divide within the twelve months or after the twelve months, as they found convenient and practicable. But if we find, as I think we do, that the estate of the testator is very easily realisable, and is just of that description which can be realised quite well within an ordinary period, say within six months of the testator's death, which is the period very frequently allowed to trustees, or even within a shorter period, then that carries one's mind in favour of the construction which I have put upon the word "thereafter," so as to give the direction this meaning—"Realise and divide as soon as possible. You shall do it at anyrate within twelve months, there can be no difficulty about that, but do it as soon as you can after the death of John Alexander without issue." Now, what is the nature of the estate as we have it disclosed in the statement made of the personal estate as at the death of John Alexander? We have about £20,000 worth of heritable bonds. These are very easily realisable. In the first place, the trustees had plenty of time before the term of Whitsunday after the death of John Alexander to call up those bonds, or if that was inconvenient and undesirable from the nature of the arrangement made at the granting of the security, they could at all events get their market value by transfer or assignation. Nothing can be more easily realised than such estate. Then the bulk of the estate otherwise consists of stocks and shares, which are in the market every day, which can be sold at any time whenever convenient to the trustees; and really the only asset of the estate that is of the smallest importance in point of amount that could not be at once realised is the farm stock, crop, and implements of two farms. The amount of these is a little over £5000, and the amount of the entire estate is £48,000. Is the division of this estate to be tied up and nothing done because it is impossible at once to realise the farm stock, crop, and implements? I do not think that is a fair way of dealing with a direction of this kind. It seems to me that the true meaning of the testator, and of the words he has used, is that when the bulk of the estate is fit to be divided, when it has been realised and in such a shape that it can be done, then it is to be divided. The declaration that the shares of the residue are to become vested interests at and only upon the period of payment above mentioned does not involve any difficulty, because there is no fixed time of payment, as I have said, and it cannot mean—at least I think it does not mean—that nothing is to vest until it is actually paid if it be in a condition fit for distribution. If the estate is in the hands of the trustees, fit for division, and capable of division, then I think it is the duty of the trustees to divide; and if that duty is imposed upon them, their mere delay in the performance of that duty will make no difference on the rights of parties, because they were under an obligation to divide as soon as they could, and therefore the period of payment being fixed as the date of vesting merely means that when the period has arrived at which the trustees are in a condition to divide, then the right shall vest. I am therefore for answering the first question in the affirmative.

The second question has been withdrawn, and with regard to the third question I have already expressed my opinion that the plate and pictures fall to be dealt with in the same manner as the heritable estate, and are inseparable from it.

Lord Mure—I am of the same opinion, that this first question put to us should be answered in the affirmative, namely, that the residue vested in James Maclean—that is, his share of it—and I do so upon the same construction of the clause in the settlement that your Lordship has referred to. I think in the whole of that ninth purpose the event in view is the death of John Alexander, and I think the words in the residue clause "within twelve months after that event, or so soon thereafter as circumstances will permit," may be read within twelve months after the death of John Alexander, or so soon after his death as circumstances will permit. In that view of it, and seeing that the residue admitted of being realised before the death of James Maclean, I think the share may be fairly held to have vested in him by the operation of that clause.

On the third question I agree with your Lordship that the plate and pictures form part of and fall to be dealt with as part of the residue.

Lord Shand—I am of the same opinion also, that the first question should be answered in the affirmative. That question relates to the residue, and, as your Lordship has pointed out, there is a very special clause there which declares that "the share of succession effeiring to the residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." The question we have to determine is, what is that period of payment? The word period is not a very accurate term to use with reference to the payment. I read it as meaning only upon the term or time of payment above mentioned, referring to one point of time. Now that depends upon the earlier clause of the deed, on which your Lordship has commented. The particular clause requiring to be construed is this:—"In the event the said John Alexander Maclean should die without any lawful descendants of his body, then, and in that event, I hereby direct and appoint my said trustees within twelve months after the death of the said John Alexander Maclean, or so soon thereafter as circumstances will permit." It is clear that the word "event" there refers to the event of the son dying, and the only question of difficulty is whether the word "thereafter" refers to the word "event" or to the words "twelve months" which immediately precede it. I am disposed to think with your Lordships that the word "thereafter" refers to "event" and not to the "twelve months," so that the clause would read in this way:—"In the event of my son dying without lawful descendants of his body, within twelve months after that event, or as soon after that event as circumstances will permit." If the clause be so read it rather appears to me that it would result that one might read this deed as making the death of John Alexander, his son, the period of vesting, because after all, that would simply come to be a direction to this effect:—"I leave the residue of my estate to be divided amongst those persons as soon as circumstances will permit." And if that be so, I take it that in a case where there was no other direction, the vesting would be held to take place at the death. But I am clear that in any view that may be taken of this deed, looking to the nature of the estate, vesting did apply, because even if you read the clause in the other way suggested, namely, "within twelve months after that event, or as soon after the expiry of twelve months as circumstances will permit," the purpose that may be said to be expressed there is that that is a direction giving twelve months if it is required to realise the estate, but nothing more. But there is no direction, such as your Lordship pointed out occurred in the other part of the deed, to divide after the lapse of twelve months; it is all within that period. Accordingly I hold with your Lordship that if the estate is of such a nature that really (with the exception of a comparatively small amount of the whole that is divisible) one can see that it may be divided a short time after the testator's death, it shall be held to have been so divided, or, at all events, that that is the time or term of payment at which it should be divided. Well, John Alexander Maclean died in January, but the estate could all have been realised admittedly, with the exception of the crop and stock at the succeeding term of Whitsunday 1888. The bonds could all have been called up, because there was time for three months' premonition, and the other parts of the estate were clearly realisable, and therefore at Whitsunday 1888 this estate was in a condition to be divided and was divisible, and James Maclean surviving until June following, I am of opinion that the share of the residue vested in him.

I entirely concur in your Lordships' view upon the third question, which is the only other one we have to answer.

Lord Adam—I arrive at the same result, although perhaps not quite by the same road as your Lordships. I do not put the same construction upon the first clause relating to residue; my view of its construction is rather this, that the direction is to pay the residue in the event of the son dying without lawful descendants within twelve months after that event. So far as that goes, I read that as a direction to pay, not at twelve months, but as soon as circumstances will permit within twelve months. I think that is the meaning of that clause—at any time within twelve months, or as soon as circumstances will permit within twelve months. If that be the meaning of that clause, if you go on to read the next clause, "so soon thereafter as circumstances will permit," putting the meaning on the word "thereafter" which your Lordship proposed, namely, as referring to the event of the death, and as meaning as soon after the death as circumstances will permit, that is just in my mind repeating again what has already been directed by the first branch of the clause, which I do not think is a natural reading, and therefore it occurs to my mind that the antecedent of "thereafter" is "twelve months," and I would read the clause so—as a direction to pay within twelve months after the death of the son, or so soon after the twelve months as circumstances will permit.

But although that is my reading of the clause, it appears to me practically to come to the same thing, because to my mind it is a direction by the truster to pay and divide as soon as circumstances will permit. That is practically on either construction of the clause what it comes to, and I do not think the different views of the possible construction of the clause is at all material as to the result.

Then we come to the other clause, "declaring that the share of the succession effeiring to said residuary legatees shall become vested interests in their persons at and only upon the period of payment above mentioned." I think that refers back to the period of actual payment, and not to any other time, as sometimes occurs in these cases, but although I think it refers to the period of actual payment, it is in this case not when payment is actually made but when payment ought to have been made subject to the direction of the truster, because that is what is meant by such a clause by the period of payment. Now, in this case, looking at the estate which we have to deal with here, it is quite obvious that the great bulk of it might have been

realised and ready for payment within a short time after the death of John Alexander Maclean. Nearly eight-ninths of it might have been realised and ready for division long before Whitsunday 1888, and if that be so, I agree with your Lordship that the vesting of the estate, or payment of that portion of the estate which can be realised, is not to be delayed because a fraction of it is not ingathered or capable of being ingathered. I am therefore of opinion that the whole of the estate vested certainly before the Whitsunday term and before the death of James Maclean.

As regards the plate and pictures, I concur with your Lordship.

The Court found and declared that a share of the residue vested in the person of the deceased James Maclean.

Counsel for the First and Second Parties—Gloag—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Third Parties—Sir C. Pearson. Agents—Macpherson & Mackay, W.S.

HOUSE OF LORDS.

Tuesday, December 18, 1888.

(Before Lord Chancellor (Halsbury), and Lords Watson and Macnaghten.)

MACKILL AND OTHERS *v.* WRIGHT BROTHERS & COMPANY.

(*Ante*, vol. xxiv. p. 618; and 14 R. 863.)

Ship—Charter-Party—Marginal Note—Guarantee as to Ship's Capacity—Stowage of Machinery and Coal.

By charter-party between Wright Brothers & Company and Mackill and others it was agreed that Mackill's vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment not exceeding what she could reasonably stow and carry," &c. The freight was fixed at a lump sum of £2200, and it was provided—"Owners guarantee that the vessel shall carry not less than 2000 tons dead weight;" and further—"Should the vessel not carry the guaranteed dead weight as above, any expenses incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." The ship was intended for a general cargo, partly of railway locomotive machinery, and the parties agreed upon and endorsed on the margin of the charter-party a note specifying the "largest pieces" of machinery, and their number, weight, and measurement, which the cargo was to contain. Wright Brothers & Company tendered a cargo not exceeding 2000 tons dead weight, including locomotives and tenders, two lots of coal, and general goods. The large pieces of machinery exceeded the number stated in the marginal note. The vessel sailed with dead weight of 1691 tons. It was admitted that her capacity equalled the guarantee, and also that 2000 tons dead weight of the cargo tendered could not have been carried without packing the coal along with the machinery, which was not done. Wright Brothers & Company claimed a deduction in the freight, and Mackill and others raised this action for the balance unpaid.

Held (*rev.* the judgment of the Court of Session) that the marginal note was information afforded to the shipowners for the purposes of the contract; the cargo tendered was not such as was expected, as the bulk exceeded the proportion of dead weight indicated by the marginal note, and as it was owing to this that the vessel carried less than the guaranteed dead weight, Wright Brothers & Company were not entitled to the reduction claimed, and were liable in the whole freight as stipulated.

Held further (*aff.* the judgment of the Court of Session), that it was not proper stowage to stow coal among machinery unless with the consent of the shippers of the coal and of the machinery, and that the *onus* of obtaining such consent was on the charterers.

This case is reported *ante*, vol. xxiv. p. 618, and 14 R. 863.

Mackill and others appealed.

At delivering judgment—

Lord Chancellor (Halsbury)—My Lords, the question in this case arises on a charter-party dated the 28th of May 1886.

The owners of the screw-steamer "Lauderdale" (the appellants) and the charterers (the respondents) agreed upon the face of that document that the "Lauderdale," then on a voyage, should proceed to Glasgow and there load all such goods and merchandise as the charterers or their agents should tender alongside for shipment. The whole of the vessel was to be at the disposal of the charterers except room for 80 tons extra bunker coal.

By the charter-party the owners guaranteed that the vessel should carry not less than 2000 tons dead weight of cargo. It was also further provided that a regular stevedore and clerks, as customary, to be appointed by the charterers, should be employed by the owners to stow and take account of the goods received on board.

The freight was to be a lump sum of £2200, and it was provided that should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight.

I have omitted to notice for the moment the marginal note upon the charter-party, with which I propose to deal separately.

The vessel reached Glasgow on the 5th of June 1886. The cargo included machinery, consisting of locomotives and tenders, and two parcels of coal of 100 tons and 370 tons respectively. On the loading of the vessel being completed it was found that only 1691 tons of cargo had been shipped.

The respondents maintain that the appellants are responsible for the short shipment, and claim

a deduction proportionate to the amount by which the cargo fell short of 2000 tons.

My Lords, I have very great difficulty in reconciling the somewhat divergent views of the learned Judges below with the conclusion at which they have nevertheless arrived.

The Lord Ordinary in terms finds the owners' guarantee is subject to the implied condition that the charterers shall tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed in the vessel.

His Lordship proceeds to decide against the shipowners, apparently upon the ground that the coal should have been stowed as was customary, among the machinery in holds 1 and 2, the size and character of the machinery making it inevitable that large spaces would be left unoccupied in the holds where it was stowed.

His Lordship finds as a fact proved that it is quite customary to stow coals among heavy pieces of machinery, provided that the owners or shippers of both coals and machinery consent to this being done. But he further holds that without such consent it is not customary, and would be improper stowage, for the consequences of which the owners would be liable not only at common law, but also under the stipulations of the charter-party in question.

The Lord Ordinary's judgment assumes that—given the machinery which in fact the charterers tendered and the quantity of coal—it would be impossible properly to stow cargo up to the guaranteed amount; this, together with the implied limit which the learned Judge places on the guarantee, would lead to a conclusion the opposite to that at which the learned Judge arrived. But the argument which appears to have decided the learned Judge's view is that the appellants were bound to obtain the consent of the owner of the machinery and of the coals, and as it is admitted they did not obtain it he holds them liable.

My Lords, this seems to be a wholly novel principle, and one to which I cannot assent. The charterers are to tender the cargo, and if, as the Lord Ordinary says, the owners' guarantee is subject to the implied condition that the charterers should tender for shipment 2000 tons of cargo of such a description as could to that weight be stowed, it is obvious to ask from what part of this contract am I to infer an obligation upon the part of the shipowners to procure the consents of different owners to that which it is admitted but for such consent would be improper stowage.

My Lords, I am unable to agree, as I have said, with the judgment of the Lord Ordinary, but it is consistent with itself, and if the principle insisted on, namely, the obligation to procure the consents, existed on the part of the owners, I should agree in the conclusion.

I am not so certain that I am able to follow the reasoning of the Lord Justice-Clerk or Lord Young. I find the Lord-Justice-Clerk describing the cargo and giving his exposition of the true construction of the guarantee to be that it was a guarantee applying to the capacity and not to the actual fact, points out that the stevedore, acting on his own responsibility, put the machinery into one part of the hold of the vessel and the coals into the other. Unquestionably by so doing, he says, a good deal of space was occupied by the machinery which ought to have been occupied by ordinary cargo. His Lordship adds—"It appears that the coals might have been packed with the machinery, so as to fill up the interstices of space, but that it does not appear that there was any duty on the stevedore to do it." His Lordship thinks that there was no sufficient evidence that the stevedore did not do anything but what was reasonable and right in the stowage, and that such a stowage might be injurious both to the machinery and to the coal. I cannot reconcile this series of propositions.

I can only understand the learned Judge's judgment on the view that the guarantee on its true construction is an absolute guarantee to carry 2000 tons of cargo of whatever kind the cargo may be, and that, inasmuch as in fact the cargo fell short of that amount the owners are responsible; such a construction gives no effect to the words "dead weight."

Lord Young, on the other hand, holds that if the cargo presented can only properly be stowed to the weight of 1600 odd tons, that does not show the vessel is not of a guaranteed dead weight carrying capacity, because, whatever the dead weight carrying capacity of a ship may be, it is quite plain that it would not carry any cargo up to that weight. The area of a ship will not carry anything just up to that.

To this view I entirely assent. The guarantee is the dead weight carrying capacity, and no one acquainted with ships or mercantile usage could suppose that such a guarantee would involve the obligation to carry any sort of cargo whatsoever up to the guaranteed amount. The guarantee is as to dead weight. But I so far agree with Lord Young that if it could be truly asserted that both parties were acquainted with the nature of the cargo that was to be carried it would be unreasonable in construing a mercantile contract of this character not to suppose that both parties used the general language with reference to the particular subject-matter as to which they were contracting, but I fail to see that the learned Judge is justified in holding that this was an ordinary cargo "exactly such as was expected," namely, coals and machinery. I am not quite certain in what sense I am to understand the adverb "exactly," or, in a later part of his judgment, the words, "the very cargo." It seems to me that a serious question would have arisen without the aid of the marginal note, which I have reserved for special treatment; whether the disproportionate excess of bulk over dead weight would not have been so unreasonable as it would not, according to the ordinary mercantile understanding of such a contract, have been a reasonable cargo. But the marginal note upon the charter-party, whether part of the contract or not, seems to me to free the question from all doubt. It certainly was information afforded to the shipowners for the purposes of the contract, and I think I may invert the terms of the judgment of Lord Young; the cargo tendered was not "the very cargo," nor "exactly" such as was expected. The bulk so far exceeded the proportion of dead weight as indicated by the marginal note in question that the cargo tendered was not all the cargo expected of and represented to be in the declared contemplation, and I think the reasoning of the learned Judge should have led to an opposite conclusion.

My Lords, I only notice for the sake of dismissing a suggestion made in argument before your Lordships, but of which I cannot find any trace in the Courts below, that there was some breach of duty by the shipowners in not informing the charterers as soon as it was ascertained that the ship could not carry to the guaranteed amount with the cargo then being loaded.

I doubt very much whether till the loading was completed, or nearly completed, the shipowners could in fact conjecture how far the loaded cargo would fall short, if at all, of the guaranteed amount, but if they could, it appears to me that those who are responsible for tendering the cargo should have themselves ascertained from time to time what would be the ultimate effect upon the carrying capacity of the vessel of the goods that they were entitled to tender, and which it is manifest the shipowners would have no right to refuse. Such a claim is an entire novelty for which no authority whatever was advanced, and would certainly be imposing upon the shipowner a new liability recognised by neither lawyers nor merchants up to the present time. I agree entirely with the judgment of Lord Rutherfurd Clark.

My Lords, under these circumstances I move your Lordships that the interlocutor appealed from be reversed.

Lord Watson—My Lords, by the contract of affreightment upon which this action is laid the appellants guaranteed that their steamship, the "Lauderdale," would, over and above eighty tons of extra bunker coal, "carry not less than 2000 tons dead weight of cargo." With reference to that warranty it was stipulated that, "should the vessel not carry the guaranteed weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight." The latter clause simply imports that should the charterers furnish a suitable cargo within the meaning of the guarantee, and the vessel prove incapable with proper stowage of fulfilling it, her owners must allow a deduction from the slump freight, proportioned to the tonnage of cargo short-shipped, together with the costs occasioned by their breach of contract.

The construction of the guarantee is attended with more difficulty. The appellants undertake in common form to load "all such goods and merchandise as the charterers or their agents shall tender alongside, not exceeding what the vessel can reasonably stow or carry." To hold that the terms in which that obligation is conceived are necessarily conclusive in determining the kind of cargo which comes within the scope of the guarantee would in my opinion neither be consistent with mercantile usage nor with the principles of the law merchant. Business men are in the habit of making shipping contracts in these general terms for the purposes of a particular adventure, and wherever it appears that the precise nature of the cargo which the charterers had it in their contemplation to ship was mutually understood, and was in the view of both parties at the time when they contracted, it becomes matter of reasonable inference that such an obligation as is involved in the guarantee given by the appellants was meant to apply only to cargo of that description. Of course no such inference can be admitted when it is inconsistent with the express or implied conditions of the charter-party. But in cases like the present it is competent to investigate the whole facts and circumstances attendant upon the execution of the charter-party with the view of ascertaining what particular kind of goods, if any, it was then in the contemplation of both parties should be shipped and carried, that being the cargo with reference to which it must be presumed, in the absence of express or implied stipulation to the contrary, that the guarantee was given and accepted.

There is really no conflict of evidence with respect to the mutual understanding of the parties to this appeal, before and at the time when they contracted, regarding the character of the cargo which it was then intended that they should respectively provide and carry. It was to be a general cargo, consisting in part of railway locomotive machinery, some portions of which occupy an extent of stowage room out of all proportion to their dead weight. During the same meeting at which the charter-party was signed (whether before or after signature does not clearly appear) a note, unauthenticated by their subscription or otherwise, was by consent of both parties written upon its margin, specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. These, as described in the note, were to consist of twenty-three pieces in all, of which twenty appear to have required about 375 tons stowage space, calculated at 30 cubic feet per ton with an aggregate dead weight of 209 tons. For the purposes of this case it is not necessary to consider whether the note in question ought to be regarded as *pars contractus* or as an unsigned jotting, because in either view it leads practically to the same legal result. Assuming it to be a mere memorandum, it nevertheless amounts to a distinct representation by the charterers that the appellants would not be required under their guarantee to carry more than twenty-three pieces of machinery of the size and character which it describes. That being the case, if the fact that the "Lauderdale" did actually stow and carry only 1690 tons dead weight of cargo was attributable to the respondents having sent forward large machinery in excess of their representation their claim to a rateable deduction from freight is as effectually barred as if the representation had been embodied in the contract and made an express condition of the guarantee.

It appears from the evidence of the witnesses for the appellants that over and above the twenty-three pieces specified in the marginal note there were forwarded for shipment by the respondent, and carried by the "Lauderdale," no less than sixty pieces of large machinery of the same description, consisting of ten tenders and ten tender frames, weighing about four tons apiece, the other forty pieces, each weighing from two to four tons. That extra machinery was an awkward species of cargo, and if stowed by itself was calculated to interfere seriously with the dead weight carrying capacity of the ship. When so stowed the tenders alone must, according to the estimates given by different witnesses, have occupied from 186 to 240 tons of of measurement space in excess of their dead weight. No attempt was made by the respon-

dents to impugn that testimony, either on cross-examination or in their own evidence.

The respondents in their statement of facts allege that in the list of machinery which they furnished to the appellants for their guidance in loading the vessel there were included two parcels of 100 and 370 tons of coal respectively, which they intended to be "stowed in odd places beside and among the machinery and locomotives, so as to fill up the spaces between the large pieces, and utilise the ship's space to the best advantage." That was admittedly not done, but they say that it ought to have been done in accordance with mercantile usage, and an examination of their record and evidence has satisfied me that they offer no other substantial excuse for having shipped large machinery in excess of their representation. Mr William Wright, one of the partners of the respondents' firm, who went to the ship and found that the coals and machinery had been kept separate, says—"I was very much surprised at that, because I expected to see the coals stowed amongst the machinery. That was our intention when we ordered the coals," and he adds that it is "invariably done." That was obviously the intention and belief of the witness and of his firm; and at the trial of the cause before the Lord Ordinary they adduced no less than eight witnesses with the view of proving that the packing of coals amongst machinery is proper stowage. Unfortunately for the respondents the testimony of their own witnesses disproves their contention. It merely comes to this, that when coals are stowed along with machinery, not much harm is done to the latter, but the damage to the coals may be considerable, that coals are frequently stowed in that manner by special arrangement between the parties interested in ship and cargo, and that in such cases it is usual for the shipowner to allow a deduction from the freight of the coals varying from 2s. to 3s. per ton in order to cover damages. It is in vain to represent a practice of that kind depending upon special agreement as constituting a proper mercantile custom, and upon this point I agree with the learned Judges in both Courts below, who were all of opinion that loading coals amongst machinery is improper stowage.

By the charter-party the appellants are made responsible to all concerned for improper stowage, but it was suggested in the argument for the respondents, and it appears to have been strongly urged in the Court of Session, that it was the duty of the appellants to obtain permission from the respective owners of the machinery and coals to stow them together. The suggestion appears to me to be utterly unreasonable. I am of opinion with Lord Rutherfurd Clark that the respondents, if they desired the stowage to be in accordance with their own views, were bound to obtain the requisite permissions from all interested, and to furnish these to the appellants before the proper time arrived for loading the machinery and coals. That they admittedly declined to do, and therefore the cargo must be held to have been properly stowed within the meaning of the contract of affreightment.

There is only one other argument addressed to us on behalf of the respondents which I think it necessary to notice. It was said that whenever it became known to those engaged in loading the ship that she could not, owing to the character of the goods sent forward, carry 2000 tons dead weight, they were bound to make an intimation to that effect, so as to give the respondents an opportunity of substituting other goods for the extra machinery. But the respondents were fully aware of the terms of their contract, and of the representation which they had made in regard to the larger machinery. In my apprehension it was for them to consider what amount or description of cargo they would furnish. So long as the goods which they chose to send alongside were capable of being properly stowed and carried without danger to the ship or her navigation, the appellants could not reject them on the ground that they were not of the precise description contemplated in the guarantee. The appellants might be thereby released, either in whole or in part, from their undertaking to carry 2000 tons dead weight, but they would not have been justified in refusing to carry any safe and otherwise suitable cargo which the charterers might find it possible or convenient to ship.

I have accordingly come to the conclusion that the so-called failure of the appellants to fulfil their guarantee was due not to any act of theirs, but to the act of the respondents, and that the judgments appealed from must therefore be reversed.

Lord Macnaghten—My Lords, the question turns upon the true construction of a charter-party in some respects peculiar. It is a charter for the hire of a vessel for a lump sum from Glasgow to Kurrachee. It has a note in the margin as to the description of part of the proposed cargo, and it contains this guarantee—"Owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo." In effect the charterers say to the owners—"We want a vessel to carry to Kurrachee a general cargo, including parcels of machinery; we give you the dimensions and number of the largest pieces; will your vessel carry 2000 tons dead weight?" The owners say "It will." That is, I think, something more than a mere guarantee of carrying capacity. It is a guarantee of the vessel's carrying capacity with reference to the contemplated voyage and the description of the cargo proposed to be shipped so far as that description was made known to the owners.

It is not disputed that the "Lauderdale" possessed a carrying capacity of more than 2000 tons dead weight.

It is admitted that the "Lauderdale" did not, in fact, carry 2000 tons.

It is admitted that a cargo up to but not in excess of that weight, and consisting partly of machinery and partly of coal and other goods, was tendered by the charterers.

It is not disputed that the cargo so tendered could not have been carried on the "Lauderdale" unless the coal had been packed with the machinery.

Though not admitted by the charterers, it is, I think, clear upon the evidence, and proved even by the testimony of the charterer's witnesses, that it is not proper stowage to pack machinery and coal together. The coal is invariably crushed and injured. The machinery generally suffers too, especially if the coal be

damp or the machinery of delicate construction.

Further, it seems to me that the fair result of the evidence is, that in regard to the machinery which was tendered for shipment and shipped, the cargo was not such a cargo as was contemplated by the charter-party. It contained more large pieces; it was more bulky in comparison to its weight, and it was more awkward for stowage than the terms of the charter-party would naturally have led the owners to expect.

These being the material facts of the case, the clause in the charter-party on which the question turns remains to be considered. The charter-party has this provision—"Should the vessel not carry the guaranteed dead weight as above, any expenses incurred from this cause to be borne by the owners, and a *pro rata* deduction per ton to be made from the first payment of freight.

What is the meaning of this provision? What is the event contemplated? Is it the case of the vessel (1) not actually carrying 2000 tons dead weight from any cause whatever; or (2) not carrying that weight from any cause not attributable to the charterers?

I think it would be unreasonable to read the provision as allowing abatement in the freight in every case of short weight. Such a construction would place the shipowners at the mercy of the charterers. They might fill the whole space at their disposal, and yet the cargo might be much under the contemplated weight, and so the shipowners would lose their full freight without any fault on their part.

I think that the provision was intended to have effect in the event of the vessel not carrying the specified weight, assuming the cargo tendered to be such a cargo as was contemplated by the charter-party—that is, an ordinary general cargo with a fair and reasonable proportion of machinery corresponding as to the largest pieces with the numbers, dimensions, and weights specified in the margin of the charter-party. In other words (to put it most favourably for the charterers), the provision was to come into effect in the event of the vessel not carrying 2000 tons dead weight from any cause not attributable to the charterers.

I think that the loss of cargo space and the short weight of the cargo carried on the "Lauderdale" were attributable to the charterers. It was their doing; I do not say it was their fault. They have committed no breach of the charter-party. They were not bound to load a full and complete cargo, and no blame therefore in the proper sense of the word attaches to them. But I do not think that they could take advantage of the stipulation for reduction of freight unless they tendered a cargo of the contemplated description and not in excess of the specified weight. They did tender a cargo of proper weight, but it was not of the contemplated description, and the result was that that cargo could only be stowed on board if stowed improperly. The charterers were at liberty to load the vessel with such goods as they pleased not inconsistent with the intention of the charter-party. They did not take the trouble to avail themselves of the whole space at their disposal. Why should the shipowners be fined for that?

I think that the charterers were altogether wrong in contending that the shipowners ought to have obtained the consent of the owners of the machinery and the consent of the owners of the coal to a method of stowage which would have been improper without the consent of both. I am unable to understand how any obligation of that sort could fall on the shipowners.

It was said that the shipowners placed some coal of their own, for which space was reserved by the charter-party, among the machinery. But that does not prove that it was a proper thing to do. The observation seems to be matter of recrimination rather than argument.

It was urged by the learned counsel for the respondents that the charterers knew nothing about the vessel except what was told them in the charter-party. After the charter was signed they gave the shipowners in ample time a list of the goods they proposed to ship, specifying weight and dimensions. With this list before him the stevedore, it was said, had as good means of judging whether the whole 2000 tons could be shipped as if the goods had been arranged on the quay alongside. It was contended that the shipowners and the stevedore ought to have prepared a scheme for loading the vessel, and that when it was found that the whole quantity of cargo could not be shipped the shipowners ought to have communicated with the charterers and given them an opportunity of altering or rearranging the cargo. Now, that might have been a reasonable course for the owners to have taken; I say nothing to the contrary. But advice unsought is not always welcome, and I am not sure that if any such advice had been given to the charterers they would not have told the shipowners that it was their business to take the cargo and stow it the best way they could. Of course the shipowners knew more about their vessel than the charterers. But the charterers ought to have known more about the cargo they proposed to ship. There is no evidence tending to show that the vessel was of peculiar construction or different in any respect from what a charterer with the charter-party before him would have been led to expect. I cannot help adding that if the charterers really felt so much in the dark, and so helpless as they are now represented to be, it would have been more natural for them to have consulted the shipowners and the stevedore than to have waited for advice without giving any intimation that advice was expected or that advice would be well received.

Neither the appellants nor the respondents were, I think, conspicuously reasonable. But the respondents were the more unreasonable of the two, and, what is more to the purpose, I think they took a wrong view of the construction of the charter-party, and of their own position.

I therefore agree that the appeal ought to be allowed.

Interlocutors appealed from reversed with costs, and cause remitted to Court of Session with directions to give the appellants decree for the sum claimed by them, together with their expenses in the Court of Session.

Counsel for the Appellants—Finlay, Q.C.—Leck. Agents—Lowless & Company, for Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Gorell Barnes, Q.C.—W. S. Robson. Agents—Stibbard, Gibson, & Company, for Boyd, Jameson, & Kelly, W.S.

Monday, April 8, 1889.

(Before Lord Chancellor (Halsbury), and Lords Watson and Macnaghten.)

MURRAY AND OTHERS (GREGORY'S TRUSTEES) *v.* MRS GREGORY'S TRUSTEES AND OTHERS.

(*Ante*, vol. xxiv., p. 266; and 14 R. 368.)

Succession—Vesting—Nearest of Kin—Destination-over—Period of Distribution.

By postnuptial contract spouses conveyed to each other in liferent, and to the children of the marriage, if any, in fee, the whole estate of each, the fee of both estates to be divisible by the husband of the marriage, such division to take effect after the death of the surviving spouse, and at majority or marriage of the children. Powers of advancing funds for their maintenance and education, or settlement in business, were given to certain named trustees. Should all the children die during the life of the surviving spouse the funds were (failing a disposition by the spouses severally) to suffer division after the decease of the survivor, by the husband's funds falling to his own nearest of kin, and the wife's falling to her own nearest of kin. The husband died without executing any further deed, survived by his widow and one child. The latter died, survived by an only son. The widow sold certain heritable property, which had been bought by her husband, and conveyed the same with consent of her grandson. The price of the subject was delivered to trustees to be held for those entitled thereto under the above named contract. The grandson died under age disposing of any right he might have in the said price in favour of his grandmother, who dealt therewith in her will.

Held (*rev.* the judgment of the Court of Session) (1) that the persons favoured as to the husband's estate were his nearest of kin as a class to be ascertained as at his own death; (2) that the grandson's will carried the price of the heritable subjects, as it had not been challenged within the prescribed period.

Opinion (*per* Lord Watson) that as a result of the Moveable Succession Act 1855 (18 and 19 Vict. cap. 23) "nearest of kin" is not equivalent to heirs *in mobilibus*.

Haldane's Trustees v. *Murphy*, December 15, 1881, 9 R. 269, doubted.

This case is reported *ante*, vol. xxiv., p. 266, and 14 R. 368.

The second parties, the trustees, and executors of Mrs Lisette Gregory appealed.

At delivering judgment—

LORD WATSON—My Lords, this appeal depends upon the construction of a destination by the late Dr William Gregory, which occurs in a postnuptial contract between him and the deceased Mrs Lisette Scott or Gregory, executed in March 1840. The spouses thereby conveyed, each to the other, in the event of his or her surviving in liferent, and to the children of the marriage in fee, certain funds and estate specially described, and in general the whole estate, heritable and moveable, then belonging to them, or which might be acquired by them during the subsistence of the marriage. Power was given to Dr Gregory to apportion the fee amongst the children, and failing appointment by him it was declared that they should take share and share alike. Two declarations are added, the first of which reserves power to the spouses severally to dispose of their own estate by testament, to take effect at the death of the longest liver, in the events either of there being no children of the marriage alive at the death of the predecessor, or of children then existing but dying in the lifetime of the survivor. The second provides that in the same events, and failing such disposition by will, the whole estates settled shall, on the expiry of the survivor's liferent, "suffer division in manner after mentioned—that is to say, the whole funds and estate above mentioned belonging or which may belong to the said Dr William Gregory shall fall to and become the property of his own nearest of kin, and the whole funds and estate above mentioned belonging to or which may belong to the said Mrs Lisette Scott or Gregory, shall fall to and become the property of her nearest of kin."

Dr Gregory died in 1858 survived by his widow and one child of their marriage, James Liebig Gregory, who died in 1863 leaving an infant son Henry, born in November 1862. The estate specifically conveyed by Dr Gregory consisted of moveables, but in the year 1848 he purchased with his own funds (whether acquired before or after the date of the postnuptial contract does not appear) certain heritable subjects in Princes Street, Edinburgh, at the price of £2275. The liferentrix, who had made up a title to these subjects upon the assumption that the deed of 1840 gave her a right of fee, sold them in 1877 for £7500. In consequence of objections taken by the purchasers to the validity of her title an arrangement was come to by which she executed a disposition in their favour, with the consent and concurrence of her grandson Henry, then a minor (who subsequently expede a title through his father James Liebig Gregory), and the price was invested in the names of three gentlemen, who granted a declaration of trust acknowledging that they held the money as a *surrogatum* for the subjects sold, to be applied in terms of the destination and conditions in the postnuptial contract. Henry Gregory died in 1881 unmarried and in minority, leaving a settlement by which he bequeathed to his grandmother his whole right and interest in and to the trust fund of £7500.

Mrs Gregory died in May 1885, when the fund in question was claimed by various parties. In order to ascertain judicially which of them had the best right to it a special case was presented to the Court of Session by (1) the trustees of the fund, who are mere stakeholders; (2) testamentary trustees of Mrs Gregory; (3) the heirs in heritage of Dr Gregory and also of Henry Gregory as at the death of the liferentrix; (4) the representatives of the late Lieutenant-Colonel Gregory, who was the heir-at-law *ab intestato* of Henry Gregory; and (5) the next-of-kin of Dr Gregory as at the time of his widow's death. A majority of the First Division, consisting of the Lord President (Inglis), with Lords Mure and Adams, *diss.* Lord Shand, by interlocutor dated the 21st

of January 1887, preferred the parties of the fifth part, who are the only respondents appearing in this appeal, the appellants being the trustees of Mrs Gregory, the parties of the second part who claim the fund as personal estate of Henry Gregory, which was carried to their author by his *mortis causa* settlement.

The conveyance of Dr Gregory's estate was according to its terms to take effect at his death, and there being a direct destination of the fee to children necessarily *natis* and not *nascituris*, I think it vested in James Liebig Gregory upon his father's decease. In considering the quality of the interest which then vested in him the power reserved to Dr Gregory to make another disposition of his estate, in the events which have since occurred, need not be taken into account. In *Balderston* v. *Fulton* (19 Court Sess. Cas. (2nd series) 293) it was held that the existence of such a power does not impede vesting, and in the present case it was never exercised by Dr Gregory and expired with him. Whether James Liebig Gregory took a right of property absolute or subject to defeasance must depend upon the terms of the second declaration. He was the nearest of blood to his father in both lines of succession at the death of the latter in 1858, and if he was also "nearest of kin" within the meaning of the deed he became the absolute owner of the estate conveyed by Dr Gregory. If, on the other hand, the words "nearest of kin" be taken to represent a class ascertainable at the death of the liferentrix, and therefore exclusive of the settlor's descendants, the fee which vested in him and his issue was subject to divestiture and became divested by their failure in the lifetime of Mrs Gregory.

So long as the old law governing the descent of personal estate remained unaltered the term "nearest of kin" and equivalent expressions were used to designate the class of blood-relations entitled to the moveable succession of an intestate. That succession belonged, as stated by Lord Stair (iii. 8, 31), "to the nearest of kin who are the defunct's whole agnates, male or female, being the kinsmen of the father's side of the nearest degree, without primogeniture or right of representation; wherein those joined to the defunct by both bloods do exclude the agnates by one blood." In the common law of Scotland next-of-kin and heirs *in mobilibus* meant one and the same thing, but another meaning might of course be impressed upon the term "next-of-kin" occurring in a written instrument if the context showed, either expressly or by reasonable implication, that the testator or settlor used it in a different sense. Thus, in *Connell* v. *Grierson* (5 Court Sess. Cas. (3rd series) 379), where the succession to a landed estate, held under a deed of entail feudalised in 1782, devolved in the year 1863 in terms of the ultimate substitution upon the entailer's "own nearest of kin and their heirs and assignees and disponees whomsoever," the Court, having regard to the whole tenor and objects of the deed, were of opinion that the entailer meant by these words to describe his nearest blood relation in the line of heritable succession, and they accordingly gave the estate to his heir of line in preference to an agnate who was one degree nearer in blood. Again, in *Scott* v. *Scott* (14 Court Sess. Cas. (2nd series) 1057), a testator directed the residue of his trust-estate to be paid over to his "nearest relations," and the Second Division held that the settlement contained sufficient indications of his intention to include in that term nephews and nieces of the half as well as of the full blood. In affirming the judgment the Lord Chancellor (Cranworth), 2 Macq. 281, said—"If, indeed, the words of his will had been merely that the testator gave the residue to his "nearest relations," without more, no doubt they would, according to the law of Scotland, mean those persons who would have taken in the event of his intestacy. But here the question is not who would take in the event of intestacy, because the testator has been his own interpreter of what he intended."

The Act 18 and 19 Vict. c. 23, altered the rule of moveable succession by admitting representation among descendants, and in the collateral line among brothers and sisters and their descendants, and also by giving a share to the father, and, in the case of his predecease, to the mother of an intestate dying without issue. But the term "next-of-kin" is still used in that statute to denote those persons who would have been the legal heirs of the intestate under the old law, and it expressly reserves to them exclusive right to the office of executor in competition with children or remoter descendants of persons who would have been next-of-kin if they had survived the intestate. The effect which these enactments may have upon the significance of the words "nearest of kin" was recently discussed by the learned Judges of the First Division in *Young's Trustees* v. *Janes* (8 Court of Sess. Cas. (4th Series) 242), but the circumstances of the case made it unnecessary to give any decision on the point. One thing is clear, that the expression is no longer equivalent to legal heirs *in mobilibus*, inasmuch as it does not include all the members of that class. It appears to me, however, that in its legal sense the expression is still applicable to those members of the class who would have been the sole heirs before the passing of the Act, and are now preferably entitled to administer the succession of the intestate. There may be a question whether, and how far, the surviving parent of a defunct ought to be regarded as one of his next-of-kin. Upon that point, which does not arise in this case, I express no opinion.

Of the three learned Judges constituting the majority in the Court below, one only relies upon the case of *Wannop* v. *Murphy* (9 Court Sess. Cas. (4th series) 269), which was decided in 1881 by a bench of seven Judges. Lord Adam no doubt considered himself bound by that decision, which, if well founded, appears to me to be a direct authority for the judgment now appealed from. In that case a testatrix, who died in 1877, directed her trustees to pay the whole income of the residue of her estate equally to and between her nieces A and B during their lifetime, and on their deaths to convey one-half of the capital to the children of A, and the other half to the children of B, declaring that it should be in the power of the trustees to delay the division until the children attained the age of twenty-two, they receiving the free income in the meantime. In the event of A and B dying without issue, or of such issue predeceasing the last mentioned period of division, the trustees were directed to pay and convey the residue to and among the truster's "own nearest heirs in moveables whomsoever,

the division always being *per stirpes* and not *per capita.*" A and B both died without having had issue. The Lord Justice-Clerk (Moncreiff), with Lords Deas, Young, and Craighill, held, in these circumstances, (1) that no interest vested in the heirs whatsoever of the testatrix before the period of distribution; and (2) that these heirs were a class to be ascertained as at that period, and not as at her death, and decree was pronounced in accordance with their opinions. The Lord President (Inglis), and also Lords Mure and Shand, dissented from the judgment, being of opinion (1) that the residue vested *a morte testatoris* in the heirs called by the ultimate destination, subject to defeasance to the extent of one-half in the event of A having issue, and to the extent of the other half in the event of B having issue; and (2) that A and B, the liferentrices, being among the heirs *in mobilibus* of the testatrix at the time of her death, each took a share of the capital, which passed to their representatives. Upon both these points I concur in the opinion of the minority. I cannot reconcile the judgment of the majority upon the first point with the decision of this House in *Taylor*, 8 App. Cas. 1287, and upon the second with its decisions in *Bullock* v. *Downes*, 9 H. of L. Cas. 1, and *Mortimore* v. *Mortimore*, 4 App. Cas. 488. These last were not Scotch cases, but in neither did the judgment of the House proceed upon any specialty of English law, and the canon of construction which they recognise appears to me to be applicable to the language of a Scotch deed which has not acquired technical significance, and falls to be construed according to the intention of the maker. The rule, as I understand it, is simply this, that in cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must *prima facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion the rule has no other effect than to attribute to the words used their natural and primary meaning unless that meaning is displaced by the context.

In the present case I do not think it necessary to consider what would have been the result of attributing to the expression "nearest of kin" the meaning which it may be taken to have borne since the Act of 1855 became law. The deed which we have to construe is not a will which might be held to speak as at the decease of Dr Gregory. So far as the interests of children of the marriage are concerned it is, in substance as well as form, a mutual contract, and its pactional provisions must be construed now in the same sense in which they were understood by the contracting parties at the time of its execution in 1840. I cannot conceive that they meant the class whom they then preferred to vary with subsequent alterations in the law of intestacy. Their deed of contract contains no invocation of intestacy in the proper sense of the word. Dr Gregory's estate is not left to descend *ab intestato*, but the then existing law is referred to for the purpose of describing the persons who are to take *provisione hominis*. In these circumstances I am of opinion that his "nearest of kin" within the meaning of the deed are the same person or persons to whom the law prevailing in 1840 would have assigned his intestate moveable succession at the time of his death in 1858. I can find nothing adverse to that interpretation of the deed, unless it be the suggestion that it is improbable the spouses should have intended to make a direct conveyance to their children and also to include them in the destination to their "nearest of kin." That is a kind of probability which has frequently been put forward without success in cases of this description, and whenever it is, as here, unsupported by the context it can only afford material for conjecture.

In the course of the argument it was pointed out that in the event of your Lordships holding that the subject of this litigation vested absolutely in James Liebig Gregory at the time of his father's death that would re-open a question between the present appellants and the parties of the fourth part, who represent the heir of line of his son Henry. They claim upon the footing that the trust fund was heritable in the person of Henry, who died in minority, and did not pass by his will. They were called as respondents, but did not appear by counsel, and it was not against their interest that the interlocutor under appeal should be reversed. Had I not, on consideration, been of opinion that their claim is untenable I should have thought it advisable either to give them an opportunity of being heard for their interest before disposing of the appeal or to remit the cause. But it has long been settled that a minor *pubes* can dispose of his heritable estate with the effect of altering his succession by an onerous contract of sale. It remains open to him, or to his heir-at-law, to set aside the transaction *intra quadriennium utile* on proving that it was to the enorm lesion of the minor. But the period limited for such challenge has run out, and the sale of 1877 is now as valid as if Henry Gregory had been of full age at the time. The terms of the trust, under which the price is still held, were intended for the protection of contingent interests which might be set up under the deed of 1840, and cannot affect the rights *inter se* of Henry Gregory's representatives.

For these reasons, I am of opinion that your Lordships ought to reverse the interlocutor appealed from, and to declare that the appellants, the parties of the second part, are entitled to the whole funds held in trust by the parties of the first part, and I move accordingly.

The Lord Chancellor (Halsbury) and Lord Macnaghten entirely concurred.

Interlocutor so far as appealed from reversed, with a declaration that the parties of the second part are entitled to the whole funds held in trust by the parties of the first part.

Counsel for the Appellants—Sir Horace Davey, Q.C.—Graham Murray—Haldane. Agents—Lee & Pembertons, for Tods, Murray, & Jamieson, W.S.

Counsel for the Respondent—Rigby, Q.C.—Low. Agents—Hanbury, Hutton, & Whitting, for J. S. & J. W. Fraser-Tytler, W.S.

Monday, June 24.

(Before Lords Herschell, Watson, and Fitzgerald.)

SCOTTISH DRAINAGE AND IMPROVEMENT COMPANY *v.* CAMPBELL.

(*Ante*, vol. xxv., p. 101; and 15 R. 108.)

Right in Security—Personal or Real—Absolute Order Charging Fee of Lands—Glebe—Parish Minister—Scottish Drainage and Improvement Company's Acts 1856 *and* 1860 (19 *and* 20 *Vict. c.* 70, *and* 23 *and* 24 *Vict. c.* 170).

The Scottish Drainage and Improvement Company's Act 1856, sec. 49, provides for the execution by the Enclosure Commissioners of an absolute order charging the amount of improvement expenditure "upon the fee of the lands improved." The form of the absolute order is prescribed by Schedule C of the statute, and by it the fee of the lands is charged, but no personal obligation is imposed. Sec. 61 provides—"Every charge on land by virtue of this Act may be recovered by the Company or the person for the time being entitled to the same, by the same means and in like manner in all respects as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

In a case where an absolute order had been granted in the form prescribed by Schedule C, charging the fee of a glebe with an annual rent charge in respect of an advance made to the parish minister for improvements on the glebe—*held* (*aff.* the judgment of the Court of Session) that the Enclosure Commissioners had not a personal action against the succeeding minister for the rent charge under the Act.

This case is reported *ante*, vol. xxv., p. 101, and 15 R. 108.

The Scottish Drainage and Improvement Company appealed.

At delivering judgment—

Lord Herschell—My Lords, the only question that arises upon this appeal is, whether the appellants can maintain a personal action against the respondent in respect of his occupation of certain land over which they have obtained a charge. That charge has been obtained by reason of an advance made in pursuance of the provisions of the Scottish Drainage and Improvement Company's Act 1856, under which a limited owner is enabled to obtain an advance for the improvement of his land, and by pursuing the course there prescribed to give a charge upon the land which binds it in the hands of his successors.

The 52nd section of the Act provides that "when the fee of any land is in pursuance of this Act charged with any money, the company shall be entitled to, and shall have from the time from which such rent charge shall commence and take effect, a charge upon such land for the money ascertained and approved by the Commissioners as aforesaid"—that is, the Enclosure Commissioners, whose assent must be obtained in order to create a valid charge under the Act. The section further provides that "such lands shall henceforth be and continue liable to the payment of such charge," and it gives the charge priority, speaking generally, over all other charges. It therefore in terms not merely creates a charge upon the land, but provides that the land is to be liable for the payment of the charge. So far as that section is concerned it is obvious that there can be no question of the creation of any personal liabillty, and if that provision stood alone it is conceded on the part of the appellants that the only remedy of the drainage company must be by real diligence—that is to say, by proceeding according to Scotch law for the recovery of the payments to be made out of the land.

But the appellants place reliance upon the 61st section of the Company's Act as giving them the right to enforce the liability personally which they claim by this action to enforce against the respondent. Before applying myself to the terms of that section, I desire to say that when an Act of this description is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinised, and I think that they ought not to be held to possess any right unless it be given in plain terms or arises as a necessary inference from the language used. The 61st section does not in terms create any personal liability. The appellants seek to infer that liability solely from the nature of the remedy which that section gives to the company. The section provides that "every charge on land by virtue of this Act may be recovered by the company" "by the same means and in like manner in all respects as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland." Now, it is said that that provision was unnecessary if the only effect of it was to enable the appellants to enforce a charge by real diligence. My Lords, I do not stop to inquire whether that view be correct or not. I think it is only natural, even if the Court would have inferred such a right from the mere creation of the charge, that the right should be given in express terms when you were creating a charge of this peculiar character—a charge which was created pursuant to these statutory provisions. However that may be, I think it clear that the language of this section is, at least primarily, directed to the mode of recovering the charge itself out of the land.

The contention of the appellants rested mainly upon the provision relating to the recovery of feu-duties. It was said that feu-duties are recoverable not only by real diligence, but also by a personal action against the original vassal or against any person who subsequently comes into occupation of the land in terms of the feu-charter, and that inasmuch as this section provided that the charge might be recovered "by the same means and in like manner in all respects as any feu-duties out of the same lands," that by implication must mean that the same kind of personal action which the superior would have against any person in occupation as his vassal was intended by this Act to be possessed by the Drainage Company against the person in occupation of the land over which the charge was created.

Now, my Lords, I think that the language of the Act does not necessarily, and does not even

naturally, bear such a construction. It is obvious that the words "feu-duties, or rent, or annual rent, or other payment out of the same lands" are all coupled together, and the use of the word "other" before the word "payment" indicates clearly that the Legislature is speaking of "feu-duties, or rent, or annual rent" in relation to their being "payments out of the land." They are bound together by that common character that they are all obligations for payment out of the land, and it is only in so far as they are payments out of or would be recoverable as payments out of "the same lands" that they are made recoverable in the case of this particular charge, because they are made recoverable by the same means and in like manner in all respects as feu-duties or other payments out of the same lands. And what is made recoverable? The provision in respect of recovery has relation to a "charge on land." It is only in respect of its being a charge that it is made recoverable in the same way as feu-duties or other payments out of the land.

My Lords, those words are perfectly apt to confer upon the company for the enforcement of that charge to which the land has been in terms rendered liable every mode of recovery, every mode of real diligence, which was open for the enforcement of any of these other payments which were charges upon the land in respect of their being payments out of the land. Is it possible to say that beyond those rights there has been conferred upon the company a right to enforce a personal liability? No doubt personal liability may be enforced as regards feu-duties not only against the original vassal, but also any occupier taking subsequently under the feu-charter. But if such a liability be enforceable, it does not arise by reason of the charge upon the land, it is not a mode of enforcing the payment out of the land, but it is a mode of enforcing a personal obligation which comes into existence owing to the creation of the relation of superior and vassal, or, it may be said, owing to the covenant for payment which arises from the original feu-charter running with the land, and passing to the person who afterwards takes the land from the original vassal. In whatever light it is to be regarded, that certainly is the enforcement either of a contractual or of a *quasi*-contractual obligation. Now, here there is no such original liability created at all in respect of the payment—it is never made anything except a charge upon the land, and there is certainly no such relation created between the drainage company and the occupier from time to time of the land as is created between the feuar and his vassal, or the person representing the feuar and any subsequent vassal.

My Lords, I have dealt principally with the words "feu-duties" which are here used, because those were most relied upon by the learned counsel for the appellants; but I do not think that the other words render the case any stronger in the direction of his contention. On the contrary, as was pointed out by Lord M'Laren, if you are to regard these words as implying personal liability, the person who would become upon the death of an occupier liable to these payments would not in all cases be the same—(15 Court Sess. Cas. (4th series), note at p. 110). In the case of rent it might be the executor, in the case of feu-duty the successor, and consequently you would be involved in very considerable difficulties if you were to say that this clause, which only relates to the mode of recovery, also determines the person against whom the recovery is to be had, because the contention of the appellants is and must be not merely that this section in effect says that there shall be a personal action in respect of this liability, but that it also determines against whom that personal action can be maintained, namely, against the person in occupation in succession to the original occupier, the occupier for the time being.

Therefore, my Lords, upon the construction of sec. 61, I am unable to find anything which by necessary inference confers upon the company a right which undoubtedly is not conferred upon them anywhere in terms, or creates a personal liability which undoubtedly there is no language expressly to create.

My Lords, certain other sections of the Act were relied upon by the learned counsel for the appellants as throwing light upon the section with which I have been dealing—those were principally secs. 68 and 69. The 68th section contains a provision in the first instance dealing with the liability to this charge as between persons becoming in succession entitled to the land upon which the charge is created; and then it has a proviso, I admit, of a somewhat singular character—"Provided that any such person entitled to succeed and becoming entitled in possession, shall not be liable to pay any arrears of the charge remaining unpaid at the time of his succession or right to succeed exceeding the amount of one year's payment of such charge." Now, it is said that this by implication shows that the person succeeding was to be personally liable to one year's arrears. It was admitted that if you were to take the analogy of feu-duties the successor would not be liable to the arrears in any personal action. There is no creation in terms of such liability. The argument was this—you must infer from these words that the Legislature created a liability even as to one year's arrears, and therefore it could hardly be supposed that it was not intended by the other section to make the successor liable in respect of his occupation of the lands for payments which became due during the time of his occupation. My Lords, whatever may be the meaning of this section, such an argument appears to me to be somewhat far-fetched. It cannot be put higher than this—that if that construction be correct it would render it probable that the Legislature would have made a provision creating a personal liability We cannot from any such suggestion of probability come to the conclusion that a right has been given and a liability imposed which we do not find in the words which are said to create or impose it.

Then the 69th section undoubtedly speaks of "the person for the time being bound to pay the yearly or other periodical payments of such charge." I say again with regard to that, that it is not possible, whatever may be the meaning of those words and however they may have come to be used, to derive from them such assistance in construing the other section as to find in it the imposition of a liability which the words are not, I think, apt to create.

My Lords, there is one other provision, to

which I drew attention in the course of the argument, which I think is not without importance. By the 59th section of the original Act it is provided that "if any charge payable under this Act to the company shall be in arrear the same shall not bear interest for a longer period than six months," but that it shall for that period bear interest at the rate of 5 per cent. per annum. By the later Act amending the company's original Act, namely the Act of 1860, that provision was modified to this extent, that if there were not upon the land charged sufficient to answer and satisfy the arrears and interest for the period of six calendar months, then the arrears should continue to bear interest at the rate of 5 per cent. until payment or satisfaction, and such interest might be recovered in the same manner as the sum in arrear. Now, if the only remedy were against the land that provision would be perfectly intelligible, and by no means unreasonable, but looking at the provisions in the earlier Act and its manifest purpose, it seems to me that it would be very strange if, because there was not enough upon the land to enable the company to enforce to the full extent their charge, they should therefore be allowed to permit the payments to run into arrear, and interest on these arrears to run, enforceable (interest as well as arrears) at any subsequent time, at all events until barred by some Statute of Limitations, against the occupier of the land. I think therefore that this points in the opposite direction. I do not lay great stress upon it, but looking at the other parts of the Act as well as section 61, it certainly appears to me that they do not all point in the same direction, and that the safer course is to limit ourselves really to the interpretation of the only section which it can be contended confers the right which the appellants are now seeking to enforce.

Upon these grounds, my Lords, I think that the judgment of the Court below was right, and I move your Lordships that this appeal be dismissed with costs.

Lord Watson—My Lords, notwithstanding the able and ingenious argument of Mr Asher, I have been unable to discover any good ground for disturbing the judgment of the Court below.

There are two sets of clauses in these statutes which require to be attended to, the first constituting as a debt the money advanced by the company for the purpose of drainage or improvements, and the second prescribing the remedies by which that debt is to be recovered by the company. As to the construction of the first set of clauses there is no controversy—their terms are perfectly plain—they declare the money advanced in terms of the Act to be a charge upon the estate, and raise no personal liability either against the representatives of the original borrower or against his successor in the lands drained or improved. The controversy is confined to the 61st section of the statute. It is said that the effect of that clause is to attach to the *debitum fundi* not only the remedies which are ordinarily competent by the law of Scotland in such a case, but also the remedies which are applicable to a mere personal debt.

Now, I think that in construing the clause it is necessary to keep in view the fact that a personal action is not an action for the recovery of a charge upon land. It is a misnomer—a contradiction in terms—to say that a creditor is recovering a charge upon land when he brings a personal action of debt for the purpose of obtaining a decree under which he can recover payment out of any part of the debtor's estate, or (at the time when these Acts were passed) by his incarceration. In the same way, a sum recovered under a personal contract or obligation is in no sense a sum recovered out of land or a payment out of land. So also in the case of a feu-duty. When the superior sues on the express personal contract which is contained in the writs constituting the feudal relation between him and his vassal, he does not seek to attach the land or the accessories of the land. The same is true of "rent or annual rent" when in addition to its being made a charge upon the land it is matter of personal stipulation between the parties that the executors or successors of the owner or landlord shall be liable.

It is unnecessary for me, after the observations which have been made by the noble and learned Lord in the chair, to say anything further upon the terms of the 61st clause. I may say in a single word that the only remedies which it appears to me to give to the company are the remedies applicable to feu-duties, rent, and annual rent, in so far as these are charges upon land or payments out of land, and not in so far as they are matters of personal contract.

Lord Fitzgerald—My Lords, at the close of the address of Mr Asher I was in considerable doubt, possibly created by an impression that the pursuers ought to have judgment on the merits. There is no doubt as to the existence of the debt, there is no doubt as to its being a charge upon the land, and there is no question that the present incumbent of the parish, who has succeeded to the reverend gentleman who procured this loan, is in possession of the thing charged and in receipt of the rents and profits. It did seem to me at first to be a very strong thing to say that the company should have no personal remedy against this present incumbent (in respect of the profits he has received) but must resort to the land and the land only. However, we are dealing now not with a public but a private Act of Parliament, and I have always understood, with reference to private Acts as contra-distinguished from public Acts of Parliament, that if a charge is imposed upon the person of an individual it must be so imposed in clear and express terms and not left to implication.

My Lords, the original Act of 1856 seems to have been prepared with very considerable care, and I would say with a due regard to the rights and interest of others. But after all, the language of this Act is the language of the drainage company. I presume they had no opponents. The Act presents the language of the company and of the company alone.

Now, it has been already observed that all through this Act until you come to the 61st section there is no doubt that the Legislature is dealing only with a charge upon land—a real security—which by no means imports a personal obligation. One may further observe, too, that before a loan under this Act of Parliament is sanctioned an inquiry is made, and it is only

sanctioned by the Commissioners when they are satisfied that there is to be a permanent and real improvement of the land commensurate with the sum to be advanced, and with the annuity with which the land would thereupon become charged.

The Act being for the improvement and reclamation of land deals with public improvements as well as private improvements, and as to some of the classes of improvements it would be exceedingly difficult either to import a personal obligation, or to ascertain against whom it was to be enforced. I may refer for instance to the 4th section of the Act, and to the 12th class of improvements referred to in it, namely—"The construction or improvement of jetties or landing-places on the sea coast or on the banks of navigable rivers or lakes for the transport of cattle, sheep, or other agricultural stock or produce." It would appear to me in reference to these words that it would be difficult to ascertain where the personal responsibility could rest if it was intended to be imposed. But proceeding further on we find that the company is to be incorporated. What powers is the company to have? Such powers and authorities as by this Act are granted and none other.

The provisional contract deals with "the sum to be charged as an improvement loan on such land" (sec. 33); and the charging section (sec. 49) makes it a charge on the fee of the land and to take effect as such charge, and so far no allusion is made to any personal liability save in sec. 37, but that section, so far from importing any personal liability beyond its express provision, seems to me to negative it, for according to that section "the Enclosure Commissioners may require security by bond or otherwise" from the parties making the application, for the payment of the expenses; and if they do not grant a provisional order, "such payment shall be made by such landowner or by the company, and shall not be a charge on the land to which such application relates." That provision dealing with personal liability does not support the contention of the pursuers.

If there was nothing further in the statute, it is clear that the party would be left to the enforcement of his charge upon the land and that alone. Possibly he would have been in a better position without the aid of sec. 61, for then the law might step in and provide him with some adequate remedy if it were not given by the Act. But sec. 61 gives a remedy, and when a remedy is given by an Act of Parliament of this kind you must pursue that remedy.

Then, referring to sec. 61, upon which the argument principally turned, what does it do? The thing to be recovered, with which it deals, is a "charge on land by virtue of this Act." It provides for the means and manner by which that liability of the land may be enforced, but it uses no words or terms whatever to indicate that any mere personal liability is cast on either the landowner or his successor in title or in occupation, or that he shall be liable in respect of or to the extent of profits received. Two things are referred to, the charge on the lands and the recovery of it out of the same lands, which is to be "by the same means and in like manner in all respects as any feu-duties, or rent, or annual rent, or other payment out of the same lands would be recoverable in Scotland."

We were very much pressed by Mr Asher with this argument, that the 61st section did refer to an action "in like manner in all respects as any feu-duties" might be recovered by—and he called our attention to this circumstance, that in certain instances feu-duties were recoverable by what might be termed a personal action. But that was only in cases in which the superior sued upon the obligation of an express contract of the vassal for the payment of the feu-duty. I do not mean to say that the original contract between the company and the applicant might not possibly have been so framed as to give them a right to resort to his personal security. I express no opinion upon that, but I observe that in this case there is nothing urged in the summons or its conclusions to show any personal liability in respect of contract or in respect of the receipt of rents or profits of the land.

My Lords, my noble and learned friend in the chair has referred to section 68, but that section creates no real difficulty, for it only determines as between the landowner and his successor their respective rights, and if his successor should be compelled, in respect of the land, to pay "one year's payment of such charge" in arrear, which his predecessor ought to have paid, then he has a personal right to recover it from his predecessor.

My Lords, after four years' trial of this Act of Parliament there came an amending Act, and there are some provisions in the amending Act which are deserving of observation. Section 4 contains the same definition of improvements or even a larger one than had been in the original Act, and the 13th sub-sec. of that section is applicable to "the construction or improvement of jetties or landing-places on the sea-coast or on the banks of navigable rivers or lakes." Then, by section 11, when the land to which the application for a provisional order relates is land held in right of any church, the advance cannot be made without the consent of the presbytery of the bounds and the patron of the benefice. Section 13, which is not unimportant, provides for fire insurance. "Where any farmhouses, farm buildings, or works susceptible of damage by fire have been erected, improved, or added to" under these Acts, fire insurance is to be effected—"the person for the time being bound to make the yearly or other periodical payments of such charge shall insure and keep insured against damage by fire all such farmhouses," and so on; and in the event of his not doing so, "it shall be lawful for the company, with the assent of the Enclosure Commissioners, to insure against damage by fire the said farmhouses, farm buildings, and works in an amount not exceeding the principal amount originally secured by such charge"—the company may pay the premium, and he is bound to "repay to the company" (and here a personal right is given) "any sums so paid by them" in respect of premiums on fire insurance.

Now, when we are dealing with this amending Act it is not unworthy of observation that the only reference in it to any personal obligation is the obligation to keep up the fire insurance premium, and if that is not done by the person in possession the company may pay it, and then, and then only, they have a personal right to sue, not for the charge, but for the sum paid in respect of fire insurance.

My Lords, both these Acts of Parliament were no doubt very beneficial for their purposes; they gave a security charged only upon the land without any words which would import a personal obligation either upon the part of the original borrower or of the landlord in succession, or, in the case of an advance upon glebe land, which would make either the original incumbent or the next incumbent personally liable. Whilst I feel coerced to agree with the motion which is to be presently put from the chair that the decision of the Court below be affirmed, I do so somewhat unwillingly. If there is any property which would require for improvement purposes the aid of an advance of money upon such easy terms as are provided by this Act it would be such property as glebe lands and residences. I presume that this case is not defended by the present respondent merely in his own interest—probably he may be supposed to represent the interests of a large class; and I see this very clearly, that after the decision of this appeal it will be difficult, if not impracticable, to obtain from the Drainage Company advances of money upon such a security as the present.

My Lords, I concur in the judgment which has been proposed, affirming the decision of the Court of Session and dismissing the appeal.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants—Sir Horace Davey, Q.C.—Asher, Q.C. Agents—Grahames, Currey, & Spens, for Ronald & Ritchie, S.S.C.

Counsel for the Respondent—Rigby, Q.C.—James Wallace. Agent—John Graham, for Menzies, Coventry, & Black, W.S.

Thursday, August 8.

(Before Lords Herschell, Watson, and Fitzgerald.)

BINNIE *v.* BROOM AND OTHERS.

(*Ante*, vol. xxv., p. 303; and 15 R. 417.)

Trust—Trust Management—Ultra vires—Process—Proof—Expenses.

The beneficiaries under a trust-deed raised an action against the trustees to make good loss which it was alleged had been caused by their management of the estate, and averred that when the defenders entered office the estate was sufficient to cover the truster's liabilities, with a substantial reversion in favour of the pursuers, and that the defenders had exceeded their powers by borrowing upon instead of selling the heritable property. The First Division remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the debts due to the truster and paid by the trustees, and the yearly income and expenditure by the trust," and disposed of the case upon the basis of the report returned.

On appeal, *held* that the pursuer was entitled to a proof of his averments respecting the value of the heritable property when the trustees entered office and could have sold it, on the ground that he had never renounced probation, or agreed to accept the report as including the evidence he wished to lead, and that it was still within his right to prove in the ordinary way disputed facts which were not proper matters of accounting, but that the appeal must be *affirmed* without costs, as the appellant had not previously asked for the restricted proof which was ultimately allowed him.

Opinion (*per* Lord Watson) that a trustee who has power to sell or borrow is only required to show ordinary prudence in selecting either course, and the question whether or not he acted prudently is one of fact to be solved according to the circumstances of each case.

This case is reported *ante*, vol. xxv., p. 303, and 15 R. 417.

The pursuer appealed.

At delivering judgment—

Lord Herschell—My Lords, I have had an opportunity of perusing the opinion which my noble and learned friend (Lord Watson) is about to deliver, and I entirely concur in it.

Lord Watson—My Lords, I have come, with much regret, to the conclusion that, notwithstanding the inquiry which has already been made in the Court below, the facts of this case have not been sufficiently investigated to enable your Lordships to dispose of it by a final judgment.

The action was brought in November 1886 by the appellant and two others, sons of William Binnie, builder in Glasgow, who died in October 1857, as beneficiaries under their father's settlement, against the respondents, who are the trustees or representatives of trustees who accepted office and administered the trust created by that deed. The trust-estate chiefly consisted of house property in Glasgow, burdened with an heritable debt of £12,000. The truster left a large amount of personal debt, and the trustees borrowed £26,000 upon the security of the real estate, with which they paid the charge of £12,000 and other debts, leaving a considerable balance unpaid. It is sufficient to say here that the results of their administration, whether prudent or not, were unfortunate, and that in June 1867 the trustees applied for a sequestration of the estate, which was accordingly realised and distributed under the provisions of the Bankruptcy Acts, some of the creditors receiving less than 20s. in the pound.

The pursuers averred that in 1857 and 1858, after the trustees entered upon office, the heritable property was worth and could have been sold for £42,980—a sum sufficient to pay the whole debt and leave a substantial margin for the beneficiaries—and that the trustees exceeded their powers and violated their duty in borrowing money on the security of the property instead of selling it. The defenders denied these allegations, and stated a variety of circumstances which it is unnecessary to detail in explanation and justification of the course of management which was pursued by the trustees.

The Lord Ordinary (M'Laren) allowed the parties a proof of their averments, but his interlocutor was recalled by their Lordships of the

First Division, who remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the debts due to the truster and paid by the trustees, and the yearly income and expenditure of the trust, and to report." The course thus adopted in order to prepare the case for judgment was in my opinion an expedient one, because a remit to an accountant of skill is a much more satisfactory method of investigating the details of trust management and its pecuniary results than a general proof. At the same time a remit of that kind does not deprive the parties of their right to prove in the ordinary way disputed facts which are not proper matters of accounting.

The report when completed disclosed the following facts upon which the controversy between the parties came to depend in the Court below—(1) That the heritable property was valued as for a loan, part of it in May, before the truster's death, and part in October 1857, after that event, the sum of the two valuations being £42,980; (2) that in the year 1862, after the sale of one tenement in November 1861 at the price of £7000, the remainder was valued, with a view to sale, at £29,748; and (3) that the entire property was sold in parcels between November 1861 and March 1870, the prices realised amounting *in cumulo* to £41,900. The reporter also stated that "as any sum that may be arrived at as the value of the property at the date of the truster's death must necessarily be a valuation," there would in his opinion be no injustice done to either party if £41,900 were taken to represent its value at that date.

When the case was heard upon the report the pursuers impeached it, without lodging a note of objections according to the usual practice, and insisted that they were entitled to a proof of their whole averments on record.

They offered, however, to waive their demand for proof, and to take the report as the evidence in the case, upon condition of the Court accepting as conclusive the accountant's view with regard to the value of the real property. Both alternatives were very properly rejected by the Court. The first of them was again pressed by the appellant at the bar of the House, but it is clear that a party who has joined issue with his opponents, and has been fully heard before the reporter upon proper questions of accounting, cannot be permitted to re-open these questions in a proof at large.

Neither of the parties having moved for a limited proof, the First Division proceeded to dispose finally of the case upon the basis of the report. Their Lordships assoilzied the defenders upon the ground as expressed in the interlocutor, "that the pursuers have failed to prove that they have sustained any loss through the misconduct of the trustees." It appears from the judgments delivered at the advising of the cause that their Lordships were of opinion that the trustees had been guilty of misconduct which would have involved the defenders in liability had not the pursuer's *injuria* been *sine damno*. But their Lordships, differing therein from the reporter, estimated the heritable property of the trust at £36,748, adopting the valuation of 1862 *plus* the sum received for the part sold in 1861. To that estimate they added £573 as the amount of the personal estate, making the total charge against the trustees £37,321. On the other side of the account their Lordships held that the trustees were entitled to credit for debts and charges paid by them, or by the trustee in the sequestration, to the amount in all of £37,521, the result being that had the real estate been sold at the time when the appellant alleges it ought to have been the liabilities of the trust would have exceeded its assets by £200, nothing whatever being left for the beneficiaries.

Were it now necessary to determine the market value of the property at the commencement of the trust with no other assistance than the information contained in the report, I should hesitate to disagree with the conclusion which was arrived at in the Court below. I certainly do not think that the prices which it fetched when sold in lots between the years 1861 and 1870 can fairly be taken to represent its selling value in the end of 1857, and experience leads me to doubt whether a valuation obtained in 1857 solely for the purpose of a loan can be safely relied on as an approximate estimate of its value for immediate sale. Besides, I do not find anything in the report tending to the inference that the market value of such properties was higher in 1857–58 than in 1862. But the appellant has now insisted before us for a proof of his averments touching the value of the subjects for sale at the time when the trustees entered upon office and could have sold, and seeing that he has never renounced probation, or agreed to accept the report as containing all the evidence which he desires to adduce, I cannot advise your Lordships that he ought not to have the opportunity which he asks for. He may at this distance of time have some difficulty in bringing forward evidence of market value in 1857 of a more direct and less speculative character than that which is to be found in the report, but that circumstance cannot affect his right to make the attempt. The respondents, in the event of the appellant being allowed a proof, expressed their desire to have an opportunity of instructing their averments bearing on the motives which induced the trustees to borrow, and I think their request ought to be conceded.

Besides the main question regarding the value of the real estate, two items in the accounting were fully discussed in the course of the argument. The appellant maintained that the Court ought to have charged the trustees with £562, being the estimated value in 1857 of furniture liferented by his mother, who is still alive. I am of opinion, for the reasons assigned in the judgment of the Lord President (Inglis), that the charge was rightly disallowed. Again, the respondents argued that the trustees ought to have had credit for the sum of £2652 which represents payments made to the widow for the maintenance of herself and the children who lived with her until her re-marriage in 1861, and payments made between 1857 and 1867 towards the maintenance and education of beneficiaries who were not living with their mother. These sums were no doubt in excess of the free income of the trust, but the trustees had under the trust settlement a power of advancement out of capital sufficient in my opinion to validate such payments in any question with the appellant and others beneficially interested. The estimate of the house property which the Court below

adopted made it unnecessary to decide as to this item, but if it were added to the sums with which the trustees have been credited the balance would still be against them if the appellant's statements with regard to the value of the property were established.

I should have contented myself with making these observations, which are sufficient for the disposal of this appeal, had it not been that in the Court below the learned Judges have expressed themselves with regard to the conduct of these trustees and of trustees generally in terms to which I cannot assent. The Lord President, with the concurrence of Lords Mure and Adam, said (15 Sess. Cas. (4th series) 423)—"The conduct of trustees in borrowing money under any circumstances is highly imprudent. If it turns out to be a mistake, it subjects the trustees to personal liability." I do not know whether by these words the Lord President intended to lay down a principle of law or a proposition of fact; the result in either aspect might prove very unfortunate so far as the interests of beneficiaries are concerned. A trustee would incur unnecessary risk (which his duty in no case compels him to do) if he borrowed in order to pay debts prudently and with a reasonable prospect of securing a considerable reversion to the beneficiaries, and he would be justified for his own protection in at once selling, to the destruction of their interests, although no prudent person (himself included) thought it the better course to pursue. But there is really no such rule in existence. All that the law requires from a trustee who has power to sell or borrow is, that he shall follow the dictates of ordinary prudence in adopting the one course or the other, and the question whether he did or did not act prudently is one of fact which must be solved according to the circumstances of each case.

Looking to the terms of Mr Binnie's trust-deed, I see no reason to doubt that the trustees had implied power either to sell or borrow for the purpose of paying debt if the exigences of the trust required it; and I am consequently of opinion that the conduct of the trustees in borrowing and not selling raises a question of prudent management only. If it were not for the unbending rule which they laid down as to the imprudence of borrowing in any circumstances, there might be difficulty in reconciling the views which the learned Judges took of the conduct of these trustees with the considerations which led them to fix the value of the property at £36,748. These were that house property in Glasgow became in the end of 1857 greatly depreciated in value and in many cases unsaleable. In that state of the market I cannot help thinking that prudent men would have been most reluctant to sell if that step could by possibility be avoided. I have thought it proper to make these remarks with no desire to prejudge any question which may arise when the facts are ascertained, but in order to guard against its being supposed that in my opinion the appellant will be necessarily entitled to prevail in this action if he succeeds in proving the value which he has alleged.

I am accordingly of opinion that the interlocutors appealed from, in so far as these concern the appellant, ought to be reversed and the cause remitted to the Court of Session with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security. If the appellant had asked in the Court below for the restricted proof which has been allowed him here, I see no reason whatever for supposing either that the respondents would have resisted the motion or that the Court would have hesitated to grant it, and I am therefore of opinion (seeing that the appellant sues *in forma pauperis*) that there ought to be no costs of this appeal.

Lord Fitzgerald—My Lords, I entirely concur in the judgment, and have nothing to add.

The cause was remitted to the Court of Session with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security.

Counsel for the Pursuer (Appellant)—Shaw—A. S. D. Thomson. Agents—Scoles & Company, for Marcus J. Brown, S.S.C.

Counsel for the Defenders (Respondents)—Lord Adv. Robertson, Q.C.—J. Shiress Will, Q.C. Agents—Bircham & Company, for Henry & Scott, S.S.C.

Thursday, August 8.

(Before Lords Herschell, Watson, and Fitzgerald.)

WALKER, HUNTER, & COMPANY *v.* HECLA FOUNDRY COMPANY.

(*Ante*, vol. xxv., p. 491; and 15 R. 660.)

Copyright—Design—Infringement—Patents, Designs, and Trade Marks Act 1883 (46 *and* 47 *Vict. cap.* 57)—*Interdict.*

The holders of a certificate under the Patents, Designs, and Trade Marks Act 1883 for the copyright of a registered design for kitchen-range fire-doors, the design being for "a range fire-door with moulding on top, the moulding forming part of range, shape to be registered," applied for interdict against an alleged infringement.

Held (*aff.* the judgment of the First Division) that as the outline of the moulding on the fire-door complained of was an obvious imitation of the registered design, it was an infringement thereof.

This case is reported *ante*, vol. xxv., p. 491, and 15 R. 660.

The respondents in the suspension and interdict appealed.

At delivering judgment—

Lord Herschell—My Lords, this is an appeal from an interlocutor of the First Division refusing a reclaiming-note against an interlocutor of the Lord Ordinary finding it proved that the appellants at your Lordships' bar had infringed the respondents' exclusive privilege of making

for sale fire-doors of the pattern produced, and interdicting the appellants accordingly.

The respondents in November 1884 registered a design, the nature of which was stated in the application to be—"Range fire-door with moulding on top, moulding forming front of range, shape to be registered."

The drawing which accompanied the application showed a rectangular door for a fire-range, with a moulding at the top of it of a form which appears to be known as ogee.

The sole question for determination is, whether a fire-door manufactured by the appellants is an infringement of the right secured to the respondents by the registration of their design? It undoubtedly is so if it is either the same design or a fraudulent or obvious imitation of it.

The Lord Ordinary in delivering his opinion used the following language—"Now, upon the question whether there is here an infringement, nothing was said to the contrary to the complainers' proposition that mere differences in the outline of the moulding would not take the respondents' design out of the patented copyright. That seems to me perfectly clear, because there is nothing original in the moulding, and in the claim of registration it is made evident that the registration was claimed, not for the particular moulding, but for the material form given by placing a moulding—any suitable moulding—upon a fire-door in the described position. Well, then, I have to consider if there was no exclusive privilege claimed for the particular pattern of moulding, whether the exclusive privilege is limited to the case of a moulding which exactly fits into the adjoining mouldings so as to present a continuous flowing surface, or whether it is not a privilege granted for putting such a moulding upon a fire-door in such a manner as to exclude air, and to accomplish the object which had been previously accomplished by putting the moulding upon the fire-cover or fall-bar." The Lord President adopted this language of the Lord Ordinary, and the view which he had taken of the subject-matter of the claim of the present respondents.

My Lords, with all respect for these learned Judges, I cannot but think that they took into account elements which were not proper to be considered for the purpose of determining what was the design protected by the registration, and whether there had been an infringement of the copyright in that design.

By section 6 of the Patents and Designs Act of 1883 "design" is defined as meaning any design applicable to any article of manufacture or to any substance, "whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof." In the present case the applicant declared that it was for "the shape" that he desired registration. Under the designs part of the Act of 1883 I do not think the object which the designer has in view in adopting the particular shape, or the useful purpose which the shape is intended to serve, or does serve, ought to be regarded in considering what is the design protected. The scheme of this part of the Act is entirely different from that relating to patents for inventions, where the object attained by the invention for which the patent is granted is of course very material to the inquiry what is the subject-matter, and whether there has been an infringement. I cannot agree therefore that the registration was claimed, or could be claimed, "not for the particular moulding," but for the form given by placing "any suitable moulding" upon a fire-door in the described position, or that a privilege was granted "for putting a moulding upon a fire-door in such a manner as to accomplish" a particular object. I think the protection was granted for the shape, and for that alone, and that in such a case when an infringement is alleged the only question is, whether the shape of that which is impeached is the same, or whether the other is an obvious imitation of the other, without reference to whether it does or does not accomplish the same useful end. I quite agree with what was said by Lord Shand in *Walker* v. *The Falkirk Iron Company*, that "the Act in this branch gives protection only to the shape or configuration or to the design for the shape or configuration in such a case as the present. The result of such protection may be, however, to secure important advantages such as attend a mechanical contrivance if these advantages should be the result, directly or indirectly, of the shape or configuration adopted." But this is a mere incident. If such advantages are obtained it is only because no shape not substantially the same, and which is therefore not an infringement, will achieve the same end. The test of infringement must always be whether the shape is or is not the same. If it be, then the exclusive privilege has been infringed, even though the same object be not accomplished; if it be not, then, though the object be accomplished, there has been no infringement. In the present case, for example, by a very slight deviation from the design, which would scarcely be apparent, the air might be admitted to the fire. I do not think that a person making such a fire-door could successfully answer the complaint that he had infringed the rights of the proprietor of the design by showing that when applied to a range it would not exclude the air.

It seems to me therefore that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other. I ought perhaps to qualify this by saying that as a design to be registered must by section 47 "be a new or original design, not previously published in the United Kingdom," one may be entitled to take into account the state of knowledge at the time of registration, and in what respects the design was new or original when considering whether any variations from the registered design which appear in the alleged infringement are substantial or immaterial.

Applying the test which I have laid down, I have come to the conclusion that there has been a violation of the respondents' rights. There are no doubt certain distinctions between the door shown on their drawing and that manufactured by the appellants. But to establish this is not enough to free them from liability. By section 58 of the Act it is not lawful for any person to apply either the design, "or any obvious imitation thereof," in the same class of goods in which the design is registered. It is impossible in such a case as the present to give reasons for the opinion formed. I can only say that to me it appears without doubt that the door complained of is an obvious imitation of the registered design.

I therefore move your Lordships that the

judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord Watson—My Lords, the evidence led before the Lord Ordinary shows that until 1884 kitchen-ranges were commonly made with a cornice or ogee moulding running along the whole front of the range, that part of the moulding which is opposite to the furnace being invariably attached either to the fire-bar or to the hot-plate which forms the cover of the range. In November of that year the respondents registered in terms of the Act of 1883 the drawing or design of a door which in compliance with the statutory rules issued by the Board of Trade they described as a "range fire-door with moulding on the top, moulding forming part of front of range, shape to be registered."

The witnesses appear to have generally agreed that the attachment of the moulding to the fire-door, or making it part of the door itself, as shown in the respondents' design, was an improvement upon previous arrangements, because it obviated various disadvantages which were inseparable from these arrangements. That may be so, but in my opinion such considerations are of no relevancy in the present case. It is quite immaterial for the purposes of registration under the Act of 1883 whether a design is useful or devoid of utility. All that the statute requires, in order to its registration and protection is that it shall be new or original, and shall not have been previously published in the United Kingdom, and the person registering acquires no exclusive right except to the shape and configuration of his design. If his design should be calculated to serve some useful purpose, it is nevertheless open to every member of the public to attain the same end by using an article which differs from it in shape and configuration. The statutory prohibition which constitutes the measure of his privilege is to the effect that so long as his copyright endures it shall not be lawful for any person without his licence or consent in writing to apply his design, "or any fraudulent or obvious imitation thereof," in the class of goods in which such design is registered.

Accordingly, the only relevant consideration in any question of infringement is, whether the article complained of is a copy or a fraudulent or an obvious imitation of the registered design. The observations which were made by Lord Westbury in *Holdsworth* v. *M'Rea*, 2 Eng. & Ir. App. 388, with reference to the Acts now repealed, are in my opinion equally applicable to the provisions of the recent statute. His Lordship there said—"Now in the case of those things as to which the merit of the invention lies in the drawing or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether therefore there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure and the other figure and ascertains whether they are or are not the same."

I agree with my noble and learned friend on the woolsack that the appellants' fire-door is an obvious imitation of the respondents' registered design, and I am therefore of opinion that this appeal must be disallowed.

Lord Fitzgerald—My Lords, I concur in the two judgments which have just been delivered. I may remind your Lordships that in the course of the discussion at the bar one of the learned counsel, I think it was the Attorney General, as counsel for the respondents, asked us to put the two things side by side, and said that we should see by a look that the article produced by the appellants was an obvious imitation of the registered design of the respondents. My Lords, I looked minutely at the two things then, and I came to the conclusion that the door of the appellants' was clearly an obvious imitation of the registered design of the respondents, and from that moment I thought the argument was at an end.

The interlocutor appealed from dismissed with costs.

Counsel for the Appellants—Sir R. E. Webster, Attor.-Gen., Q.C.—Chadwyck Healey. Agents—Martin & Leslie, for J. & J. Ross, W.S.

Counsel for the Respondents—Asher, Q.C.—Ure. Agents—Grahames, Currey, & Spens, for Auld & M'Donald, W.S.

Note.—The case of *Rae* v. *Meek*, decided in the House of Lords on August 8th, will be reported in the beginning of the succeeding volume.

END OF VOLUME XXVI.